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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. RENE SAJID MUNOZ, Defendant and Appellant.	B227880 (Los Angeles County Super. Ct. No. BA338780)

APPEAL from a judgment of the Superior Court of Los Angeles County, John Fisher, Judge. Affirmed in part, reversed in part, and remanded.

Valerie G. Wass, under appointment by the Court of Appeal for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and Douglas L. Wilson, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Rene Sajid Munoz appeals from his convictions for murder, attempted murder, and assault on a peace officer. For the attempted murder counts, he challenges the sufficiency of the evidence that he acted with the requisite intent to kill. He also challenges the evidence supporting his convictions for assault on a peace officer. Defendant raises numerous challenges to the jury instructions on the kill zone theory of attempted murder, the defense of voluntary intoxication, and assault on a peace officer. He claims the jury failed to make findings that the victims in the attempted murder counts were peace officers. Finally, he points out inconsistencies between the minute order of the sentencing, the abstract of judgment, and the oral pronouncement of sentence by the trial court.

We conclude the convictions for attempted murder and assault on a peace officer are supported by substantial evidence. The instructional errors were harmless in that there is no reasonable probability a different verdict would have been reached absent the errors. The jury's factual findings on the assault counts that victims Justin Darby, John Darby, Kelly Cook, and Kyle Heinbechner were peace officers apply also to the attempted murder counts as to these same victims. We remand the matter for resentencing on count 6 and any corresponding sentencing change resulting from that sentence, as well as clarification of the fees imposed. On remand, the abstract of judgment is to be corrected as directed by this opinion.

FACTUAL AND PROCEDURAL SUMMARY

On the evening of April 3, 2008, Kelly McCowen was bowling at an alley in midtown Los Angeles. Her fiancé, defendant, went to the bowling alley. He approached one of McCowen's friends and asked twice if she knew a Mr. Bryant. The friend answered truthfully that she did not. McCowen came over, and in a louder voice, defendant asked "'Who in the fuck is Mr. Bryant?'" McCowen said "Let's go." The friend watched McCowen and defendant walk toward the door of the bowling alley. Stephanie Marks saw McCowen get into the SUV. Another acquaintance later saw

McCowen sitting in the passenger seat of an SUV talking with a man matching defendant's description. About 40 minutes later, Marks heard a gunshot, then saw two flashes inside the SUV as she heard two additional shots fired. From her position, where she had fallen to the ground, Marks heard the SUV door open and saw McCowen's body drop out of the SUV. The SUV pulled out, circled the parking lot, and left. Someone called 911. McCowen was pronounced dead at a hospital from multiple gunshot wounds.

Later that night, at about 9:45 p.m., Glendale police officers responded to reports of shots fired in the area of Forest Lawn Memorial Park in Glendale. This was followed by a lengthy standoff between defendant and police officers. Two incidents during the standoff gave rise to the charges in this case. The first occurred when defendant fired a shotgun in the vicinity of four officers in two patrol cars parked near his SUV at the Tender Care area of the cemetery. The second occurred when defendant pointed a weapon at a group of five officers who were in an armored Bearcat vehicle. (We reserve the details of these incidents for our discussion of the sufficiency of the evidence to support the convictions and the claims of instructional error.) The standoff ended when defendant drove the SUV at a high rate of speed, across graves, in the direction of a police roadblock erected at the entrance to the cemetery. Officers opened fire on the SUV, which veered off and went over a curb. Eventually, the rear tires of the SUV were shot out by officers and defendant was wounded. He exited the SUV and was arrested.

A loaded Banelli shotgun was recovered from the backseat of the SUV, another shotgun from the front seat, a loaded Glock .40-caliber handgun was in the center console, and a loaded Glock .45-caliber handgun was on the passenger side floorboard. The .45-caliber handgun had a flashlight mount for nighttime or tactical shooting that could be used as a flashlight. Spent shotgun shells and spent casings were found inside the SUV. Additional shotgun shells that had not been fired were recovered from the SUV. Two spent shotgun shells and a spent .45-caliber casing were recovered from the Tender Care area of the cemetery.

Defendant was charged with the murder of McCowen (count 1); with four counts of attempted murder of a peace officer at the Tender Care location (counts 2 through 5), and nine counts of assault with a firearm on a police officer (counts 6-14). Firearm use enhancements were alleged. Defendant was found guilty as charged on all 14 counts, and various firearm allegations were found true. Defendant's motion for new trial was denied. He was sentenced to an indeterminate prison term of 110 years-to-life and a consecutive determinate term aggregating 112 years.[1] Defendant appeals from the judgment of conviction.

DISCUSSION

I

Defendant challenges the sufficiency of the evidence of intent to kill, an element of attempted murder with respect to counts 2 through 5. He raises numerous challenges to jury instructions on the alternative kill zone prosecution theory of attempted murder. He also claims that the sentence on the attempted murder counts must be reduced because the verdicts did not include specific findings that he attempted to kill a peace officer.

"'"The proper test for determining a claim of insufficiency of evidence in a criminal case is whether, on the entire record, a rational trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.] On appeal, we must view the evidence in the light most favorable to the People and must presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citation.]"' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 738–739 (*Smith*).)

A. Intent to Kill

"'[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*Smith*, *supra*, 37 Cal.4th at p. 739.) The defendant must intend to kill the alleged victim,

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[1] We discuss the details of the sentence in the context of defendant's claims of sentencing errors.

not someone else, and therefore specific intent to kill must be judged separately as to each victim. (*Id*. at p. 740.)

Direct evidence of an intent to kill is not required to support a conviction for attempted murder. "[I]t is well settled that intent to kill or express malice, the mental state required to convict a defendant of attempted murder, may in many cases be inferred from the defendant's acts and the circumstances of the crime. [Citation.] 'There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions. [Citation.] The act of firing toward a victim at a close, but not point blank, range "in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill . . . ." [Citation.]' (*People v. Chinchilla* (1997) 52 Cal.App.4th 683, 690 (*Chinchilla*); see also *People v. Villegas* (2001) 92 Cal.App.4th 1217, 1224–1225.) '"The fact that the shooter may have fired only once and then abandoned his efforts out of necessity or fear does not compel the conclusion that he lacked the animus to kill in the first instance. Nor does the fact that the victim may have escaped death because of the shooter's poor marksmanship necessarily establish a less culpable state of mind." [Citation.]' (*Chinchilla*, at p. 690.)" (*Smith*, *supra*, 37 Cal.4th at p. 741.)

