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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. NICHOLAS ANTHONY MUNOZ, Defendant and Appellant.	B283921 (Los Angeles County Super. Ct. No. KA110065)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert M. Martinez, Judge. Judgment of conviction affirmed; sentence vacated and remanded for further proceedings.

Law Offices of James Koester and James Koester, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Yun K. Lee, Lindsay Boyd and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Nicholas Anthony Munoz of shooting at an occupied motor vehicle and two counts of premeditated attempted murder, with firearm and gang enhancements. Munoz appeals, contending: (1) there was insufficient evidence to support the jury's finding that the attempted murders were willful, premeditated, and deliberate; (2) the trial court committed instructional error; and (3) the matter must be remanded to allow the trial court to exercise its discretion to strike or dismiss the firearm enhancements pursuant to Penal Code section 12022.53, subdivision (h).[1] We affirm Munoz's convictions, but vacate his sentence and remand the matter to allow the trial court to exercise its discretion and determine whether to strike or dismiss the firearm enhancements.

FACTUAL AND PROCEDURAL BACKGROUND

1. *Facts*

Munoz was a member of the Pico Viejo criminal street gang. His cousins, codefendant James Rojas, and Rojas's brother, Jonathan Loaiza, were also Pico Viejo members. Victor Espindola, David Carrillo, and Adrian Perez were all members of the Brown Authority criminal street gang. The Pico Viejo and Brown Authority gangs were bitter enemies. Their claimed territories overlapped, leading to ongoing violence and numerous shootings between the gangs. Both gangs claimed Streamland Park in Pico Rivera as their territory.

a. *People's evidence*

(i) *The shooting*

On June 26, 2015, between 7:00 and 8:00 p.m., Espindola, Carrillo, and Perez, along with a woman named Daisy, went to Streamland Park in Espindola's mother's burgundy Yukon SUV. At the park, Carrillo spoke to some men near the baseball diamond.

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[1] All further undesignated statutory references are to the Penal Code.

Espindola's group then saw a person with whom they did not "get along." Carrillo or Perez confronted the man, who ran up a nearby hill.

Espindola then drove the group away from the park in the SUV. Carrillo and Perez sat in the back seat, with Carrillo on the driver's side. Daisy was in the front passenger seat. Espindola drove northbound onto Rosemead Boulevard, in the far right lane, at 10 to 15 miles per hour, looking for the man who had run up the hill. According to Espindola, his group did not intend to scare the man, but simply wished to determine why he ran from them.

Meanwhile, Rojas was driving his girlfriend's blue Mitsubishi Galant on Rosemead Boulevard, with passengers Munoz and Loaiza. When Espindola's SUV was parallel with the park at the top of the hill, Rojas drove up to the SUV on the driver's side and Munoz and Loaiza fired shots directly at the SUV. Espindola heard six gunshots. He heard his window "pop" and a gunshot hit the car door, and then Rojas's Mitsubishi sped off. Espindola briefly continued driving on Rosemead until Carrillo said he had been hit, and lost consciousness. Espindola made a U-turn and drove Carrillo to the hospital. According to Espindola, he was surprised by the shooting and did not know why the assailants shot at his SUV. No one in Espindola's group was armed, and they did not display guns or shoot at anyone. The whole incident transpired very quickly.[2]

Carrillo was shot in the stomach and underwent surgery at the hospital.

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[2] Espindola described the incident to detectives in a July 29, 2015 recorded interview that was played for the jury, and again in a second, unrecorded interview with a detective shortly before trial. At trial, Espindola denied being a gang member, denied making most of the statements in the interviews, professed not to remember most of the evening's events, and at times refused to answer questions. He did, however, confirm that no one in his group was armed or shot at Rojas's car.

(ii) *The accident*

Rojas drove from the shooting scene and attempted to enter the 60 Freeway at an excessive speed, causing the Mitsubishi to crash. Motorist Cynthia Arredondo observed the Mitsubishi tumble down an embankment by the Rosemead onramp, landing on its roof. Arredondo pulled over and called 911, while her boyfriend attempted to render aid. Munoz was partially pinned inside the car and was calling for help; he eventually managed to free himself. Loaiza, who had been seated in the front passenger seat, was deceased. Rojas was outside the car, talking on a cellular telephone. When Arredondo asked Rojas whether everyone was okay, he responded, " 'I killed my brother.' " He also said someone had been chasing them. Within three minutes, before emergency personnel or deputies arrived, a car picked Rojas up from the accident scene.

