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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. NERSES ARTHUR GALSTYAN, Defendant and Appellant.	B279947 (Los Angeles County Super. Ct. No. LA064891)

APPEAL from a judgment of the Superior Court of Los Angeles County, Charlaine F. Olmedo, Judge. Convictions affirmed and matter remanded for resentencing.

Danalynn Pritz, 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, and Steven E. Mercer and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Nerses Arthur Galstyan (Galstyan) of three counts of murder (Pen. Code, § 187, subd. (a)); one count of voluntary manslaughter (§ 192, subd. (a)); one count of mayhem (§ 203); and two counts of attempted premeditated murder (§§ 187, subd. (a), 664). The jury found true a multiple-murder special circumstance, alleged in two counts (§ 190.2, subd. (a)(3)), and firearm enhancements (§ 12022.53, subds. (b)-(d)) alleged as to all counts.

On appeal, Galstyan challenges multiple jury instructions and asserts claims of spectator misconduct, insufficient evidence, and cumulative error. He also requests resentencing due to a change in state law and points to a discrepancy between the abstract of judgment and oral pronouncement.

We affirm the convictions, and remand for resentencing.

FACTUAL AND PROCEDURAL BACKGROUND

On April 3, 2010, Galstyan attended a memorial gathering in honor of his deceased friend, Artoum ["Artoum"] Tachchian. The memorial reception was held in the banquet room of a restaurant, the Hot Spot Cafe.

Near the end of the event, approximately 12 men remained at the restaurant, including Galstyan. Galstyan left the banquet room and returned eight minutes later, carrying a firearm and extra magazine of ammunition. Galstyan fired 50 rounds at the group, killing four men (Harut Baburyan (Harut), Sarkis Karadjian (Sarkis K.), Vardan Tofalyan (Vardan), and Hayk Yegnanyan (Hayk), and wounding two others (David Agazaryan (David) and Nshan Norashkaharyan (Nshan).

The motive for the shooting was unknown. Multiple prosecution witnesses testified that Galstyan was friendly or

acquainted with the victims, and that there were no arguments or disputes while at the cemetery or the restaurant.

A. Prosecution Evidence

Of the eight men who survived the shooting, four of them Grigor Taschchian (Grigor), Nshan Norashkaharyan (Nshan), Sarkis Terzyan (Sarkis T.) and Edward Keshishian (Edo) testified as prosecution witnesses. The two final men, Galstyan, and his brother Sam, testified as defense witnesses.

1. Grigor's Testimony.

Grigor's brother Artoum died on May 9, 2009; his birthday was April 3rd. On April 3, 2010, friends were having a service for Artoum which started at the cemetery, followed by a reception at the Hot Spot Cafe. Grigor neither observed any arguments at the cemetery or at the restaurant, nor recalled any discussions about drug sales or anyone pressuring anyone else to conduct drug sales prior to the shooting.

Video from the Hot Spot Cafe showed people going out to the patio area at 3:17 p.m.[1] At around 3:19 p.m., Grigor was standing between Hayk and Sam, with Hayk right behind Grigor. Galstyan came and grabbed Hayk by the thighs, picked him up, and put him over his shoulder. The video showed Galstyan carrying Hayk towards the outside of the patio area. Grigor testified he did not know whether it was an argument or horseplay. He did not recall

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[1] The restaurant had video cameras located in the patio, the driveway, the front entrance, and near the kitchen. There was no video camera in the banquet room, where the shooting occurred.

seeing Hayk take out a knife.[2]

At 3:56 p.m. there were eight to 10 people in the banquet room. There was no tension or yelling, and no threats were being made. Grigor heard 10 to 20 shots, but did not see who was shooting because he covered his head. He left without speaking to police.

2. Nshan's Testimony.

Nshan was Grigor's friend. Nshan attended high school with Grigor, Hambik, Sarkis T., and David. Nshan had seen Galstyan at past memorial events for Artoum and had been to other social events with Galstyan, but he never saw him act violently or start any trouble. Nshan described Galstyan as "quiet" and "acting normal" that day.

According to Nshan, the mood in the banquet room was "sad," and people were telling stories about Artoum. Vardan sang a song Artoum had liked; while Vardan was singing, the other men were smiling.

Nshan did not hear any threats or arguments, either at the cemetery or at the restaurant, nor did he see any weapons displayed. Sarkis K., Edo, and Harut arrived towards the end of the function when only a small group of people remained. A few minutes before the shooting, someone walked out of the banquet room; Galstyan then walked into the room holding a 9mm Glock with a long clip. Galstyan began shooting in Harut's direction. Nshan dropped to the floor and tried to hide under the table. Hayk

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[2] Photos of the patio sequence were shown to Grigor, wherein Hayk was hanging over Galstyan's shoulder. Grigor said he couldn't tell whether there was a knife in Hayk's hand, a cellular phone, or if the image was simply a shadow.

fell to the floor next to Nshan. Nshan heard gunshots. He later realized he had been shot in the back.

When Nshan was in the hospital, he spoke to two sets of police officers. He did not identify the shooter to any of these officers. He later identified the shooter after speaking to a family member.

3. Sarkis T.'s Testimony[3]

Sarkis T. was friends with Nshan; David was his cousin. Sarkis T. had met Galstyan several years earlier; he had never had any problems with Galstyan or his brother. Shortly before the shooting, the men were making toasts and reminiscing about Artoum. At one point, Hayk made a toast about Galstyan and his brother Sam. Hayk referred to Sam's recent motorcycle accident and wished Galstyan and his brother well, while also suggesting Sam stop riding motorcycles to avoid causing stress to his brother. Sarkis T. did not observe any threats or arguments,[4] nor did he see anyone with a weapon.

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[3] In July 2010 (in an unrelated matter) Sarkis T. pled guilty to three felony counts involving bank fraud, aggravated identity theft, and misapplication of bank funds. As part of his plea agreement, Sarkis T. agreed to provide details about this case. Sarkis T. received a sentence of 39 months and was on probation when he testified at Galstyan's trial.

[4] Sarkis T. testified he was standing near the doorway watching what he referred to as the "horseplay" incident on the patio. However, he was subsequently impeached when defense counsel played another portion of the video from the Hot Spot Cafe showing Sarkis T. in the driveway during the time the incident was going on outside on the patio.

Right after the toasts, he heard a gunshot from behind him. Everyone dropped to the floor. Sarkis T. originally told police that he too dropped to the floor and did not see anything; at trial he testified that while on the floor, he saw Galstyan standing next to Sam, shooting directly at the table. He believed Harut was the first to get shot, but did not see what happened to Hayk or Sarkis K. He heard a number of shots fired, with one break in between the shots. During that break, he saw Galstyan possibly changing his magazine. Galstyan was staring directly at the table as he continued to shoot. Then he leaned over the table and began shooting downward from left to right.

After the shooting, Sarkis T. met with the fathers of Vardan and Hayk, but denied they influenced his testimony or dissuaded him from saying anything negative about the victims.