Intent to kill may be inferred from evidence that a defendant fired a lethal weapon at close range, even if there is no evidence of motive. It is the very act of firing a weapon """in a manner that could have inflicted a mortal wound had the bullet been on target""" that is sufficient to support an inference of intent to kill." (*Smith*, *supra*, 37 Cal.4th at p. 742, quoting *Chinchilla*, *supra*, 52 Cal.App.4th at p. 690.) In *Smith*, the defendant fired a bullet directly into the victim's car from a distance of one car length. He knew that the car was occupied by a woman and her baby. The bullet passed through the rear window, showering the baby with broken glass, and through the mother's headrest before lodging in the driver's door. The evidence that the defendant purposefully discharged a lethal weapon at both victims was sufficient to support an inference of an intent to kill both of them. (*Smith*, *supra*, 37 Cal.4th at pp. 743–744, citing *Chinchilla*, *supra*,

52 Cal.App.4th at p. 685.) In *Chinchilla*, two convictions of attempted murder were affirmed based on the firing of a single bullet at two police officers who were crouched, one behind the other, in the shooter's line of fire. The court held that "intent to kill two different victims can be inferred from evidence that the defendant fired a single shot at the two victims, both of whom were visible to the defendant." (*Ibid.*)

This case is unusual because the evidence includes defendant's express intent to shoot everybody who came close to him. In light of the high-powered arsenal defendant had in his possession, the jury could reasonably infer this was an expression of an intent to kill everybody who came near. There was, in addition, overwhelming circumstantial evidence that defendant acted with an intent to kill the four officers who originally went to the Tender Care area of the cemetery. Defendant positioned himself in that area of the cemetery and fired one or more shots. This brought calls of shots fired to the security guard, who then drove to the area and saw defendant's black SUV parked off the road. No shots were fired at him. At this point, defendant was talking to his friend Marcus Reed on his telephone.[2] He warned Reed not to come to the cemetery because he was armed and was "going to shoot everybody that gets close." Defendant told Reed that he had murdered McCowen and that he did not want to get a life sentence and be in jail. He repeatedly warned Reed not to come to the cemetery: "Don't come close dog because I'm going to shoot everybody that gets close. Oh yes, I am." He said: "Just stay away. A couple of feet away from me and that's cool." Defendant told Reed repeatedly that he was "loaded" and that everything he touched "kaboom." Toward the end of this conversation, defendant told Reed: "It's over homey. You can't come close to me. It's over, dog. Yeah, they should be coming any minute. Security patrol came. Naw, you're not going to miss me, dude. . . . They're going to get closer and closer."

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[2] Reed testified that he spoke to defendant three or four times that night between 7:30 p.m. and 9 or 10 p.m., while at work. Reed drove to the cemetery with a friend of Munoz's because defendant sounded upset.

Glendale police officers responded to the security guard's call. The guard led three carloads of police officers to the area where defendant was parked. The lead patrol car, driven by Officer Justin Darby, accompanied by his brother, Officer John Darby, had its headlights on high beam. Officers Heinbechner and Cook followed in the next patrol car, which had its parking lights on. The guard pulled off and pointed in the direction where he had seen the SUV parked. Sergeant Hopper, in a third car at the rear, veered off to follow and stop a car they saw leaving the cemetery. The other two patrol cars drove 100 yards down the road, to the Tender Care area. Officers Justin Darby and Heinbechner saw a light from a flashlight behind a hedge off to the right side of the road. At a distance of about 80 feet, the officers saw several flashes of light, then a steady beam of light for a few seconds. Then, as they drove forward, the light swung downward and went off. Officer Justin Darby testified that he thought the light might have come from a worker or another security guard. Officer Heinbechner thought it might be a security guard guiding the officers to the location of the SUV.

As the patrol cars continued down the road, Officer Heinbechner saw the black SUV parked directly south of the hedge bordering the right side of the road. When the lead car was one or two car lengths from where the light flashes had been seen, the officers heard a loud gunshot from the right side of the road, in the area of the SUV. It sounded like shotgun fire. The windows of the lead patrol car were open, and Officer Justin Darby testified the shot was very close to his vehicle, perhaps one to two car lengths away. He feared an ambush, and accelerated out of the area. Officer Heinbechner did the same.

Defendant made a digital recording of his telephone conversations. It was recovered from the SUV and played for the jury. At one point after shots are heard on the recording, defendant said: "So cops are here. They're coming. I just shot (inaudibile). Fuck it. Fuck the cops. . . . Two cops came around and I shot them. . . . They're coming, dog. . . . They're here, dog. They're here. They're trying to shoot me."

This constitutes both direct and circumstantial evidence of defendant's intent to kill the officers when he fired his shotgun. The jury could reasonably infer that he saw the lights on the patrol cars as they approached his position, used the flashlight on one of his weapons to lure the officers closer, and then fired his shotgun. He expressed an intent to shoot everyone who came close to his position. This evidence supports the attempted murder verdicts. (*Chinchilla*, *supra*, 52 Cal.App.4th at p. 690 ["The act of firing toward a victim at a close, but not point blank, range 'in a manner that could have inflicted a mortal wound had the bullet been on target is sufficient to support an inference of intent to kill. . . .' [Citation.]"].) The two shotguns and two Glock handguns with which defendant was armed were clearly capable of inflicting mortal wounds.

Defendant attempts to diminish the impact of his statements by arguing that, while he said he intended to shoot anyone who came near, he did not say he intended to kill them. In light of the arsenal with which he armed himself, the jury could reasonably infer an intent to kill from defendant's statements that he intended to shoot anyone who came close to him. He also contends that the mere act of shooting does not in itself prove an intent to kill. But as we have discussed, here there was far more evidence than a single shot from which an inference of intent to kill could be drawn.

B. Kill Zone Theory

The prosecution also relied upon the "kill zone" theory of attempted murder. The Supreme Court in *Smith* examined that theory as expressed in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*): "*Bland* simply recognizes that a shooter may be convicted of multiple counts of attempted murder on a 'kill zone' theory where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in an area around the targeted victim (i.e., the 'kill zone') as the means of accomplishing the killing of that victim. Under such circumstances, a rational jury could conclude beyond a reasonable doubt that the shooter intended to kill not only his targeted victim, but also all others he knew were in the zone of fatal harm. (*Bland*, *supra*, 28 Cal.4th at pp. 329–330.) As we explained in *Bland*, 'This concurrent intent [i.e., "kill zone"] theory is not a

legal doctrine requiring special jury instructions. . . . Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.' (*Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.)" (*Smith*, *supra*, 37 Cal.4th at pp. 745–746.)