(iii) *The investigation*

Two firearms were found outside the Mitsubishi at the accident scene: a nine-millimeter Sig Sauer with an empty magazine, and a .380-caliber Lorcin semiautomatic pistol, loaded with a bullet in the chamber and a magazine containing five live cartridges. At the shooting scene, which was approximately a half mile from the accident scene, deputies recovered a bullet fragment, four fired nine-millimeter cartridge cases, and one fired .380-caliber cartridge case. Espindola's SUV bore five bullet holes, and five bullet fragments were recovered from the area between the vehicle's exterior and the interior panel. Forensic examination revealed that the .380-caliber cartridge case had been fired from the .380-caliber Lorcin gun found at the accident scene. Munoz's DNA matched DNA found on the .380-caliber Lorcin gun. The four expended nine-millimeter cartridge cases and four of the bullet fragments had been fired from the Sig Sauer gun.[3] Two of the bullet

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[3] The fifth bullet fragment was too small to allow for a conclusive comparison.

holes in the SUV were made by nine-millimeter bullets. A Pittsburgh Pirates baseball cap that had been ejected from the Mitsubishi was on the ground at the accident scene.

Rojas's Mitsubishi bore no evidence of bullet strikes, and no evidence suggested the occupants of the SUV shot at the Mitsubishi.

(iv) *Munoz's jail conversation with a confidential informant*

On June 29, 2015, Munoz was placed in a jail cell with a confidential informant. Their conversation was recorded and played for the jury. Munoz stated he was a Pico Viejo gang member with the moniker "Lil Scrappy." He described the incident as follows.[4] Some "fools," whom he believed to be Brown Authority gang members, had been chasing and attempting to shoot at or harm his cousin and fellow gang member, Loaiza. Loaiza was an "ace" and a "straight rider," that is, an active gang member known for committing crimes for the gang. Munoz and Loaiza shot at the Brown Authority gang members, with Munoz firing a .380 and Loaiza firing a nine-millimeter firearm. Munoz's gun jammed after he fired one shot. Loaiza, however "fucken served them, boom, boom, boom, boom, boom."[5] Although it was dark, Munoz "just knew it was them, though . . . I just knew it." When Munoz's group fled, the other car chased them. Munoz thought the Brown Authority gang members had guns and tried to pull them. When the accident occurred, he and Loaiza were not wearing seat belts. Munoz was injured, Loaiza died, and Rojas fled.

(v) *Gang expert's testimony*

Los Angeles County Sheriff's Detective Stephen Valenzuela testified as the prosecution's gang expert, regarding the Pico Viejo gang's membership, origins, territory, primary activities, symbols,

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[4] Munoz described the incident using street slang, which was in some instances interpreted by the gang expert.

[5] According to the gang expert, "served," in this context, means shot at.

"code of silence," and predicate offenses.[6] Pico Viejo was one of the most violent gangs in the Pico Rivera area. There had been numerous shootings between the Pico Viejo and Brown Authority gangs, and incidents of violence in Streamland Park. In Valenzuela's opinion, Munoz, Loaiza, and Rojas were Pico Viejo gang members.[7] The gang used the Pittsburgh Pirates "P" as one of its symbols, and the Pittsburgh Pirates baseball cap found at the accident scene was commonly worn by Pico Viejo gang members. Valenzuela opined that Espindola and Carrillo were members of the Brown Authority gang.

When given a hypothetical based on the evidence adduced at trial, Valenzuela opined that the shooting was committed for the benefit of, and in association with, the Pico Viejo gang. The shooting benefitted the gang by showing the community and other gangs that Pico Viejo gang members would "do anything to protect their borders." Moreover, the gang members were acting together, looking for rivals. Such conduct would instill fear in the community and in gang rivals, thereby making them afraid to report crimes to police, "further[ing] the stranglehold that gangs and gang violence have in the community."