4. Edo's Testimony

Edo had never met Galstyan before April 3rd, 2010. Edo knew Galstyan's brother Sam.

On April 3, Edo attended the event at the cemetery with Sarkis K. and Harut, and then went to Sarkis K.'s business office. At one point, Sarkis K. told Edo they were going to the restaurant to give Hayk a ride home because he had too much to drink.[5] Edo drove Harut and Sarkis K. to the restaurant in Harut's Mercedes.

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[5] The coroner testified Hayk had an extremely low, negligible amount of alcohol in his blood.

On the way to the restaurant, Edo saw Sarkis K. and Harut exchanging weapons. Sarkis K. was on the telephone during the drive.[6]

Video footage from the Hot Spot Cafe showed the men arriving at the restaurant at 3:52 p.m.; Edo got out of the driver's seat. The men entered the banquet room at 3:56 p.m. There were about a dozen people there. Edo described the atmosphere as normal and a somewhat happy event. Edo did not remember anyone insulting Galstyan or Sam.

About 20 minutes after they arrived, Sarkis K. went to the bathroom and then texted Edo to go set up some cocaine in the bathroom. Edo found this strange, because normally he and Sarkis K. went to the bathroom together to use cocaine.

After about four or five minutes in the bathroom, Edo heard loud banging. Grigor came into the bathroom frantic, with blood all over him. When Edo went back into the banquet room, he did not see Sarkis K., but thought he saw Harut and Hayk under a table.

Edo acknowledged telling the police that Sarkis K. was a gangster, but testified he meant that Sarkis K. acted like a gangster: this was the image or lifestyle he portrayed, although he was not an actual gang member. However, Edo testified Sarkis K. had the phrase "don't trust anyone" tattooed across his chest and that Edo was aware this was a common gang tattoo. Edo also told the police that Sarkis K. and Harut did not like Galstyan.

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[6] Los Angeles Police Detective Romero testified there were seven calls between Sarkis K. and Hayk that afternoon with the last call placed at 3:39 p.m., shortly before Sarkis K. arrived at the restaurant.

5. Owner/Employees of Hot Spot Cafe

The owner of the restaurant, Artour Balian, did not observe any threats or arguments between the men gathered at the restaurant for the memorial. At one point, around 3:19 p.m., Artour saw an incident on the patio where one man picked up another man and then put him down. The incident appeared friendly. Everyone was laughing. Artour did not see anyone with a knife. Artour went home shortly after 3:19 p.m.

Gevorg Zakaryan, a cook at the restaurant, then called and told him, "They are killing each other." Artour ran towards the restaurant, and called 911.

Ruben Varpetyan was working as a waiter. By 4:00 or 4:30 there were only 12 to 14 people left from the party. Ruben did not observe any arguments or fights among the guests in the banquet room that day. Just before the shooting, someone asked Ruben to leave the banquet room. After Ruben left the room, he heard banging noises.

Ruben looked into the banquet room and saw a man standing with his arm outstretched straight across his body; his hand was constantly moving. Ruben saw another person holding up a chair. Ruben could not describe either man.

6. Investigation

Sarkis K., Harut, and Hayk were pronounced dead at the scene of the shooting. Vardan was transported to the hospital, but did not survive.

Sarkis K.'s body was found face-down on the floor of the banquet room, with a Beretta nine-millimeter handgun in his right hand, finger on the trigger. There were five live rounds in the gun's magazine, and the safety was off. However, the gun was not ready

to be fired: the chamber of the gun was empty, and the hammer was down.

Harut's body was found on the floor of the banquet room, with a .45 caliber semiautomatic handgun in a waistband holster. There were eight live cartridges in the gun's magazine, and the safety was off. The chamber of his gun was empty, and the hammer was down.

At the time of his death, Hayk had a knife with a seven-to-eight-inch long blade in his belt buckle.

Investigators found 50 nine millimeter shell casings in the banquet room. All casings were fired from a firearm different from the gun recovered from Harut or Sarkis K. The investigators also found a magazine for a nine-millimeter Glock firearm.

Autopsies performed on Sarkis K., Hayk, Harut, and Vardan demonstrated the cause of death to be multiple gunshot wounds. Harut suffered six gunshot wounds; four shots to the back were relatively close to one another, suggesting that Harut was motionless at the time the bullets struck. Sarkis K. suffered 10 gunshot wounds; six of the wounds were close together. Hayk suffered eight gunshot wounds, and two superficial graze wounds. Vardan suffered three gunshot wounds.

7. Galstyan's Arrest

Two days after the shooting, Galstyan and Sam arrived at the home of their uncle, Noel Sahakian, in Kenmore, Washington. Galstyan and Sam stayed with Sahakian's family for two weeks. After a week, Sahakian asked Galstyan what had happened. Galstyan said people he shot had told him that he was marked.

Galstyan and Sam were arrested in Washington on April 20, 2010. Sam was interviewed and released on April 22nd.

B. Defense Evidence.

1. Galstyan's Testimony.

Galstyan testified he attended Artoum's memorial after his close friend, Vardan, told him about it. Galstyan had been friends with Artoum, and knew Artoum's brother Grigor. Galstyan had known Hayk for about three years. Galstyan was not close with Sarkis K.

Prior to the memorial, there had been tension between Galstyan, Hayk and Sarkis K. Galstyan's brother, Sam, a member of a motorcycle club, had told Galstyan about Hayk and Sarkis K. pressuring him to help them with their drug business. Hayk and Sarkis K. had asked Galstyan on multiple occasions why Sam would not help them. On one occasion, Galstyan was told, "You know what happens when someone says no to us."

Hayk had a "187" tattoo (referencing the applicable Penal Code section for murder) on his arm. Hayk told Galstyan he had earned this tattoo. Hayk and Sarkis K. were self-proclaimed gangsters.

On the day of the memorial, Galstyan and Sam went to the cemetery in Sam's car. Before going to the cemetery, Galstyan put a nine-millimeter semiautomatic Glock handgun in his trunk to be cautious in light of the tension with Hayk and Sarkis K. He had a 17-round magazine for the gun, as well as a 33-round magazine. Both magazines were fully loaded.

After the cemetery, Galstyan went to the Hot Spot Cafe. Galstyan and Sam went inside the banquet room; Vardan sat with them. After eating, Galstyan left the banquet room and went to the patio.

Galstyan saw Hayk and Sam in what appeared to be some type of a confrontation. Hayk was aggressive and reached for his

waistband. Galstyan picked up Hayk and raised him over his head. As he did so, he noticed a knife in Hayk's hand. Galstyan put Hayk back down. At that point, Vardan and Artour (the restaurant owner) attempted to calmed things down. Galstyan asked Hayk if everything was okay; Hayk responded, "Only time will tell."

Everyone went back inside the banquet room. Harut, Sarkis K., and Edo arrived. The scene became more aggressive and serious because their arrival was unexpected when others were ready to leave. Galstyan did not, however, see any weapons. However, Hayk gave a toast in which he said something like, "It's too bad, Sam, you haven't died. But you're limping now and too bad your days are numbered. And your days are numbered by us."