1. Evidence of Kill Zone

Defendant challenges the sufficiency of the evidence to support application of this theory, arguing that only a single shot was fired and that no one was hit.

This case is distinguishable from *People v. Perez* (2010) 50 Cal.4th 222, cited by defendant. In *Perez*, the defendant fired a single bullet from a car moving 10 to 15 miles per hour, at a group of seven peace officers and a civilian who were standing in a group 60 feet away. (*Id*. at p. 224.) There was no evidence the defendant was targeting any particular individual when he fired at the group. The bullet hit one officer in the hand. No one was killed. Defendant was convicted of seven counts of premeditated attempted murder of a peace officer and one count of premeditated attempted murder as to the civilian victim. The Supreme Court concluded that the evidence was sufficient to sustain only a single count of premeditated attempted murder of a peace officer. The defendant fired at a group with the intent to kill someone, but did not target a particular individual and did not use force calculated to kill everyone in the group. (*Id*. at p. 225.) The Supreme Court relied on the absence of evidence that the defendant intended to kill two or more persons in the group but was only thwarted from firing off the required additional shots by circumstances beyond his control, such as a jammed weapon. (*Id*. at pp. 230–231.) In contrast, here defendant, armed with a deadly arsenal capable of inflicting mortal injury, expressed his intent to shoot everyone who came close to him. He was thwarted from firing additional shots when the officers took immediate evasive action and accelerated away.

In *People v. Adams* (2008) 169 Cal.App.4th 1009, the defendant was convicted of the murder of one victim and attempted murder of three others. The defendant set the house in which the victims were located on fire, but three of the victims escaped. On

appeal, the defendant argued the three attempted murder convictions should be reversed because there was no evidence of her attempt to kill them. In affirming the convictions, the *Adams* court held that a rational jury could infer "the required express malice from the facts that: (1) the defendant targeted a primary victim by intentionally creating a zone of harm, and (2) the attempted murder victims were within that zone of harm." (*Id*. at p. 1023.) It concluded: "Whether or not the defendant is aware that the attempted murder victims were within the zone of harm is not a defense, as long as the victims actually were within the zone of harm. [Citation.]" (*Ibid.*)

Defendant argues the evidence failed to establish that any of the alleged victims, or anyone else, was the primary target of the shot he fired. We disagree. *People v. Stone* (2009) 46 Cal.4th 131 (*Stone*) is instructive. In that case, defendant fired a gun from a stopped vehicle at a group of about 10 gang members four to five feet away. (*Id*. at p. 135.) The defendant was charged with and convicted of a single count of attempted murder for firing a single shot at the group of 10 people. The Supreme Court held that the kill zone theory did not fit the circumstances of the case since only one count of attempted murder was charged. (*Id*. at p. 138.) The court concluded "that a person who intends to kill can be guilty of attempted murder even if the person has no specific target in mind. An indiscriminate would-be killer is just as culpable as one who targets a specific person." (*Id*. at p. 140.) The court reasoned that even though the guilt of attempted murder must be judged separately as to each alleged victim, "this is true whether the alleged victim was particularly targeted or randomly chosen." (*Id*. at p. 141.)

This case presents a classic kill zone situation even though no particular person was the primary target. Defendant expressed his intent to shoot everyone who came close to him and armed himself with an arsenal of powerful weapons and ammunition. He created a kill zone by luring police officers to his location and then opening fire on them. The jury could reasonably infer that he intended to kill any responding officer and that all four officers were within the kill zone he created.

2. Instruction on Kill Zone Theory

Defendant raises numerous challenges to the kill zone instruction given by the trial court. He contends that errors in the instruction allowed the jury to find him guilty of four counts of attempted murder without finding he had a specific intent to kill all four officers. He contends that this error lessened the prosecution's burden of proof in violation of his constitutional rights to due process and a fair trial. The Supreme Court has held that the kill zone theory does not require special jury instructions, but is simply a reasonable inference the jury may draw in a given case. (*Stone*, *supra*, 46 Cal.4th at p. 137, quoting *Bland*, *supra*, 28 Cal.4th at p. 331, fn. 6.)

The modified written version of CALCRIM No. 600 given by the court read in pertinent part: "The defendant is charged in Count 2 thru 5 with attempted murder. [¶] To prove that the defendant is guilty of attempted murder, the People must prove that: [¶] 1. The defendant took at least one direct but ineffective step toward killing (another person/; [¶] AND [¶] 2. The defendant intended to kill that (person/)." The instruction then explained the requirements to satisfy the first prong of the offense. We indicate the trial court's written interlineations in the challenged portion of the instruction in italics: "A person may intend to kill a specific victim or victims and at the same time intend to kill anyone in a particular zone of harm or 'kill zone.' In order to convict the defendant of the attempted murder of *those other officers in the* '*kill zone*', the People must prove that the defendant not only intended to kill *the single, primary target officer* but also intended to kill anyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill *the primary officer target* or intended to kill *the other officers by* harming everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of *all officers*."[3] (Italics added.)

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[3] The oral version of the instruction differed somewhat from the written version: "Now I'm going to discuss what we call in the law a kill zone or if you intend to kill one person and there's other people within the kill zone can you infer an intent so to speak relating to those other people. So this, once again, relates to the officers in the two police cars. [¶] A person may intend to kill a specific person or person and at the same time

We first address whether the challenge to this language is preserved for appeal, since no objection was raised in the trial court. Where an instruction is generally accurate but potentially incomplete, it is incumbent on a criminal defendant to request a modification if he or she thought the instruction would be misleading under the circumstances of the case. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1260.) Failure to request a modified instruction forfeits the claim. (*Ibid.*) In *People v. Souza* (2012) 54 Cal.4th 90, on appeal the defendant challenged the instruction regarding specific intent for attempted murder of specific victims as inadequate and misleading. At trial, defendant did not object to or request amplification of the instructions. The Supreme Court held that his claim was forfeited. (*Id*. at p. 120.) The same is true in this case.