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[6] Because Munoz does not challenge Detective Valenzuela's qualifications as an expert, or the sufficiency of the evidence to support the gang enhancement, we do not detail that evidence here.

[7] Munoz had Pico Viejo-related tattoos, and had admitted his gang membership to the confidential informant, and to a detective; Valenzuela was also aware of Munoz's membership by virtue of his own investigation into violent crimes committed by the gang. Rojas and Loaiza also had Pico Viejo-related tattoos. Photographs showed Munoz, with Loaiza, Rojas, and others, making Pico Viejo gang signs.

b. *Defense evidence*

(i) *Testimony from witnesses at Streamland Park*

Robert Mendoza and Savaltore Dominic Mendoza[8] were both at Streamland Park on the evening of June 26, 2015,[9] preparing the baseball fields for a tournament the next morning. Mariah Ginez and her boyfriend were also at the park at that time. Robert saw a male Hispanic walking around the park, apparently looking for something. Shortly thereafter, a maroon SUV pulled into the parking lot. Two Hispanic men exited the SUV and began "hanging out" with the first man at the baseball diamond's backstop. One of the men asked Robert whether there were any games that night, whether Robert knew a former Little League president, and whether anyone from Pico Viejo was at the park. Robert said only the Little League coaches were present. The men returned to the SUV. Shortly thereafter, one of the men returned to the field with a baseball bat and yelled, " 'Are you guys from Pico Viejo?' " Robert and Savaltore ignored them and moved to another area of the field. Savaltore phoned his wife and asked her to call 911. The SUV picked up the man with the bat, and "peeled out" of the parking lot.

Ginez observed a man at the top of a small hill on the back side of the park. The driver of the SUV yelled at the man on the hill, "this is my barrio," or similar words. The men seemed to be arguing, and the man from the SUV said, "let's go one-on-one." However, the man from the SUV did not attempt to run up the hill after the other individual.

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[8] For ease of reference, and with no disrespect, we hereinafter refer to Robert Mendoza and Savaltore Mendoza by their first names.

[9] Although the witnesses did not testify to the precise date in June, there is no dispute that their testimony related to June 26, 2015, the date of the shooting.

According to Robert and Savaltore, other than the baseball bat, the men from the SUV did not have any visible weapons, nor, according to Ginez, did the man who yelled at the person on the small hill.

Within five to 10 minutes, Robert, Savaltore, and Ginez heard gunshots nearby.

(ii) *Rojas's testimony*

Rojas testified in his own defense. His family had longstanding ties to the Pico Viejo gang. In June 2015 he and his family were living in Bell Gardens. On the night of the shooting, Loaiza called Rojas and said he was at Streamland Park to meet a girl, but did not feel safe and thought it might be a set up. Rojas drove to the park and located Loaiza, who was with Munoz. Rojas picked both men up and began driving home. When he made a right turn onto Rosemead, he saw a burgundy SUV on the shoulder. Loaiza said, " 'Those are those fools right there.' " As Rojas neared the SUV, he saw the SUV's windows rolling down. Rojas "hit the gas." Almost immediately, Rojas heard gunshots and ducked. He could not tell whether the shots came from inside or outside of his vehicle. He continued down Rosemead Boulevard and saw, in his rearview mirror, that the other car was behind him, driving fast. Rojas sped up and lost control of his car, which plunged down an embankment, flipping several times. He had not been looking for anyone when he pulled onto Rosemead Boulevard; he had been planning to drive home. When Arredondo approached to help, he told her to leave because "we just got chased." He fled the scene because he was scared. He had gone to the park to protect his little brother; he had not come prepared for violence; he had not known, and had no reason to believe, that Loaiza had a weapon or that there were guns in the car. He denied being an active gang member, but admitted a prior association with the Pico Viejo gang.