At one point Galstyan heard either Hayk or Sarkis K.[7] saying to Sam, "So you're not going to do it. Help us out?" Galstyan recalled Sam saying no. The tone became more aggressive. Hayk told Galstyan to stay out of it, and Galstyan at that point told his brother to meet him at the car. Galstyan left the banquet room.

When Galstyan reached his car, he started thinking about the events and concluded the situation was serious. After five minutes, Galstyan retrieved his gun and an extra magazine, and walked back inside. He did not intend to use the gun.

Galstyan sat down next to Sam, and told him it was time to leave. At that point, Hayk and Sarkis K. stood up and said, "You're not going anywhere." Sarkis K. pointed a gun at Galstyan and Sam. Sam pushed the table. Galstyan felt an object hit his head. Galstyan pulled out his gun and started firing.

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[7] During his testimony, Galstyan attributed statements made to him or his brother by referring generically to "them" or "they" without specifying who made the statement.

Galstyan fired first at Sarkis K. It took fewer than 10 seconds for Galstyan to fire all 17 rounds from the gun's magazine. Sarkis K. and Hayk were still moving, so Galstyan removed the gun's empty magazine and replaced it with the extra magazine. Galstyan fired at Hayk because Hayk was moving closer to him, and he thought Hayk was going to stab him.[8] Galstyan next saw Harut and Vardan struggling. Galstyan could see that Harut was overpowering Vardan, and Harut was reaching for his weapon. Galstyan shot in their direction, but did not intend to shoot Vardan. The second, larger, clip took about 25 seconds to fire. Galstyan did not intend to shoot David or Nshan.

Afterward, Galstyan and Sam left the restaurant and went home, and then drove to Washington to visit relatives.

2. Sam's Testimony

Sam testified he had previously worked for Sarkis K., but later distanced himself from him because he was "shady." Sam believed Sarkis K. and Harut were involved with gangs. Sam was part of a motorcycle club, and in September of 2009 had a bad motorcycle accident. Prior to his accident, Sarkis K. and Hayk had asked Sam on multiple occasions to transport drugs through the motorcycle club, but Sam refused. Sam was afraid of Hayk. Sarkis K. and Hayk had a very strong demeanor, and Sam knew Hayk carried a knife.

Sarkis K. and Hayk asked him again to run drugs at the Hot Spot Cafe on April 3rd. At the restaurant Sam was out on the

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[8] On cross-examination, Galstyan testified that after he shot Sarkis and Sarkis went down, he changed magazines because Hayk was coming towards him and he thought Hayk had retrieved the gun from Sarkis K. Galstyan testified he emptied half of the 33 clips in the second magazine at Hayk.

patio; Hayk came outside and told Sam, "You're limping, huh? You see what happens? So you're not going to help us, huh? If you helped us, this wouldn't have happened." Grigor was standing in between them. Hayk was not joking. Sam heard the word loyalty right before Hayk reached for his waist, where Sam saw his knife.

Galstyan then came over and picked up Hayk and put him over his shoulder. Sam saw a knife in Hayk's hand, with the blade pointing towards Galstyan's neck. Galstyan then put Hayk down. Sam would not describe this as horseplay. Vardan came out to the patio and calmed Hayk down; Hayk put the knife away.

After the patio incident, Sam stayed outside, while Galstyan and Vardan went into the banquet room to try and calm Hayk down. When Sam went back into the banquet room, Hayk continued to ask him to help them, and Sam continued to say no.

Sarkis K., Harut, and Edward arrived around this time, and Hayk became more aggressive after they arrived. As they were sitting around the table, Hayk repeated his comments about helping, loyalty, and disrespect. Galstyan was present and wanted to leave, but Sam wanted to try to calm the situation.

After Galstyan left the room, Hayk told Sam, "Things won't be good for you if you don't help us." Sam continued to refused to be involved. About five minutes after Galstyan left, he came back and sat next to Sam. Sam stood up to say goodbye, and Hayk, who was across the table from them, threw something at Galstyan.

Sarkis K. removed a gun from his waist and pointed it at Sam and Galstyan. Sam pushed the table causing Sarkis K. to stumble backwards. Sam heard a loud noise but didn't know who made it; Galstyan started firing. He saw Sarkis K. with a gun in his hand moving around the table. Sam picked up a chair and pushed it forward.

Galstyan shot Sarkis K. first, who fell to the floor. Hayk was holding David, trying to reach for Sarkis K.'s gun. It looked like Vardan was struggling with Harut over the gun in Harut's waistband. At this point, Galstyan had been firing for about one minute.

Sam did not see Galstyan change clips, and he did not know if Galstyan was moving around the room. However, Galstyan did not just walk in the room and start shooting while everyone was having a good time, and he did not lean over the table to shoot at people on the ground.

Sam did not know how Galstyan got the gun. He had never known Galstyan to own a gun, although he had seen him fire guns, including semi-automatics, at the shooting range.

After Galstyan stopped shooting, Sam noticed Galstyan had blood all over his head. They ran to the car and left without knowing whether anyone was dead. Sam drove them home, where they took cash and left because they were afraid the others would kill them. Sam's aunt and uncle picked them up and drove them to Washington.

3. Armand Sahakian's Testimony

Galstyan's cousin Armand Sahakian ["Armand"] testified that, when Galstyan came to visit his family in Washington in April 2010, Galstyan had a wound on his head. Armand helped Galstyan treat the wound.

4. Detective Luis Romero

Detective Romero testified the gun recovered from Sarkis K. had the slide in the forward position, meaning one could not tell visually whether the gun was loaded. There was broken glass next to Hayk's body at the crime scene. Phone records showed that

following the shooting, Galstyan's phone received a call from a phone number associated with Sarkis K.'s household. Sam's phone received six calls from the same phone number. Video surveillance from the Hot Spot Cafe showed that Harut's car was parked directly in front of the restaurant.

5. The Convictions

Galstyan was charged with four counts of murder (Pen. Code, § 187, subd. (a); counts 1-4) with a multiple-murder special circumstance allegation (§ 190.2, subd. (a)(3)); one count of mayhem (§ 203; count 5); and two counts of attempted premeditated murder (§§ 187, subd. (a), 664; counts 6-7).[9] As to all counts, firearm enhancements (§ 12022.53, subds. (b)-(d) were alleged.
The People sought the death penalty.

The jury found Galstyan guilty of two counts of first degree murder (counts 2, 4), one count of second degree murder (count 1), and one count of mayhem (count 5). On count 3, the jury found Galstyan guilty of the lesser included offense of voluntary manslaughter. One counts 6 and 7, the jury found Galstyan guilty of the lesser included offense of attempted voluntary manslaughter. The jury found true the multiple-murder special circumstance and the firearm allegations. The jury fixed the penalty for counts 2 and 4 at life without the possibility of parole.