In any event, defendant's challenges to the instruction fail on their merits. "When considering a claim of instructional error, we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner. (E.g., *People v. Jablonski* (2006) 37 Cal.4th 774, 831.)" (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

Defendant's instructional arguments are directed to the written version of CALCRIM No. 600, modified as given. He says the first and second sentences of the instruction improperly refer to an intent to kill "anyone" in the kill zone, citing *Stone*, 46 Cal.4th at page 138 and *People v. Campos* (2007) 156 Cal.App.4th 1228. In *Stone*, the Supreme Court concluded that "[i]n context, a jury hearing about the intent to kill

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intend to kill everyone in a particular zone of harm or kill zone. [¶] So in order to convict the defendant of attempted murder of a specific officer—and there's going to be four officers. One in count two, three, four and five by name, but the names are really not that significant. [¶] So in order to convict the defendant of attempt[ed] murder of officer one, let's say, the People must prove that the defendant not only intended to kill that officer but also intended to kill any other one or all within that kill zone. [¶] If you have a reasonable doubt whether the defendant intended to kill a specific single officer or intended to kill any of the other officers within the kill zone then you must find the defendant not guilty of the attempt[ed] murder of the specific officer named in that particular count."

anyone within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone. But any possible ambiguity can easily be eliminated by changing the word 'anyone' to 'everyone.'"[4] (*Stone*, 46 Cal.4th at p. 138, fn. 3.) In *Campos*, the court found meritless a claim that the use of the word "anyone" instead of "everyone" allowed the jury to find defendant guilty of attempted murder without finding an intent to kill all group members. (*Campos*, at p. 1241.)

Like the courts in *Stone* and *Campos*, we find no basis for reversal of the attempted murder convictions in the instruction's use of the word "anyone" instead of "everyone." In context, it was clear that the issue was whether defendant intended to kill everyone in the kill zone. The instruction given used the term "everyone" in the last sentence. Similarly, defendant complains that the final sentence of the written instruction referred to "harming" everyone in the kill zone rather than "killing" everyone in the kill zone. The *Stone* court suggested that it would be better for the instruction to use the word "kill" rather than "harm," and the instruction was subsequently revised to make this change. (46 Cal.4th at p. 138, fn. 3) But the first part of CALCRIM No. 600 clearly instructed the jury that it had to find the defendant intended to *kill*. The instruction given, as a whole, made it clear that the issue was an intent to kill. We find no reasonable likelihood that the jury was misled into finding defendant guilty of the four counts of attempted murder without a finding of intent to kill each victim.

Defendant also complains that the instruction given did not name any particular target officer. In *Stone*, the court held that the kill zone theory applies even where the defendant targets a group of people rather than a particular individual. (46 Cal.4th at p. 140.) It was not necessary that the instruction name a particular target. Defendant also argues the instruction told the jury as a matter of law that the officers were in the kill

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[4] CALCRIM No. 600 was revised after *Stone* was decided to substitute "everyone" for "anyone." (Jud. Council of Cal. Crim Jury Instns. (2011) CALCRIM No. 600, p. 409.) The court gave the older version here. The court should have used the more current version of the instruction, but as we discuss, the failure to do so is harmless.

zone by instructing in the second sentence: "In order to convict the defendant of the attempted murder of those other officers in the 'kill zone,' the People must prove that the defendant not only intended to kill the single, primary target officer but also intended to kill anyone within the kill zone." We disagree that this sentence instructed the jury as a matter of law that the officers were in the kill zone. Defendant contends the jury was required to find that each officer was within the kill zone. The instruction as given explicitly refers to an intent to kill everyone within the kill zone. The second sentence of the challenged portion told the jury that it was the prosecution's burden to prove that the defendant intended to kill "anyone within the kill zone." It is not reasonably likely that the jury could have believed that it could find defendant guilty of attempting to kill an officer victim who was not in the kill zone.

Although the court used an outdated version of CALCRIM No. 600, reading the instructions as a whole, we conclude the jury could not have been misled into believing that it did not need to find that Defendant intended to kill everyone in the kill zone in order to find him guilty on the attempted murder counts. The evidence was that defendant fired shots he knew would bring officers to his location at the cemetery, he intended to kill everyone who came close, he used his flashlight to lure officers closer to his location, and then fired on them from close range. As applied to this evidence, the modified version of CALCRIM No. 600 given here required the jury to find that defendant intended to kill all the officers in the kill zone in order to find him guilty of the attempted murder of each. We find no reversible instructional error.

C. Verdict Forms

The verdict forms for the attempted murder counts did not say that to convict defendant of attempted murder of a *peace officer*, the jury had to find that each victim was a peace officer. The form for counts 2 through 5 identified each victim by name, and included findings as to whether the murder was committed willfully, deliberately and

with premeditation.[5] The jury also was asked to find whether defendant personally and intentionally used and discharged a firearm in the commission of the offense. (Pen. Code, § 12022.53, subds. (b) and (c), all statutory references are to the Penal Code.) The court imposed consecutive terms of 15 years-to-life for each of the attempted murders, the appropriate sentence for premediated attempted murder of a peace officer pursuant to section 664, subdivision (f). The abstract of judgment lists counts 2 through 5 as attempted murder of a peace officer.

Defendant points out that the jury was not required to make a specific finding that the victims on the attempted murder counts were peace officers. He contends that since the peace officer status increases the penalty for premeditated attempted murder, therefore, the jury had to find it was proven beyond a reasonable doubt. (*Apprendi v. New Jersey* (2000) 530 U.S. 466, 476.) He suggests that we correct the sentence by imposing consecutive sentences of life in prison *with* the possibility of parole, the penalty for attempted murder of a victim other than a peace officer, and amend the abstract of judgment accordingly.

The Attorney General points out that, in fact, the jury did find that the persons named as victims in the verdict forms for counts 2 through 5 are peace officers. This is shown by the verdicts on the lesser offenses of assault on a peace officer in counts 11 through 14. Counts 2 through 5 and 11 through 14 involved the same four victims (Justin Darby, John Darby, Kelly Cook, and Kyle Heinbechner) based on the shot defendant fired in the vicinity of the two patrol cars. The verdict forms for counts 11 through 14 identify each of the officers by name as peace officers. In addition, the instruction on attempted murder of a peace officer informed the jury that the prosecutor had to prove that Defendant knew or reasonably should have known that each of these men were peace officers performing his duties when defendant attempted the murder.

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[5] The portion of the verdict forms for finding whether the offenses were committed willfully, deliberately and with premeditation incorrectly describe the offenses as "murder" rather than "attempted murder."