2. *Procedure*

The jury found Munoz guilty of the attempted willful, deliberate, and premeditated murders of Carrillo and Espindola (§§ 664, subd. (a), 187, subd. (a)) and of shooting at an occupied motor vehicle (§ 246). As to each offense, the jury further found Munoz personally and intentionally used and discharged a firearm (§ 12022.53, subds. (b), (c)); a principal personally and intentionally used and discharged a firearm, proximately causing great bodily injury to Carrillo (§ 12022.53, subds. (b), (c), (d), (e)(1)); and the offenses were committed for the benefit of, at the direction of, or in association with, a criminal street gang. (186.22, subd. (b)(1)(C).)[10] The court sentenced Munoz to two consecutive life terms, plus 50 years to life. It ordered him to pay victim restitution and imposed a restitution fine, a suspended parole revocation restitution fine, a court operations assessment, and a criminal conviction assessment. Munoz appeals.

DISCUSSION

1. *The evidence was sufficient to support the jury's finding that the attempted murders were willful, premeditated, and deliberate*

Munoz contends the evidence was insufficient to support the jury's findings that the attempted murders were willful, deliberate, and premeditated. He argues that the "overwhelming force of the evidence" showed nothing more than a spontaneous and impulsive shooting occurring when Munoz's group unexpectedly encountered Espindola's group in the SUV. We disagree.

When determining whether the evidence was sufficient to sustain a criminal conviction, we " ' "review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and

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[10] The jury found Rojas not guilty of shooting at an occupied motor vehicle. It deadlocked on the vehicular manslaughter and attempted murder charges alleged as to Rojas, and the trial court declared a mistrial on those counts.

of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" ' " (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) We presume in support of the judgment the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Medina* (2009) 46 Cal.4th 913, 919.) Reversal is not warranted unless it appears " ' "that upon no hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.) The same standard of review applies when the prosecution relies primarily on circumstantial evidence. (*Salazar*, at p. 242.)

Attempted murder requires the specific intent to kill and commission of a direct but ineffectual act toward accomplishing the intended killing. (*People v. Perez* (2010) 50 Cal.4th 222, 229.) Premeditation and deliberation require more than a showing of intent to kill. (*People v. Mendoza* (2011) 52 Cal.4th 1056, 1069.) An attempted murder is premeditated and deliberate when it occurs as the result of preexisting thought and reflection, rather than an unconsidered or rash impulse. (*People v. Pearson* (2013) 56 Cal.4th 393, 443; *People v. Burney* (2009) 47 Cal.4th 203, 235.) "Deliberate" means formed, arrived at, or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. (*People v. Houston* (2012) 54 Cal.4th 1186, 1216.) "Premeditation" means thought over in advance. (*People v. Solomon* (2010) 49 Cal.4th 792, 812; *People v. Disa* (2016) 1 Cal.App.5th 654, 664.) However, to prove a killing was premeditated and deliberate, it is " 'not . . . necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act.' [Citation.]" (*People v. Disa*, at p. 665.) The " ' "process of premeditation and deliberation does not require any extended period of time." ' " (*People v. Salazar*, *supra*, 63 Cal.4th at p. 245.) " ' " 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived

at quickly . . . .' [Citations.]" [Citation.]' " (*People v. Houston*, at p. 1216.)

A reviewing court typically considers three categories of evidence when determining whether a finding of premeditation and deliberation is adequately supported: planning activity, motive, and manner of killing. (*People v. Houston*, *supra*, 54 Cal.4th at p. 1216; *People v. Anderson* (1968) 70 Cal.2d 15, 26–27; *People v. Gonzalez* (2012) 54 Cal.4th 643, 663–664.) These so-called *Anderson* factors are not exclusive, but are a framework to guide the assessment of whether the evidence supports an inference that the killing occurred as the result of preexisting reflection rather than unconsidered or rash impulse. (*People v. Gonzalez*, at p. 663; *People v. Solomon*, *supra*, 49 Cal.4th at p. 812.)