The trial court sentenced Galstyan to a total determinate term of 31 years, four months on counts 3, 6, and 7 as follows: 21 years on count 3 (11 year upper term for offense, plus 10 year upper term for firearm enhancement), consecutive to 10 years and four

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[9] Unless otherwise stated, all further statutory references are to the Penal Code.

months for counts 6 and 7 (one-third the midterm for each offense, plus one-third the upper term for firearm enhancements).

The trial court sentenced Galstyan to an indeterminate term consisting of two terms of life without the possibility of parole on counts 2 and 4, plus 40 years to life on count 1 (15 years for second degree murder, plus 25 years to life for the firearm enhancement), plus 33 years to life on count 5 (eight years for mayhem, plus 25 years to life for the firearm enhancement under § 12022.53, subd. (d)).

DISCUSSION

I. Any Error In Instructing the July With CALCRIM No. 3471 Was Harmless

Over defense objection, the court instructed the jury on the limits of self-defense for a person who engaged in mutual combat or was the initial aggressor:

> " **CALCRIM No. 3471[Right to self-defense: Mutual Combat or Initial Aggressor]**[10]
>
> A person who engages in mutual combat or starts a fight has a right to self-defense only if:
>
> 1) he actually and in good faith tried to stop fighting;
> 2) he indicated by words or by conduct to his opponent in a way that a reasonable person would understand that he wanted to stop fighting;

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10 The trial court also instructed the jury with CALCRIM No. 3472 (right to self-defense: may not be contrived): A person does not have the right to self-defense if he or she provokes a fight or quarrel with the intent to create an excuse to use force.

Galstyan did not object to the instruction below, but asserts error on appeal, *see* Argument IV, *post*.

3) he gave his opponent a chance to stop fighting.

If a defendant meets these requirements, he then has a right to self-defense if the opponent continues to fight.

A fight is mutual when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied and must occur before the claim to self-defense arose."

Defense counsel argued the instruction did not apply, because the People did not assert Galstyan had been fighting. The prosecution argued that the jury instruction was applicable, in light of the events that took place on the patio and the conduct inside the banquet room. The trial court determined the instruction was warranted, explaining the jury could draw various inferences from the evidence, including that Galstyan was the aggressor on the patio and that numerous interactions resulted in a mutual combat scenario.

A. Standard of Review

We independently review instructional errors. (*People v. Russell* (2006) 144 Cal.App.4th 1415, 1424, disapproved on other grounds in *People v. Covarrubias,* 1 Cal.5th 838, 874, fn. 14.)

"'"It is settled that in criminal cases, even in the absence of a request, a trial court must instruct on general principles of law relevant to the issues raised by the evidence"' and "'necessary for the jury's understanding of the case.'" [Citations.] It equally well settled that this duty to instruct extends to defenses' if it appears . . . the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Brooks* (2017) 3 Cal.5th 1, 73; *People v. Davis* (2005) 36 Cal.4th 510, 570.)

On the other hand, it "is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case." (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) We determine whether any such error is harmless by applying the test set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836, under which "reversal is required if it is reasonably probable the result would have been more favorable to the defendant had the error not occurred." (*People v. Guiton*, *supra,* 4 Cal.4th at p. 1130.)

B. Analysis.

Because we conclude that any error in giving the instruction was harmless, in light of the whole record, we need not determine whether the trial court erred in giving this instruction to the jury. In reviewing a claim that the court's instructions were incorrect or misleading, we inquire whether there is a reasonable likelihood the jury understood the instructions as asserted by the defendant. (*People v. Cross* (2008) 45 Cal.4th 58, 67–68 [82 Cal.Rptr.3d 373, 190 P.3d 706].) We consider the instructions as a whole and assume the jurors are intelligent persons capable of understanding and correlating all the instructions. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) The jury was instructed that not all instructions may apply, and that they should disregard instructions that apply to facts the jury did not find. We presume the jury followed the instructions. (*People v. Homick* (2012) 55 Cal.4th 816, 866-867.)

If the jury did not find facts supporting mutual combat, the jury was thus instructed to disregard the instruction. In finding Galstyan guilty of first degree murder, the jury determined he acted with malice, not in self-defense. The evidence of malice was strong. Galstyan testified that he brought the gun and loaded magazines to the memorial. While there he left the event room, and sat in his car

for five minutes, considering what to do; he returned to the event with the gun and ammunition. Although he testified that he did not intend to shoot anyone, he fired rapidly and continued to fire after stopping to change magazines; he did not testify that anyone fired at him during this time. No other witness described any preceding threats of immediate harm to him, or display of a firearm by any other person before he began to fire. In light of the entire record, it is not reasonably proper that he would have obtained a more favorable result had the instruction not been given.

Galstyan argues that by giving the mutual combat instruction, the trial court effectively removed his claim of self-defense from the jury's consideration. The instruction neither precluded the jury from considering defense testimony on the right to self-defense, nor prevented the jury from finding Galstyan acted in perfect or imperfect self-defense. (Cf. *People v. Johnson* (2009) 180 Cal.App.4th 702, 711 [explaining that CALCRIM No. 3471 simply "charges a jury to make a *preliminary determination* of whether the defendant had the *right* to use force to defend himself when the defendant and the victim engaged in mutual combat, or when the defendant was the initial aggressor"].)

II. Any Error Concerning Transferred Intent Instructions Was Harmless

The jury was instructed on transferred intent with CALCRIM No. 562:

> If the defendant intended to kill one person, but by mistake or accident killed Vardan Tofalyan instead, then the crime, if any, is the same as if the intended person had been killed.

Galstyan contends the trial court erred by giving the wrong paragraph of CALCRIM No. 562,[11] and by failing to instruct sua sponte on the principle of "transferred self-defense." He argues the latter instruction was necessary because the defense theory was that Vardan had been inadvertently hit by a shot fired in self-defense. The doctrine of transferred self-defense was recognized in *People v. Mathews* (1979) 91 Cal.App.3d 1018, 1023–1024, which held it applies where "the act [in self-defense] is directed towards the unlawful aggressor and inadvertently results in the injury of a nonaggressive party." (*Id*. at p. 1023, fn. 2, italics omitted; see also *People v. Vallejo* (2013) 214 Cal.App.4th 1033, 1038-1039 [recognizing doctrine of "transferred self-defense," but concluding self-defense instructions adequately conveyed the principle].)

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[11] CALCRIM No. 562 has two possible paragraph options to choose from depending on whether "only the unintended victim is killed" (Paragraph A), or whether "both intended and unintended victims are killed" (Paragraph B):

Paragraph A: Only unintended victim is killed
If the defendant intended to kill one person, but by mistake or accident killed someone else instead, then the crime, if any, is the same as if the intended person had been killed.
Paragraph B: Both intended and unintended victims are killed.
If the defendant intended to kill one person, but by mistake or accident also killed someone else, then the crime, if any, is the same for the unintended killing as it is for the intended killing.
(CALCRIM No. 562.)