On this record, the jury was properly instructed and the verdicts reflect the jury's findings that the victims of the attempted murder counts were peace officers. (*People v. Jones* (1997) 58 Cal.App.4th 693, 710□711 [factual findings by jury are applicable for all purposes].) The sentence imposing the term of 15-years-to-life on each attempted murder charge was not unauthorized.

II

Defendant argues that an erroneous instruction on voluntary intoxication requires reversal of the murder and premeditated attempted murder convictions. He contends the trial court improperly limited the voluntary intoxication instruction to the issue of premeditation. As a result, he claims, the jury was precluded from considering the impact of voluntary intoxication on his ability to form express malice, which is an element of these charges. He contends that the error deprived him of his constitutional rights to due process and to present a defense. The Attorney General concedes, for the sake of argument, that the instruction on voluntary intoxication, as limited by the trial court, was erroneous, but contends the error was harmless.

Section 22, subdivision (b) provides: "Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." A defendant is entitled to an instruction on voluntary intoxication "only when there is substantial evidence of the defendant's voluntary intoxication and the intoxication affected the defendant's 'actual formation of specific intent.' [Citations.]" (*People v. Williams* (1997) 16 Cal.4th 635, 677.)

A. Instruction Given

During a colloquy about jury instructions, the court asked defense counsel whether he wanted an instruction on voluntary intoxication. Defense counsel said: "I would request it because he [defendant] did seem inebriated when he was talking. And it would

go to his specific intent and state of mind." The prosecutor took the position that there was no evidence that defendant was intoxicated. She contended that defendant's statements in the recordings played to the jury that he was "loaded" referred to the firearms in his possession rather than being intoxicated. The trial court said that he listened to defendant's voice on the recordings, and concluded that voluntary intoxication was a potential defense instruction. The court observed that defendant sounded "incoherent a little bit, for whatever reason, whether it was drugs, alcohol, pills of some sort or that that's his normal voice." Over objection by the prosecution, the court ruled that there was sufficient evidence that defendant was intoxicated to support the instruction.

The court instructed the jury with CALCRIM No. 3426, as modified: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted or failed to do an act with those certain specific intent or mental states required in count one, the premeditation or malice that's required in that one or the defendant knew the alleged victims were officers or any other charge or allegation requiring a certain mental state or certain specific intents. [¶] A person is voluntarily intoxicated if he becomes intoxicated willingly using any intoxicating drug, drink or other substance knowing it could produce an intoxicating effect or willingly assuming the risk of that effect. [¶] In connection with all the charges other than the lesser offense the prosecution has the burden of proving beyond a reasonable doubt that the defendant acted with certain mental states or certain intents. [¶] If the prosecution has not met this burden you must find the defendant not guilty of those particular charges. [¶] You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to the lesser offense of assault with a firearm on a person."

When the court concluded instructing the jury, the prosecutor began her closing argument. Before she could complete it, the proceedings were recessed for the weekend. At the start of trial the following Monday, outside the presence of the jury, the court said:

"The only thing I was going to say to the jury in my thinking regarding the instructions on the intoxication instruction is I'm going to tell the jury that the intoxication instruction only applies to the premeditation allegation as it relates to the murder and the attempted murder." The court said it would also instruct the jury that voluntary intoxication could be considered for "the knowledge aspect of whether the defendant knew the status of the other people in the car. That's the limited elements that the instruction pertains to." Initially, defense counsel agreed.

When the jury was brought into the courtroom, the court said: "I just wanted to mention one thing. I don't know if you recall I gave you an intoxication instruction. You could consider it if you wanted to or not. That issue applies only to the premeditated aspect of murder or the attempted murder. Those are allegations or the knowledge aspect of whether or not the defendant knew that the people in the cars were police officers. But other than that it doesn't fly whatsoever."

At the conclusion of the prosecutor's closing argument, out of the presence of the jury, defense counsel said: "Under 22(b) voluntary intoxication goes to the issue of premeditation, deliberation or express malice aforethought because earlier you just said deliberation." The court responded: "There is so little evidence of intoxication in here, frankly, that probably I shouldn't be giving the instruction at all. So that's how it's going to be." Defense counsel insisted that the court follow section 22, subdivision (b). The court acknowledged that it gave the instruction "a little modification." Defense counsel said: "So you're going to drop out deliberation and express malice aforethought?" The court responded: "No. All I'm saying is what I said, that the intoxication only goes to the allegations, the premeditation and knowledge regarding whether he knew they were cops or not. [¶] But as far as whether he intended to kill or not, I don't know what else to say other than there's—the only thing that I could even speculate that there's intoxication is what I said earlier and that was at some point during his tape he says 'I'm loaded.' [¶] The D.A. responded the loaded was not directed towards this intoxication state. It was towards his being loaded with the firearms which, frankly, the evidence supports that

more than intoxication. And also that, you know, his voice sounded strange, you know. So basically that's the answer."

Defense counsel asked to make a record, and then quoted section 22, subdivision (b). He contended the instruction had to be complete or it would not be correct. The prosecutor continued to challenge the sufficiency of the evidence to warrant the instruction, and asked that the voluntary intoxication instruction be limited. Defense counsel repeated that the instruction needed to include all of section 22, subdivision (b). The court responded: "Noted. Frankly, if I was on the Court of Appeal I'd say, 'Fisher, what were you thinking?" in reference to giving the voluntary intoxication instruction.[6]

The written version of CALCRIM No. 3246 given the jury was heavily modified by the trial court. We indicate its pertinent interlineations in italics: "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with *premeditation as to the special allegations re murder and att. Murder, and whether Deft. had mental state of knowing the alleged victims were officers.* [The court crossed out language stating that the voluntary intoxication evidence could be considered in deciding whether the defendant acted with specific intent.] . . . [¶] In connection with the charge of murder or att. murder, or that the alleged victims were police officers[] the People have the burden of proving beyond a reasonable doubt that the defendant acted with premeditation or knowledge, as defined[.] If the People have not met this burden, you must find the defendant not guilty of the allegation of premeditation or the crimes that allege the mental state of knowledge that the alleged victims were officers. [¶] You may not consider evidence of voluntary intoxication for any other purpose. Voluntary intoxication is not a defense to ____ <insert general intent offenses>." (Italics added.)

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[6] We doubt that defendant's recorded statement that he was "loaded," by itself was sufficient to warrant an instruction on voluntary intoxication. But his voice as recorded might have done so. The trial judge heard this recording, and we are not in a position to reweigh his finding.