Here, there was evidence of all three *Anderson* factors. First, the evidence demonstrated a motive for the shooting. Munoz and Loaiza were members of the Pico Viejo gang, and Espindola, Carrillo, and Perez were members of Pico Viejo's "bitter enem[y]," Brown Authority. In his conversation with the confidential informant, Munoz stated he believed the victims were Brown Authority members, who had chased or shot at his cousin, Loaiza. The gang expert testified that gang members are expected to protect their territory, including "eliminating rivals in their territory." Both gangs claimed Streamland Park as their territory. (See *People v. Romero* (2008) 44 Cal.4th 386, 401 [evidence of motive shown where victim and defendant were members of rival gangs, and killing a gang rival would elevate the killer's status]; *People v. Martinez* (2003) 113 Cal.App.4th 400, 413 [motive for shooting involved gang rivalry]; *People v. Rand* (1995) 37 Cal.App.4th 999, 1001; *People v. Wells* (1988) 199 Cal.App.3d 535, 541 [gang rivalry was motive for shooting where defendant and victim were members of rival gangs].)

Second, there was evidence of planning, in that both Loaiza and Munoz brought loaded guns with them in the car. (*People v. Salazar*,

supra, 63 Cal.4th at p. 245 ["defendant brought a loaded gun with him to the Beef Bowl, demonstrating preparation"]; *People v. Lee* (2011) 51 Cal.4th 620, 636 ["defendant brought a loaded handgun with him on the night [of the killing], indicating he had considered the possibility of a violent encounter"]; *People v. Romero*, *supra*, 44 Cal.4th at p. 401 [evidence of planning shown by facts defendant brought gun to a store and shot victim in the back of the head]; *People v. Wells*, *supra*, 199 Cal.App.3d at pp. 540–541 [carrying concealed, loaded handgun "is consistent with intent to kill a rival gang member even it if does not provide solid evidence of prior planning to kill this particular victim"].)

And, third, the manner of killing showed premeditation. Loaiza fired multiple shots directly at the victims' vehicle; Munoz attempted to do so, but his gun jammed. Thus, the men acted in concert to attack their perceived enemies. According to Espindola's statements, the shooting was an ambush, and according to both him and Carrillo, no one in the SUV shot at the Mitsubishi or had a gun. This account was corroborated by the fact that the SUV was hit with multiple bullets, whereas the Mitsubishi was not. (See *People v. Bolin* (1998) 18 Cal.4th 297, 332 [firing multiple gunshots at victims supported finding of premeditation]; cf. *People v. Romero*, *supra*, 44 Cal.4th at p. 401 [evidence of execution style killing, without a struggle by the victim, indicates premeditation and deliberation].) This unprovoked shooting at close range suggested premeditation and deliberation. In short, the evidence was sufficient. (See *People v. Romero*, at p. 401; *People v. Boatman* (2013) 221 Cal.App.4th 1253, 1266.)

Munoz argues that the "only evidence" relating to his and Loaiza's actions immediately preceding the shooting was Rojas's testimony that he picked the men up and they unexpectedly encountered the SUV; there was "basically no evidence" of planning; and the shooting was "spontaneous" and reflexive. Not so. Munoz's statements to the confidential informant suggested the encounter was not unexpected: his group went looking for the Brown Authority gang

rivals who had accosted Loaiza, or at the very least, recognized them and shot when the two cars passed by. Loaiza's statement upon seeing the SUV, " 'those are those fools right there,' " likewise demonstrated such recognition. The fact both Munoz and Loaiza coordinated the attack was inconsistent with a finding the shooting was unplanned and spontaneous, as was the fact they each brought a loaded gun in the car. Further, Espindola testified his group was unarmed and did not shoot, undercutting the argument that Munoz's and Loaiza's actions were simply reflexive. Even assuming Munoz's group was not seeking out Espindola's group, the evidence was sufficient to show that, once they happened upon them, the shooting was premeditated, willful, and deliberate. "Premeditation can be established in the context of a gang shooting even though the time between the sighting of the victim and the actual shooting is very brief." (*People v. Sanchez* (2001) 26 Cal.4th 834, 849; *People v. Rand*, *supra*, 37 Cal.App.4th at pp. 1001–1002 [sufficient evidence of premeditation where defendant committed a drive-by shooting, aiming at stranded persons whom he believed were rival gang members; "[t]he law does not require that an action be planned for any great period of time in advance" and a " 'cold and calculating decision to kill can be arrived at very quickly' "].)