Here, even assuming the trial court erred, any error was harmless.[12] The jury found Galstyan guilty of the first degree premeditated murder of Harut. The jury thus necessarily rejected the theory that Galstyan inadvertently shot Vardan in self-defense.[13] (*People v. Vallejo*, *supra*, 214 Cal.App.4th at p. 1039.)

III. The Kill Zone Instructions

Galstyan was charged with two counts of attempted premeditated a murder as to David (count 6) and Nshan (count 7). The trial court instructed the jury with CALCRIM No. 600,

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[12] Although Galstyan failed to object to the transferred intent instruction during trial, we consider the argument to determine whether any error affected Galstyan's substantial rights. (§ 1259; *People v. Ramos, supra,* 163 Cal.App.4th at p. 1087.)

[13] Galstyan argues the jury would not have been constrained to transfer only the defenses applicable to Harut to Vardan when "[t]his entire situation would not have occurred if Sarkis K. had not drawn his weapon first." Galstyan's argument appears to suggest that if the jury had been instructed on the principle of transferred self-defense, it might have transferred its voluntary manslaughter verdict, relating to Sarkis K., to Vardan. However, Galstyan himself testified he inserted the second magazine into his weapon and subsequently shot Harut because he saw Harut "going for his weapon" –and noticed Harut, seated next to Vardan, was "struggling, and overpowering" Vardan. (*People v. Mathews*, *supra,* 91 Cal.App.3d at p. 1023 ["It has been long accepted that if A shoots at B, intending to kill B, but instead the bullet strikes C . . . the 'malice follows the blow' and the criminal intent of A to harm B is transferred to C."], quoting *State v. Clifton* (1972) 32 Ohio App.2d 284); *People v. Bland* (2002) 28 Cal.4th 313, 322, 326 ["Intent to kill transfers to an unintended homicide victim even if the intended target is killed"].)

[attempted murder] and CALCRIM No. 604 [attempted voluntary manslaughter: imperfect self-defense].~ (1CT 192, 195.)~ CALCRIM No. 600 included the kill zone provision, 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 [David and Nshan], the People must prove that the defendant not only intended to kill [Hayk, Vardan, Sarkis K. or Harut], but also intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill [David or Nshan] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of [David and Nshan].

The jury convicted Galstyan of attempted voluntary manslaughter as to David and Nshan. Galstyan contends the kill zone instruction was not supported by the evidence which showed, at most, that he fired at his intended targets in a reckless or indiscriminate manner. The record does not support that argument.

A. The Kill Zone Theory

Unlike the mental state for murder, which does not require an intent to kill but only a conscious disregard for life (implied malice), "[a]ttempted murder requires the specific intent to kill." (*People v. Smith* (2005) 37 Cal.4th 733, 739 [internal quotations omitted].) "'[A]lthough the intent to kill a primary target does not *transfer* to a survivor, the fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within . . . the 'kill zone.' (*People v. Bland*,

supra, 28 Cal.4th at p. 329, quoting *Ford v. State* (1993) 625 A.2d 984, 1000-1001.)

The California Supreme Court recently narrowed the boundaries of the kill zone theory, stating a kill zone instruction is warranted only when: "(1) the circumstances of the defendant's attack on a primary target, including the type and extent of force the defendant used, are such that the only reasonable inference is that the defendant intended to create a zone of fatal harm—that is, an area in which the defendant intended to kill everyone present to ensure the primary target's death—around the primary target; and (2) the alleged attempted murder victim who was not the primary target was located within that zone of harm." (*People v. Canizales* (2019) 7 Cal.5th 591, 607-608.)

B. Substantial Evidence Supports The Instruction

The record in this case supports the instruction.

First, there was evidence Galstyan's primary targets included Hayk, Sarkis K. and Harut. The alleged attempted murder victims, Nshan and David, were seated next to Hayk, [14] Thus, Nshan and David were within close proximity of the primary target(s)–as well as Galstyan himself. (*People v. Canizales, supra,* 7 Cal.5th at pp. 607-608 [factors supporting kill zone theory include close proximity between alleged attempted murder victims and primary target, as well as defendant and attempted murder victims].)

Second, Galstyan fired a total of 50 gunshots with a semi-automatic weapon, resulting in 30 gunshot wounds to six different men. (*People v. Canizales*, 7 Cal.5th at pp. 607–608 [number of shots and type of weapon relevant to whether kill zone theory

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[14] According to trial testimony, David was seated to the left of Hayk and Nshan was seated next to David.

applies].) Galstyan's method of attack was highly comparable to the "kill zone" examples and decisions cited in *Bland*: using an explosive device or automatic weapon fire against a group of people (*People v. Bland, supra*, 28 Cal.4th at p. 330); spraying wall-piercing bullets at occupied houses (*ibid*., citing *People v. Vang* (2001) 87 Cal.App.4th 554, 563–565); and defendant's method of attack in *Bland* itself: firing "a flurry of bullets" into a fleeing car (*People v. Bland*, *supra*, 28 Cal.4th at pp. 330–331).)

Third, the two victims to whom the theory applied in this case (Nshan and David) were struck by the spray of bullets fired at the primary target(s). (*Cf. People v. Canizales, supra,* 7 Cal.5th at pp. 611-612 [fact that neither victim was hit by any shots militated against kill zone instruction]; *People v. Smith* (2005) 37 Cal.4th 733, 745-746 [kill zone theory inapplicable where defendant fired single shot and missed intended and unintended targets].) Indeed, the primary targets, Hayk, Harut, and Sarkis K. suffered a total of 28 gunshot wounds, while Vardan, seated next to Sarkis K., suffered three gunshot wounds, two of which were fatal. The fact that the only attempted murder counts charged in this case were for victims actually struck by fire–and located within a few feet of Hayk–demonstrates the kill zone here was narrowly drawn. (Cf. *People v. Canizale*s, *supra,* 7 Cal.5th at pp. 610-611 [alleged victim shot while at least 100 feet away in an open area]; *People v. McCloud* (2012) 211 Cal.App.4th 788, 801-803, 806 [defendant fired 10 shots at party, killing two people and injuring a third, and was convicted of 46 counts of attempted murder; prosecutor failed to identify primary target and argued those who were merely endangered or "put at risk" were attempted murder victims].)

In sum, the circumstances of the offense provide evidence that Galstyan intended to create a zone of fatal harm to ensure the

death of his primary targets, and that David and Nshan were within that zone of harm. (*People v. Canizales*, *supra,* 7 Cal.5th at pp. 606-607, fn. 5.) On this record, the trial court did not err in giving the instruction.

IV. Self-defense and Associated Theories.

Galstyan contends the judgment must be reversed because the record established self-defense as a matter of law, but the presentation of multiple invalid theories improperly caused the jury to reject self-defense. We disagree.

First, the evidence did not establish self-defense as a matter of law because the jury could reasonably have concluded that Galstyan ambushed his rivals. The jury could also have concluded Galstyan did not act out of fear alone, but with a desire to kill those he specifically targeted. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1044-1045 [rejecting contention that evidence established self-defense as a matter of law where facts supported alternate theories, including a finding "that defendant did not act on the basis of fear alone but also on a desire to kill his rival"].)