B. Argument

We agree with defendant that this instruction was erroneous. Over the objections of defense counsel, the trial court persisted in modifying the instruction so that it failed to inform the jury that it could consider defendant's voluntary intoxication to negate the elements of deliberation and willfulness and intent to kill. The court erred in making these modifications. The Attorney General assumes for purposes of argument that the court's follow-up instruction "was legally insufficient" but argues that no reasonable probability of prejudice appears here.[7]

"Although a trial court has no sua sponte duty to give a 'pinpoint' instruction on the relevance of evidence of voluntary intoxication, 'when it does choose to instruct, it must do so correctly.' (*People v. Castillo* (1997) 16 Cal.4th 1009, 1015.) We apply the 'reasonable probability' test of prejudice to the court's failure to give a legally correct pinpoint instruction. (*People v. Hughes* (2002) 27 Cal.4th 287, 362–363.)" (*People v. Pearson* (2012) 53 Cal.4th 306, 325 (*Pearson*).) Here, defendant argues that the erroneous instruction deprived him of his constitutional rights to due process and to present a defense. But "[t]he failure to give a fully inclusive pinpoint instruction on voluntary intoxication did not, contrary to defendant's contention, deprive him of his federal right to fair trial or unconstitutionally lessen the prosecution's burden of proof. (See *People v. Saille* (1991) 54 Cal.3d 1103, 1117–1120 [voluntary intoxication as negating specific intent sets out neither a defense nor a general principle of law on which instruction must be given sua sponte].)" (*Id*. at p. 325, fn. 9.)

Mental gymnastics are required to see how the jury could find that defendant was able to, and did premeditate, yet not deliberate or act willfully and with the requisite intent. (*Pearson*, *supra*, 53 Cal.4th at p. 325 [jury necessarily found defendant was able to form specific intent for torture despite erroneous instruction on voluntary intoxication

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[7] The Attorney General suggests that it is likely that the jury understood the court's use of the word "premeditation" to be shorthand for "premeditation and deliberation."

which omitted torture as specific intent crime for which intoxication could be considered because it convicted him of specific intent crimes of murder, robbery, and kidnapping].) In addition, the "loaded" remark as we have observed carries little weight, and the evidence that the defendant had thought through what he did, and intended to do it, was overwhelming. McCowen was seen entering defendant's SUV and her body was dropped from it at the bowling alley. The SUV had extensive blood stains throughout the passenger compartment. Defendant expressed his intent to shoot "everybody" who came close to his location at the cemetery. He armed himself with an arsenal of deadly weapons and ammunition, lured the officers to the Tender Care area of the cemetery, brought them closer to his position by waving his flashlight at them, and then fired on them from close range. The instructional error was harmless by any standard.

III

Defendant challenges the sufficiency of the evidence to support his convictions for counts 11 through 14, assault with a firearm on Officers Justin Darby, John Darby, Kelly Cook and Kyle Heinbechner in violation of section 245, subdivision (d)(1). These charges arose from the first incident at the Tender Care area, which also was the basis for the four counts of attempted murder. He also contends that these convictions must be reversed because of instructional error. We find sufficient evidence to support these assault convictions, and conclude that the instructional error was not prejudicial on this record.

Section 240 defines assault as "an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another." Section 245, subdivision (d)(1) provides: "Any person who commits an assault with a firearm upon the person of a peace officer . . . and who knows or reasonably should know that the victim is a peace officer . . . engaged in the performance of his or her duties, when the peace officer is engaged in the performance of his or her duties, shall be punished by imprisonment in the state prison for four, six, or eight years."

A. Sufficiency of the Evidence

Defendant argues there is insufficient evidence of his present ability to apply force with a firearm against these officers because there was no evidence that he either aimed or fired at the officers or the two patrol cars. The present ability element of assault "is satisfied when 'a defendant has attained the means and location to strike immediately.' [Citations.] In this context, however, 'immediately' does not mean 'instantaneously.' It simply means that the defendant must have the ability to inflict injury on the present occasion. Numerous California cases establish that an assault may be committed even if the defendant is several steps away from actually inflicting injury, or if the victim is in a protected position so that injury would not be 'immediate,' in the strictest sense of that term." (*People v. Chance* (2008) 44 Cal.4th 1164, 1168, fn. omitted (*Chance*).)

In *Chance*, when sheriff's officers went to the defendant's residence to arrest him on felony warrants, the defendant ran from the house and was pursued on foot by one of the officers. The defendant ran around a trailer. Fearing an ambush, the officer went around the other side of the trailer and saw the defendant facing the direction from which he expected the officer to appear, holding a gun in his extended right hand, which was supported by his left hand. The defendant was apprehended before firing any shots. (44 Cal.4th at pp. 1168–1169.) He claimed on appeal that he did not have the present ability to inflict injury on the officer because he would have had to turn, point his gun at the officer, and chamber a round before shooting. (*Id*. at p. 1171.) The court emphasized that "it is the ability to inflict injury on the present occasion that is determinative, not whether injury will necessarily be the instantaneous result of the defendant's conduct." (*Ibid.*) "There is no requirement that the injury would necessarily occur as the very next step in the sequence of events, or without any delay." (*Id*. at p. 1172.) The *Chance* court explained: "California cases establish that when a defendant equips and positions himself to carry out a battery, he has the 'present ability' required by section 240 if he is capable of inflicting injury on the given occasion, even if some steps remain to be taken, and even if the victim or the surrounding circumstances thwart the infliction of injury." (*Ibid.*)

The court rejected the defendant's claim that he lacked the present ability because he never pointed his weapon in the officer's direction: "That degree of immediacy is not necessary . . . ." (*Id*. at p. 1176.) The court held that the defendant attained the present ability to inflict injury by positioning himself to strike on the present occasion with a loaded weapon. (*Ibid.*)

The reasoning of the court in *Chance* disposes of defendant's claim that he cannot be convicted of violating section 245, subdivision (d) because there is no evidence that he fired his weapon at any of the victims, or that he aimed and fired at the two patrol cars and their occupants. He also contends that reversal is required because there was no damage to the patrol cars and no officer was injured. But defendant had armed himself with multiple weapons and ammunition, and was in a position from which he could have inflicted injury on the officers when he fired. He had the same present ability as the defendant did in *Chance* to harm the officers.