2. *The trial court did not commit instructional error*

a. *Additional facts and contentions*

Munoz argues that the trial court misinstructed the jury regarding the mental state required for an aider and abettor convicted of premeditated attempted murder under the natural and probable consequences doctrine.

The prosecutor argued that Munoz could be found guilty of premeditated attempted murder if he personally committed the premeditated attempted murders of the victims, or, alternatively, if he aided and abetted the target crime of firing at an occupied vehicle and attempted murder was a natural and probable consequence of that offense. As to the premeditation allegation, the prosecutor explained,

"What you're looking at is not just whether the individual defendant formed that specific intent but whether any of the principals, meaning defendant Rojas, defendant Munoz, or the decedent, Jonathan Loaiza, committed that attempted murder with specifically the intent to do so willfully, deliberately, and with premeditation."

The trial court instructed the jury on attempted murder, aiding and abetting, the natural and probable consequences doctrine, and premeditation and deliberation. Consistent with the prosecutor's argument, CALCRIM No. 601 stated that, to establish the premeditation allegation, the People had to prove that either Munoz, Rojas or Loaiza, or all of them, committed the attempted murder willfully and with deliberation and premeditation.[11]

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[11] CALCRIM No. 402 stated, in pertinent part: "To prove that the defendant is guilty of attempted murder under the doctrine of natural and probable consequences, the People must prove that: [¶] 1. The defendant is guilty of shooting at an occupied vehicle; [¶] 2. During the commission of shooting at an occupied vehicle a coparticipant in that shooting at an occupied vehicle committed the crime of attempted murder; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of *attempted murder was a natural and probable consequence of the commission of the shooting at an occupied vehicle.* [¶] . . . [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes." (Italics added.)

CALCRIM No. 601 stated, in pertinent part: "If you find the defendant guilty of attempted murder under Count 1 and/or Count 2, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] The defendant or Jonathan Loaiza acted willfully if he intended to kill when he acted. The defendant or Jonathan Loaiza deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant or Jonathan Loaiza acted with premeditation if he decided to kill before completing the acts of attempted murder. [¶] *The*

Munoz complains that the jury should have been instructed that the premeditation allegation could be found true as to him only if *premeditated* attempted murder — rather than *unpremeditated* attempted murder — was a natural and probable consequence of the target offense of shooting at an occupied motor vehicle. He argues that this purported flaw in the instructions eliminated an element from the jury's consideration in violation of his Sixth and Fourteenth Amendment rights. Because it is unclear, based on the record, including the verdict forms, which theory the jury relied upon in rendering its verdict, he contends the purported instructional error requires reversal of the jury's findings that the two attempted murders were premeditated, willful, and deliberate.

b. *Standard of review and applicable legal principles*

A trial court has the duty to instruct the jury on the general principles of law relevant to the issues raised by the evidence and necessary for the jury's understanding of the case. (*People v. Townsel* (2016) 63 Cal.4th 25, 58.) We independently determine whether the instructions given were correct and adequate. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088; *People v. Riley* (2010) 185 Cal.App.4th 754, 767.)

"There are two distinct forms of culpability for aiders and abettors." (*People v. Chiu* (2014) 59 Cal.4th 155, 158 (*Chiu*).) First, to be liable as a direct aider and abettor to murder, the prosecution must show the defendant aided or encouraged the commission of the murder with knowledge of the perpetrator's unlawful purpose, and with the intent or purpose of committing, encouraging, or facilitating its commission. (*Id*. at pp. 166–167.) Consequently, the aider and abettor must have had the intent to kill. (*People v. Lee* (2003) 31 Cal.4th 613,

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attempted murder was done willfully and with deliberation and premeditation if either one of the defendant [*sic*] *or Jonathan Loaiza or all of them acted with that state of mind*." (Italics added.)