Second, the trial court did not err by instructing the jury with CALCRIM No. 3472, contrived self-defense. The instruction is a correct statement of the law (see *People v. Enraca* (2012) 53 Cal.4th 735, 761-762; *People v. Eulian* (2016) 247 Cal.App.4th 1324, 1334), and there was substantial evidence to support it. If the jury determined Hayk did not threaten Sam on the patio, it could have found Galstyan threw Hayk over his shoulder to initiate a quarrel, and did so "with the intent to create a real or apparent necessity of exercising self-defense" –either against Hayk alone, or against

Hayk and his cohorts. As such, the evidence contained a factual predicate for the instruction. (*Eulian*, at pp. 1334-1335.)[15]

Third, Galstyan's challenges directed at "improper theories" or arguments made by the prosecution during closing argument fall under the category of prosecutorial misconduct claims as opposed to claims based on a resolution of the case on an improper instructional basis.[16] (*People v. Morales* (2001) 25 Cal.4th 34, 43; *Nguyen*, *supra*, 61 Cal.4th at pp. 1046-1047). Galstyan did not object to these prosecutorial comments or arguments. As a result, he forfeited any claims relating to the prosecutor's closing arguments. (*People v. Nguyen*, *supra,* 61 Cal.4th at p. 1047; see also *People v. Huggins* (2006) 38 Cal.4th 175, 251-252, citing *People v.*

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[15] To the extent Galstyan claims the blanket instruction removed his defense theory from the jury's consideration, Galstyan requested no modification or amplification. (*People v. Miceli* (1951) 101 Cal.App.2d 643, 648-649 [where instructions on law of self-defense were adequate, the defendant should have requested an amplifying instruction to inform the jury that a "sudden and perilous" counterassault justified his use of deadly force]; cf. *People v. Olguin* (1994) 31 Cal.App.4th 1355, fn. 12 [claim that contrived self-defense instruction was incorrect for failure to require specific intent to create pretext waived for failure to request modification].) Moreover, as discussed earlier, any purported "deadly" response came over an hour after the patio incident and thus would not qualify as a "sudden and perilous" counterassault. (*Miceli*, *supra*, 101 Cal.App.2d at p. 649, *People v. Ramirez*, 233 Cal.App.4th 940, 946.)

[16] Specifically, Galstyan challenges the prosecutor's argument that Galstyan "ambushed" the victims as unsupported by evidence, and the argument that Galstyan's claim of self-defense was not credible in light of the number of victims, and shots fired.

Prieto (2003) 30 Cal.4th 226, 259 [as a general rule defendant may not complain on appeal of prosecutorial misconduct unless he raised objection and requested admonition].)

V. Spectator Misconduct

Galstyan contends multiple instances of spectator misconduct deprived him of his constitutional rights to a fair trial and impartial jury.[17] The record demonstrates, however, that the trial court acted well within the bounds of discretion, and there was no alleged spectator misconduct that would be prejudicial and influence the verdict.

A trial court has broad discretion in determining whether spectator misconduct is prejudicial. (*People v. Lucero* (1988) 44 Cal.3d 1006, 1022.) "The reason is obvious: the court ordinarily is present in the courtroom at any time when a spectator engages in an outburst or other misconduct in the jury's presence and is in the best position to evaluate the impact of such conduct on the fairness of the trial." (*People v. Cornwell* (2005) 37 Cal.4th 50, 87, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

A. Incidents Alleged as Spectator Misconduct.

At the outset of trial, the court admonished audience members to refrain from visible displays of emotion and interactions with jury members. During the trial, the defense brought six incidents to the attention of the trial court.

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[17] We granted Galstyan's request for leave to file a supplemental opening brief on this issue. (See Cal. Rules of Court, rule 8.200(a)(4).) Both parties submitted supplemental briefing.

1. Hayk's father yelled during Nshan's testimony.

On the second day of Nshan's testimony, defense counsel alerted the court that the previous day, a man, later identified as Hayk's father, had yelled a comment in Armenian during Nshan's testimony. Counsel stated that, after speaking to Galstyan's parents, he learned that the comment translated to "a good job, Nshan." The court noted it had removed Hayk's father and advised him that he would not be allowed in court if he did not comply with the court's rules.[18] The court reminded all audience members to exhibit proper courtroom conduct and to avoid gestures or verbal comments.

2. An audience member wiped a tear during Sarkis T.'s testimony.

During Sarkis T.'s testimony, defense counsel asked for a sidebar and told the court, "I don't think my client gets a fair trial when mothers are crying in the courtroom in view of the jury. That's not fair." The court said it had seen "one older woman take a Kleenex and touch her eyes with a Kleenex, and the court does not find that to be disruptive, nor would it necessarily be unduly prejudicial." The court noted the woman had made no sound. The court overruled Galstyan's motion for a mistrial.

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18 Defense counsel stated Hayk's father had also said "Fuck the police" in English and in Armenian as he was taken out of the courtroom; the bailiff confirmed that Hayk's father had said something to the effect of "Fuck these guys" or "Fuck you guys."

3. During Grigor's testimony, his father shouted a comment in Armenian.

While Grigor was being cross-examined, an unidentified audience member said something in a foreign language. Defense counsel stated that the man responsible for the comment was Grigor's father and asked for a hearing to determine what Grigor's father had said. The court noted there did not appear to be any Armenian jurors and it was unclear whether any jurors understood the language, but would ask Grigor's father to return to court to ascertain what was said. Outside the presence of the jury, the court admonished the audience.

The court subsequently questioned Grigor's father about his comment; he stated that he was sick, nervous, and had not taken his medicine that morning. He could not recall what he had yelled out, but it was "in terms of [Grigor] wanted to take me home," and "we were late, and so I felt discomfort." The court admonished Grigor's father not to discuss the case with his son, and added, "And if you are around the courtroom, do not do anything. That means don't say anything, behave in any way, do any conduct in an attempt to influence the jurors or any other witness in this case."

4. Audience members allegedly laughed during Sam Galstyan's testimony.

After Sam finished testifying as a defense witness, defense counsel informed the court that audience members in the front of the courtroom, who were apparently family members of one of the victims, had been laughing during Sam's testimony. The court said it had been watching the audience, but had not seen that behavior. The court noted that it had admonished the audience repeatedly and would watch for any inappropriate conduct.

5. Prior to Galstyan's testimony, defense counsel asked for an admonishment on making signs, laughing, and smirking.

Just before Galstyan testified, defense counsel asked for an admonition "of no signs, no laughter, no smirking," stating he had "seen that," and wanted his client to "have a fair opportunity, obviously, in the courtroom environment." The trial court replied, "with regard to the admonishment to the audience, I have been admonishing the audience throughout these proceedings. For the most part, they have been complying with the court's admonishment. I continue to expect everyone to behave, as they have been."