Defendant attempts to distinguish *People v. Trujillo* (2010) 181 Cal.App.4th 1344, in arguing for reversal of these assault counts. In that case, the defendant in a moving car fired numerous shots from a semiautomatic rifle at another moving car, striking that car, but not its two occupants. He was convicted of two counts of assault with a semiautomatic firearm (§ 245, subd. (b)). On appeal he argued that one count of assault had to be reversed because there was no evidence he knew there was a second occupant in the vehicle. (*Id*. at p. 1350.) The Court of Appeal found evidence of a present ability to inflict injury on both persons in the vehicle, noting that the defendant fired three shots. (*Id*. at p. 1351.) After reviewing kill zone cases involving attempted murder convictions, the *Trujillo* court concluded that if evidence would support convictions for attempted murder under the kill zone theory, it is also sufficient to support convictions of assault against both occupants of the car Trujillo fired upon. (*Id*. at p. 1357.) We already have found that substantial evidence supports defendant's convictions for attempting to murder Officers Justin and John Darby, Cook, and Heinbechner under a kill zone theory. This evidence also supports the assault counts. It also disposes of defendant's alternative

argument that only two of the counts of assault are supported by sufficient evidence because he fired only a single shot, claiming that he did not create a zone of harm around both vehicles. Substantial evidence supports his convictions of assault on counts 11 through 14.

B. Instructional Error

Defendant argues the trial court erred in instructing the jury with CALCRIM No. 860 because it misidentified the factual basis for the assault charges. No other challenge to this instruction is raised. In this case there were two sets of charges of assault with a firearm on a peace officer (§ 245, subdivision (d)). Counts 11 through 14 arose from defendant's firing a shotgun when the two patrol cars containing officers Justin and John Darby, Cook, and Heinbechner were parked near the SUV at the Tender Care area of the cemetery. Counts 6 through 10 arose from defendant's later action of pointing a shotgun at the officers[8] in the Bearcat armored vehicle when it was parked at the Tender Care area. We address the sufficiency of the evidence to support the convictions arising from the Bearcat incident below.

In both the written and oral versions of CALCRIM No. 860, the court erroneously told the jury that counts 6 through 14 related to the officers in the Bearcat, although this was true of only counts 6 through 10.[9] Defense counsel did not object and did not request correction or modification of the instruction. It was incumbent on defense counsel to do

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[8] Officers Justin Darby, Chad McDonald, Mike Severo, Eric Meyer, and Sergeant Ernie Garcia, the occupants of the Bearcat, were the named victims in counts 6 through 10.

[9] The introductory paragraph of the written version of CALCRIM No. 860 was modified to read: "The defendant is charged [in Count 6 through 14] (officers in the 'Bearcat' vehicle') Justin Darby, Ernie Garcia[,] Chad McDonald[,] Mick Severo[,] Eric Meyer with assault with a firearm/on a (/peace officer) [in violation of Penal Code section 245]." When reading CALCRIM No. 860, the court said: "With respect to counts six through 14, these relate to the charges of the officers in the Bearcat vehicle. So now we're talking about that vehicle. [¶] The defendant is charged in counts six through 14 with assault with a firearm. That's in violation of section 245 of the Penal Code."

so, and failure to raise the issue forfeits the claim on appeal. (*People v. Loza* (2012) 207 Cal.App.4th 332, 350; *People v. Virgil*, *supra*, 51 Cal.4th at p. 1260.)

In any event, the error was not prejudicial because there is no reasonable probability that the jury could have been confused about the factual basis for the two sets of assault charges. The prosecutor clearly explained in closing argument that counts 11, 12, 13, and 14 related to the first sets of officers who responded to the Tender Care location. After discussing the elements of assault with a firearm, the prosecutor reviewed the evidence that defendant committed assault by firing a shotgun when the two patrol cars were parked near his SUV. The prosecutor then discussed the separate assault charges (counts 6 through 10) based on defendant pointing a weapon at the officers in the Bearcat. Each officer in the Bearcat was identified in argument.

We find no reversible instructional error on this basis.

IV

Defendant claims the evidence is insufficient to support his convictions for assault on the peace officers in the Bearcat vehicle. Sergeant Ernie Garcia testified that after defendant fired on the two patrol cars, a call for backup went out. He and his partner, Mike Severo, took a Bearcat armored vehicle from the station and drove it to the cemetery. At that location, Officers Chad McDonald, Eric Meyer, and Justin Darby also got into the Bearcat. Justin Darby directed them to the location where his patrol car and the second patrol car had been fired upon, in the Tender Care area.

The Bearcat parked on the roadway, about two car lengths behind the SUV. Garcia could see the back side and right passenger side of the SUV from his position inside the Bearcat, but could not see the driver's side. The windows of the SUV were up, but the tailgate was open. He could not see inside the vehicle. A Los Angeles Police Department helicopter assisted by providing aerial observations of defendant's movements inside the vehicle. The helicopter spotlights were trained on the SUV. The helicopter officers said they could see a person in the driver's seat armed with a shotgun.

He was moving the shotgun about as he held it in his hand. After about half an hour, the officers in the Bearcat learned that a crisis negotiator was speaking with defendant.

The officers in the Bearcat waited an hour and a half. At some point, the front passenger window and right rear passenger window of the SUV went down and up. A little before midnight, Sergeant Garcia saw that "when the front passenger window was lowered . . . —what appeared to be a shotgun pointed in our direction." He described seeing "a long black object with a thick barrel that appeared to me to be a shotgun." It was not out the window, but was inside the SUV pointed directly at the officers. No shots were fired. At that point, the Bearcat still was two car lengths from the SUV. Sergeant Garcia explained that if a shotgun shell had been fired from the position he saw, it would have hit the vehicle, or Officers Severo and Myer in the turret, who were exposed. It would have gone in the immediate direction of the Bearcat. A few seconds later, the window was raised again.

Defendant claims that there is no evidence that he committed an act with a firearm which by its nature would directly and probably result in the application of force to a person, the mens rea for assault. (*People v. Williams*, 26 Cal.4th at p. 788 ["[A] defendant guilty of assault must be aware of the facts that would lead a reasonable person to realize that a battery would directly, naturally and probably result from his conduct."]; *People v. Earle* (2009) 172 Cal.App.4th 372, 392.) Defendant's argument is that throughout this phase of the standoff, the five officers were inside the Bearcat, which had armor and bulletproof windows. He points out that no shots were fired at the officers and that the weapon did not protrude outside the vehicle.