624 (*Lee*).) Second, under the natural and probable consequences doctrine, a " ' "person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime," ' " that is, that was reasonably foreseeable. (*Chiu*, at p. 161.) " 'Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.' " (*Ibid.*)

In *Lee*, the defendant, who was tried for attempted, premeditated murder as a direct aider and abettor, argued section 664[12] required that an attempted murderer must personally act with willfulness, deliberation, and premeditation, and that the trial court erred by failing to so instruct the jury. (*Lee*, *supra*, 31 Cal.4th at pp. 616, 618, 621–623.) The *Lee* court disagreed, concluding that based on the statutory language, "section 664(a) properly must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor." (*Id.* at p. 616.)

People v. Favor (2012) 54 Cal.4th 868, came to the same conclusion when a defendant is tried under the natural and probable consequences theory, holding that "the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense." (*Id.* at p. 872.) *Favor*

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12 Under section 664, subdivision (a), a person guilty of attempted murder generally will be punished by a term of five, seven, or nine years. However, if the People plead and prove that the attempted murder was willful, deliberate, and premeditated, the punishment is life in prison. (*Lee*, *supra*, 31 Cal.4th at p. 616; *People v. Gallardo* (2017) 18 Cal.App.5th 51, 82 (*Gallardo*).)

reasoned that section 664, subdivision (a), did not create a greater degree of attempted murder, but constituted a penalty provision that prescribes an increased punishment. (*Favor*, at pp. 876–877.) The court explained: "Because section 664(a) 'requires only that the attempted murder itself was willful, deliberate, and premeditated' [citation], it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' [Citation.] . . . [W]ith respect to the natural and probable consequences doctrine as applied to the premeditation allegation under section 664(a), attempted murder—not attempted premeditated murder—qualifies as the nontarget *offense* to which the jury must find foreseeability. Accordingly, once the jury finds that an aider and abettor, in general or under the natural and probable consequences doctrine, has committed an attempted murder, it separately determines whether the attempted murder was willful, deliberate, and premeditated. [¶] Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*Favor*, at pp. 879–880.)

c. *The instructions given were not erroneous*

In light of the foregoing, it is clear the trial court did not commit instructional error. Attempted murder—not attempted premeditated murder—qualifies as the nontarget offense, and the jury need not be instructed that a premeditated attempt to murder must have been a natural and probable consequence of the target offense. (*Favor*, *supra*, 54 Cal.4th at p. 872.)

Munoz acknowledges that *Favor* is "directly on point" and would normally compel rejection of his argument. However, he contends *Favor* has been undermined by the United States Supreme Court's

opinion in *Alleyne v. United States* (2013) 570 U.S. 99 (*Alleyne*) and by our Supreme Court's decision in *Chiu*. Our Supreme Court is currently considering whether *Favor* should be reconsidered in light of *Alleyne* and *Chiu*, and whether, in order to convict an aider and abettor of attempted premeditated murder under the natural and probable consequences doctrine, a premeditated attempt to murder must have been a natural and probable consequence of the target offense. (*People v. Mateo* (Feb. 10, 2016, B258333 [nonpub. opn.]), review granted May 11, 2016, S232674.)

Alleyne held, based on *Apprendi v. New Jersey* (2000) 530 U.S. 466, that any fact that increases the penalty for a crime is an element and must be submitted to the jury and found true beyond a reasonable doubt. (*Alleyne*, *supra*, 570 U.S. at p. 103.) The high court explained, "When a finding of fact alters the legally prescribed punishment so as to aggravate it, the fact necessarily forms a constituent part of a new offense and must be submitted to the jury." (*Id.* at p. 114.)

Subsequently, *Chiu* held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu*, *supra*, 59 Cal.4th at pp. 158–159.) The court reasoned that in the context of murder, the natural and probable consequences doctrine serves the policy goal of deterring aiders and abettors from encouraging the commission of offenses that would naturally, probably, and foreseeably result in an unlawful killing. (*Id.* at p. 165.) This policy goal, however, loses its force in the context of a defendant's liability as an aider and abettor to a first degree premeditated murder, for at least two reasons: the premeditative mental state is "uniquely subjective and personal," and the resultant harm is the same regardless of whether the perpetrator premeditated. (*Id.* at p. 166.) *Chiu* concluded that "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime" based on

the natural and probable consequences doctrine. (*Ibid.*) *Chiu* declined to overrule *Favor*, distinguishing it instead on the basis that (1) premeditation and deliberation are elements of first degree murder, whereas premeditation and deliberation simply increase the penalty for attempted premeditated murder; (2) *Favor*, but not *Chiu*, involved a question of legislative intent; and (3) the consequences of imposing liability for premeditated attempted murder are less severe than for first degree premeditated murder. (*Chiu*, at p. 163.)