6. A man in the audience leaned on a bible during appellant's testimony.

During a break in Galstyan's testimony, defense counsel complained that a man in the audience was "laying on" a bible, which he maintained was not appropriate and was unfair to appellant. The court pointed out the man had not opened the book and was not reading it, and that it was unclear whether any juror would recognize the book to be a bible. The court described the man as having his hands crossed, leaning on the back of the bench in front of him; his arms were crossed over the book, with his head resting on his arms in front of him. The court disputed defense counsel's characterization of the man's position as "prayer mode." Defense counsel said, "Okay. If it's not - - if it's not bothering the court, then I just wanted to bring it to your attention. The court noted it had positioned one bailiff to observe the audience and specifically instructed him to ask the individual to leave if any disturbances occurred.

2. There Was No Prejudicial Error

Though Galstyan identifies the claim as one of "Spectator Misconduct" throughout the headings in all briefs, in his supplemental briefing he claims the issue is "neither spectator misconduct nor jury misconduct," but "the sort of private communication or tampering with the jury the trial court was obligated to explore." Galstyan argues the misconduct attached a "rebuttable presumption of prejudice" which was not dispelled because the trial court failed to "sua sponte" conduct a hearing on the allegations."

Attempts to re-characterize spectator misconduct claims as juror misconduct giving rise to presumptive prejudice have been squarely rejected by the Supreme Court. (*People v. Cornwell, supra,* 37 Cal.4th 50, 88, fn. 9; *People v. Lucero* (1988) 44 Cal.3d 1006, 1022). The Court has not only reiterated that no prejudice is presumed from such asserted errors, but proclaimed that "it is generally assumed that such errors are cured by admonition," unless "the record demonstrates the misconduct resulted in a miscarriage of justice." (*People v. Hill* (1992) 3 Cal.4th 959, 1002, disapproved on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.)[19]

Galstyan also argues actual prejudice, citing "the same constellation of out-of-state spectator misconduct cases" distinguished in *People v. Trinh, supra,* 59 Cal.4th at p. 251, fn. 12; *People v. Myles* (2012) 53 Cal.4th 1181, 1215, *People v. Lucero*, *supra*, 44 Cal.3d at p. 1023.) Here too the alleged misconduct is

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[19] "[B]ecause a spectator does not wear the same cloak of official authority as a prosecutor, most instances of spectator misconduct will likely be more easily curable than those of a prosecutor." (*People v. Hill*, *supra*, 3 Cal.4th at p. 1000.)

distinguishable from the "unrelenting, prejudicial disruptions at issue in the cited cases." (*People v. Myles*, *supra*, 53 Cal.4th at p. 1215.)

The record here establishes both the limited nature and impact of any misconduct and the trial court's prompt admonitions; it discloses no prejudice. (*People v. Carrasco* (2014) 59 Cal.4th 924, 963, 966 [no reversal warranted for spectator misconduct where defendant failed to show trial court's response was inadequate or that any alleged conduct prejudiced defendant].); *People v. Trinh*, *supra*, 59 Cal.4th at pp. 250-251 [rejecting argument that trial court should have sua sponte inquired into whether jury heard purported spectator comment and reiterating trial court is best situated to evaluate potential impact of such conduct]; *People v. Chatman* (2006) 38 Cal.4th 344, 368-370 [no prejudice established, despite outburst by victim's mother during defendant's testimony].)[20]

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[20] To the extent Galstyan criticizes the trial court for failing to issue a permanent order of exclusion against the fathers of Hayk or Grigor, we agree with the following observations: "A trial is the recreation of a human event. When the event involves life and death, the aftermath for all those affected is profound and emotions run high. . . . Surely, we would not say that the [parent] of either the victim or the accused should be excluded from the courtroom simply because [s/he] might act beyond the strictures of accepted legal deportment. Courts have a responsibility to manage this reality but they cannot ignore it." (*People v. Chatman, supra,* 38 Cal.4th at pp. 368-370.)

VI. There Was Sufficient Evidence of Premeditation To Support The Convictions on Counts 2 and 4.

Galstyan argues his first degree murder convictions on counts 2 (Vardan) and 4 (Harut) rest on insufficient evidence of premeditation and deliberation.

Our role in considering a sufficiency of the evidence claim is quite limited. We do not reassess the credibility of witnesses (*People v. Barnes* (1986) 42 Cal.3d 284, 303-304), and review the record in the light most favorable to the judgment. (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) The issue is whether "'any rational trier of fact'" could have been persuaded of the defendant's guilt. (*Ibid.*, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

In assessing evidence of premeditation and deliberation, we consider as a framework for our review: (1) planning activity, (2) a prior relationship with the victim supporting a motive to kill, and (3) the manner of killing. (See *People v. Thomas* (1992) 2 Cal.4th 489, 517; *People v. Anderson* (1968) 70 Cal.2d 15, 26-34.) Applying this framework, the trial record discloses more than sufficient evidence to persuade a rational trier of fact.[21]

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[21] Galstyan testified he shot Sarkis K. first, then Hayk, then Harut/Vardan; Nshan testified Galstyan first shot in the direction of Harut (who was seated next to Vardan, ~(5RT 908-909; 8RT 1586-1590)~ while Sarkis T. believed Harut was first shot.~(5RT 911; 8RT 1605)~ Though the jury returned a verdict of manslaughter in relation to Sarkis K., and second degree in relation to Hayk, our review is not limited by these verdicts. Instead we look to the evidence in support of Counts 2 and 4 without regard to the jury's verdicts on other counts. (See *People v. Covarrubias* (2016) 1 Cal.5th 838, 890-891; *People v. Lewis* (2001) 25 Cal.4th 610, 656.)

First, as to planning: Galstyan arrived at the restaurant with a loaded semiautomatic handgun and extra magazine, and he brought his weapon into the restaurant after sitting in his car and "analyzing" the various incidents and "serious" interactions which had taken place that day. The fact that Galstyan paused in the middle of the shooting to reload his gun with the additional magazine he brought with him is evidence from which the jury could find that Galstyan further, or more specifically, premeditated the murder of Harut (which then transferred to Vardan). (*People v. Osband* (1996) 13 Cal.4th 622, 697 [in assessing premeditation and deliberation, the test "is not time, but reflection," as "[t]houghts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly"].) To the extent Galstyan maintains he placed the gun in his trunk that day to be "cautious," and later retrieved the gun solely out of "caut[ion]," the jury was free to reject his testimony, (see *People v. Mayberry* (1975) 15 Cal.3d 143, 150 [exclusive province of jury to determine credibility]), while his repeated proclamations that he had no "preconceived plan" to shoot his "best friend" Vardan carry no persuasive weight against a charge pursued on a theory of transferred intent.