Defendant contends that the convictions were based on an improper hypothetical question put to Sergeant Garcia. The court overruled a defense objection to the following question by the prosecutor: "We're assuming . . . that the gun was loaded and that the person maintained the position of the firearm when they shot and they didn't move the gun, but assuming that all of this happened . . . and it would take a snapshot of how that gun was positioned and how you saw it facing you, if a shot shell had been ejected from

that gun would it have hit your vehicle or the officers standing in the turret?" Garcia answered: "Yes, it would have. The . . . officers on the turret are exposed. It's an opening on the top of the Bearcat." The prosecutor asked: "And based on the direction the shot would have hit them; is that correct?" Garcia said it was. The court interjected "Well, it could have. I don't know about would have. I would more or less say, I mean, if a shot was fired it would have been in the direction of the officers and your vehicle. I mean that's about where it is?" Sergeant Garcia answered: "That's correct." The court continued: "Not whether it would have hit, but the bullet or whatever would be shot in the direction, the immediate direction of your vehicle?" Sergeant Garcia said: "That's correct."

As we have discussed, it is not necessary for a defendant to actually point a gun at a victim in order to commit assault. (*People v. Raviart* (2001) 93 Cal.App.4th 258, 263.) Here defendant heavily armed himself and engaged in a prolonged standoff with the officers in the Bearcat. Sergeant Garcia saw him point a gun in the direction of the Bearcat from within the vehicle. It is no defense that the officers were protected by the armored Bearcat vehicle. (*People v. Valdez* (1985) 175 Cal.App.3d 103, 108, 112–114 [affirming assault conviction where defendant fired at victim protected by bulletproof glass].) Substantial evidence supported defendant's convictions on counts 6 through 10.

We also reject defendant's alternative argument that he lacked the present ability to apply force to the officers in the Bearcat who were not in the exposed turret area (Sergeant Garcia, Officers McDonald, and Justin Darby, counts 6, 7, 8). The Supreme Court in *Chance*, *supra*, 44 Cal.4th at p. 1174 cited *People v. Valdez*, *supra*, 175 Cal.App.3d at p. 112 with approval on this point: "'Nothing suggests this 'present ability' element was incorporated into the common law to excuse defendants from the crime of assault where they have acquired the means to inflict serious injury and positioned themselves within striking distance merely because, unknown to them, external circumstances doom their attack to failure. . . .' [Citation.]" The *Chance* court continued: "'Once a defendant has attained the means and location to strike immediately

he has the "present ability to injure." The fact an intended victim takes effective steps to avoid injury has never been held to negate this "present ability."' [Citations.] This view of the 'present ability' element is accurate, and consistent with the *McMakin* holding that an 'immediate' injury for purposes of assault is one that is threatened on the present occasion. ([*People v.*] *McMakin* [(1857)] 8 Cal. [547,] 548.)" (*Ibid.*)

V

Defendant claims his convictions must be reversed based on cumulative errors which undermined the fundamental fairness of his trial in violation of his rights under the Fifth, Sixth and Fourteenth Amendments to the United States Constitution.

We have found harmless error in the instructions on voluntary intoxication and assault with a firearm on peace officers, and have otherwise rejected defendant's claims of error. There is no basis for reversal due to cumulative error. (*People v. Robinson* (2005) 37 Cal.4th 592, 655.) The "'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) There is no reasonable probability that the jury would have reached a verdict more favorable to Defendant in the absence of these errors.

VI

Defendant raises several problems with the sentence and the abstract of judgment.

A. Count 1 Enhancements

On count 1 (murder), the jury was asked only to consider a firearm use enhancement under section 12022.53, subdivision (d), which it found true. The jury was not asked to make a finding as to other firearm use enhancements alleged in the information pursuant to section 12022.53, subdivisions (b) and (c). But in orally pronouncing sentence on count 1, the court stayed the firearm allegations under section 12022.53, subdivisions (b) and (c). Defendant asks that we modify the abstract of judgment to omit any reference to stayed enhancements under section 12022.53,

subdivisions (b) and (c) because there was no jury finding on them. We agree, and will order the abstract of judgment corrected accordingly.

B. Discrepancies Between Oral Pronouncement, Minute Order, and Abstract of Judgment

In the event of a discrepancy between the oral pronouncement of judgment and the abstract of judgment, the trial court's oral pronouncement controls. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) We may correct clerical errors in the abstract of judgment. (*Id*. at p. 186.)

1. Count 6

The court failed to orally pronounce sentence on count 6 (assault on Officer Justin Darby). The Attorney General concedes that this was error and suggests that remand is necessary to allow the court to impose sentence on that count. The court orally imposed a full term sentence on count 7 (the mid-term of six years plus the 10-year gun enhancement). On counts 8, 9, and 10 the oral sentence imposed was one-third of the midterm (two years) plus three years and four months for a total of five years and four months. Counts 7 through 10 were imposed consecutively.

The minute order and abstract of judgment incorrectly reflect the imposition of a six-year term plus 10 years for the gun enhancement under section 12022.53, subdivision (b) on count 6. The matter must be remanded for imposition of sentence on count 6 and correction of the abstract of judgment and minute order on that count, as well as any corresponding sentencing changes necessitated by the imposition of sentence on count 6.

2. Counts 11 through 14

The court imposed and stayed sentences of 36 years[10] on each of the assault counts 11 through 14 because they were based on the same incident as were the attempted murder charges. The abstract of judgment fails to reflect that the sentence on count 13

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[10] The sentence on each count 11 through 14 was six years, plus 20 years for the gun allegation under section 12022.53, subdivision (c) and 10 years for the weapon allegation under section 12022.53, subdivision (b), for a total of 36 years.

was stayed. On remand, the abstract of judgment is to be corrected to reflect that the sentence on count 13 was stayed.

3. The Conviction and Security Fees

Defendant argues that although the court imposed only one $30 conviction fee and one $30 security fee, the abstract of judgment reflects imposition of these two fees for each of the 14 counts. The Attorney General contends that the fees are mandatory for each conviction. Since we must remand the matter for sentencing on count 6, the trial court is to clarify its imposition of the conviction and security fees at that time.

DISPOSITION

The matter is remanded for sentencing on count 6 and any corresponding sentencing change, correction of the abstract of judgment, and clarification of the fees imposed on each count. In all other respects the judgment of conviction is affirmed. The clerk of the superior court is directed to forward a copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P. J.

We concur:

WILLHITE, J.

SUZUKAWA, J.