Munoz argues that, in light of *Alleyne*, *Favor*'s reasoning that section 664, subdivision (a) is merely a penalty provision, rather than the functional equivalent of a greater offense, cannot stand. Further, he avers that the bases upon which *Chiu* distinguished *Favor* are "clearly contrary to *Alleyne*'s reasoning and holding."

We reject Munoz's argument for two reasons. As *People v. Gallardo*, *supra*, 18 Cal.App.5th 51 explained: "*Alleyne* was decided approximately one year before *Chiu*. Although *Chiu* addressed *Lee* and *Favor* at length, it did not mention *Alleyne*, or provide any indication that *Alleyne* had undermined its prior holdings in those cases. We presume the Supreme Court was aware of *Alleyne* when it issued *Chiu*. [¶] Moreover, at least as applied in this case, we fail to see how section 664, subdivision (a)'s sentencing enhancement for attempted premeditated murder violates the rule of *Alleyne*. Under the statute, a defendant cannot be subjected to the enhanced penalty provision unless the jury finds two facts beyond a reasonable doubt: (1) the defendant committed an attempted murder; and (2) the defendant or his accomplice committed the attempted murder with premeditation. . . . Thus, an enhanced penalty cannot be imposed under section 664, subdivision (a) unless the jury makes a true finding on the question of premeditation." (*Id.* at pp. 85–86, fn. omitted.) We agree with *Gallardo*'s reasoning and adopt it here.

Second, and more fundamentally, at present *Favor* remains good law. Unless and until our Supreme Court overrules *Favor*, it precludes

Munoz's argument. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)[13]

3. *The matter must be remanded for resentencing*

When the trial court sentenced Munoz in July of 2017, imposition of a section 12022.53 firearm enhancement was mandatory and the trial court lacked discretion to strike it. (See *People v. Franklin* (2016) 63 Cal.4th 261, 273.) Accordingly, the court imposed consecutive terms of 25 years to life on counts 1 and 2 pursuant to section 12022.53, subdivisions (d) and (e)(1).[14]

Effective January 1, 2018, the Legislature amended section 12022.53, subdivision (h) to give trial courts authority to strike section 12022.53 firearm enhancements in the interest of justice. (Sen. Bill No. 620 (2017–2018 Reg. Sess.), Stats. 2017, ch. 682, § 2.) Munoz contends his case must be remanded to allow the trial court to exercise its discretion to strike the firearm enhancements, and the People agree. The parties are correct. The amendment to section 12022.53 applies to cases, such as appellant's, that were not final when the amendment became operative. (*People v. Watts* (2018) 22 Cal.App.5th 102, 119; *People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090–1091; *People v. Brown* (2012) 54 Cal.4th 314, 323; *People v. Vieira* (2005) 35 Cal.4th 264, 305–306; *People v. Nasalga* (1996) 12 Cal.4th 784, 792; *In re Estrada* (1965) 63 Cal.2d 740, 745.) Remand is necessary to allow the trial court an opportunity to exercise its sentencing discretion under the amended statute. (See *People v. Gutierrez* (2014) 58 Cal.4th 1354, 1391; *People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) We express no opinion about how the court's discretion should be exercised.

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[13] In light of our conclusion, we find it unnecessary to reach the parties' arguments regarding prejudice.

[14] The court also imposed a 25-years-to-life term for the firearm enhancement on count 3, but stayed it pursuant to section 654.

DISPOSITION

Munoz's sentence is vacated and the matter is remanded to allow the trial court to exercise its discretion and determine whether to strike or dismiss the section 12022.53 firearm enhancements pursuant to section 12022.53, subdivision (h). The judgment of conviction is otherwise affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EDMON, P. J.

We concur:

LAVIN, J.

EGERTON, J.