Second, the manner of killing strongly supports a finding of premeditation and deliberation. Galstyan shot Harut six times, including shots to the back of the head, the face, two shots to the upper side of the back, and two shots to the middle of the back. When manner-of-killing evidence strongly suggests premeditation and deliberation, that evidence is enough, by itself, to sustain a conviction for first degree murder. (*People v. Bloyd* (1987) 43 Cal.3d 333, 348 [premeditation found where victims were shot in the head, one from point-blank range and the other from a distance of one foot]; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1192

[manner of killing found to be indicative of premeditation and deliberation where five or six shots were fired from a car five feet from victim].)

Third, to the extent motive is another element of consideration, the fact that the prosecutor argued the motive was unknown does not mean the record was wholly devoid of motive evidence. The testimony of both prosecution and defense witnesses indicated there was animosity between Galstyan and the victims, even if the reasons behind it may not have been fully revealed. In any event, the lack of motive has never been regarded as fatal to a finding of premeditation. (*People v. Thomas* (1992) 2 Cal.4th 489, 519 [providing several plausible inferences of motive the jury could infer, and commenting that "[w]e have never required the prosecution to prove a specific motive before affirming a judgment, even one of first degree murder"].)

There was sufficient evidence to support the verdicts. (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 490-491 ["Even if the evidence supported [defendant's] theory, we are not free to reform the verdict simply because another theory is plausible"]; *People v. Jackson* (2016) 1 Cal.5th 269, 345 [same].)

VII. Cumulative Error

Galstyan contends the cumulative effect of the errors alleged denied him due process and compels reversal. In light of our disposition, there are not multiple errors to accumulate. (*People v. Trinh, supra,* 59 Cal.4th at p. 253; *People v. Woodruff* (2018) 5 Cal.5th 697, 783; cf. *People v. Bradford* (1997) 15 Cal.4th 1229, 1382 [no cumulative error where court "rejected nearly all of defendant's assignments of error"].)

VIII. Sentencing Error: Count 5 [Mayhem]

The trial court pronounced a total determinate sentence of 31 years, four months. The abstract of judgment, however, reflects a determinate sentence of 39 years, four months. In light of the discrepancy, Galstyan requests modification of the abstract of judgment to make it consistent with the court's oral pronouncement at sentencing. (*People v. Zackery* (2007) 147 Cal.App.4th 380, 385 ["[w]here there is a discrepancy between the oral pronouncement of judgment and the minute order or the abstract of judgment, the oral pronouncement controls"].)

The trial court imposed a sentence of eight years for the substantive mayhem offense, plus 25-years-to-life for the associated section 12022.53, subdivision (d) firearm enhancement. Though respondent is generally correct in stating that "an indeterminate enhancement cannot exist independently of the offense to which it is attached," that does not mean that Count 5 is indeterminate; it is the underlying offense that drives the classification. (*People v. Lyons* (1999) 72 Cal.App.4th 1224, 1229 [explaining that "a firearm-use enhancement cannot exist without the crime to which it is attached" and that pursuant to statutory scheme, underlying offense drives classification of determinate or indeterminate designations].) Thus, the sentence on Count 5 is part of the determinate sentence.

As a result, it is subject to recalculation as a subordinate term, *People v. Mason* (2002) 96 Cal.App.4th 1, 4-5, 14-15 (*Mason*). In addition, the trial court must consider whether the mayhem conviction, which involves the same victim as count 6 is subject to section 654's prohibition against multiple punishments, and whether it should be stayed. (*People v. Phong Bui* (2011) 192 Cal.App.4th 1002, 1015 [reversing imposition of consecutive

sentences for attempted murder and mayhem involving single victim]; *People v. Pitts* (1990) 223 Cal.App.3d 1547, 1560 [reversing consecutive sentences for aggravated assault and mayhem "based on attack on one victim"].)[22]

We remand the matter to the trial court for resentencing.[23]

IX. Amendments of Sections 12022.5 and 12022.53: Senate Bill No. 620

Galstyan's sentence included four section 12022.53, subdivision (d) enhancements (on Counts 1, 2, 4, and 5), and three section 12022.5 enhancements (on Counts 3, 6, and 7). The court selected the 10-year upper term on the section 12022.5 enhancements and imposed a 25-to-life term on the section 12022.53, subdivision (d) enhancements.

In 2017 the Governor signed into law Senate Bill No. 620 (2017-2018 Reg. Sess.), which went into effect on January 1, 2018. Senate Bill No. 620 amended sections 12022.5 and 12022.53 to state, "[t]he court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section." (Sen. Bill No. 620, §§ 1 & 2, amending §§ 12022.5, subd. (c), 12022.53, subd. (h).) Prior to the enactment of Senate Bill No. 620,

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[22] Should the mayhem count be stayed under section 654, the enhancement would have to be stayed as well. (*People v. Guilford* (1984) 151 Cal.App.3d 406, 411.)

[23] Respondent points to an additional error: the abstract of judgment reflects Galstyan was convicted of second degree murder in count 3, but the jury found him guilty of voluntary manslaughter (§ 192, subd. (a)) in count 3. On resentencing, the court should correct the abstract of judgment. (*People v. Sanders* (2012) 55 Cal.4th 731, 742, fn. 13.)

these enhancements were mandatory, and the trial court lacked the authority to strike or dismiss them. (See, e.g., *People v. Kim* (2011) 193 Cal.App.4th 1355, 1362–1363, citing former § 12022.53, subd. (h).)

As the respondent concedes, "Senate Bill No. 620's (2017-2018 Reg. Sess.) grant of discretion to strike firearm enhancements under section 12022.53 applies retroactively to all nonfinal convictions." (*People v. Hurlic* (2018) 25 Cal.App.5th 50, 56, accord, *People v. McDaniels* (2018) 22 Cal.App.5th 420, 424-425.)

Respondent contends, however, that remand is not warranted because the trial court's comments about the aggravating factors, combined with its decision to impose the upper term for the 12022.5 enhancements and run the indeterminate counts consecutive to one another, are clear indication the court would not have stricken the firearm enhancements.

Galstyan was sentenced on December 20, 2016. As we explained in *People v. Billingsley* (2018) 22 Cal.App.5th 1076, 1081, "the court was not aware of the full scope of the discretion it now has under the amended statute. "'Defendants are entitled to sentencing decisions made in the exercise of the 'informed discretion' of the sentencing court. [Citations.] A court which is unaware of the scope of its discretionary powers can no more exercise that 'informed discretion' than one whose sentence is or may have been based on misinformation regarding a material aspect of a defendant's record.'"" (*People v. Billingsley, supra,* 22 Cal.App.5th at p. 1081.) This is especially so where, as here, there are multiple enhancements which carry heavy terms. (See *People v. McDaniels*, *supra*, 22 Cal.App.5th at p. 427 [given "high stakes" involved, "a reviewing court has all the more reason to allow the trial court to decide in the first instance whether these

enhancements should be stricken, even when the reviewing court considers it reasonably probable that the sentence will not be modified on remand"].)

On remand for resentencing, the trial court shall consider whether any firearm enhancements should be stricken.

DISPOSITION

The convictions are affirmed, and the matter is remanded for resentencing.

ZELON, J.

We concur:

PERLUSS, P. J

SEGAL, J.