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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. MARK COOPER, Defendant and Appellant.	B283492 (Los Angeles County Super. Ct. No. NA094945)

APPEAL from a judgment of the Superior Court of Los Angeles County, Laura L. Laesecke, Judge. Affirmed in part, reversed in part, and remanded for resentencing.

David L. Annicchiarico, 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, Susan Sullivan Pithey and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Mark Cooper and three unidentified confederates, entered a home in a mobile home park ostensibly to purchase a large quantity of marijuana from the head of the household, Mr. Padilla, living there with his family. Defendant and two of his confederates were armed with firearms. Padilla's son-in-law, Mr. Vidal, and friend, Ms. Loza, were present, and Padilla's neighbor, Mr. Gonzalez, entered towards the end of the events. The outcome of the transaction and the ensuing violence left Vidal dead at the hand of one of the confederates to whom defendant gave his gun upon another confederate's command to "shoot." Gonzalez also was shot, but he survived, as did Padilla, another target of the shooting. After the shootings, defendant and his confederates fled with the marijuana.

A jury convicted defendant of Vidal's murder while in the commission of a robbery or burglary; attempted murder of Gonzalez and Padilla; robbery of Vidal, Padilla, Gonzalez, and Loza; assault with a firearm on Loza; and burglary of Padilla. The jury found true that defendant personally used a firearm under Penal Code section 12022.53[1], which was charged as to all counts except the assault count involving Loza. The jury also found true a firearm enhancement charged under section 12022.5 as to that assault count. The trial court sentenced defendant, among other terms, to an indeterminate term of life in prison without the possibility of parole (LWOP).

On appeal defendant argues that his LWOP sentence for felony murder of Vidal is unconstitutional cruel and unusual punishment. In making this argument, defendant invites us to

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[1] Undesignated statutory citations are to the Penal Code.

ignore binding Supreme Court authority rejecting his argument. We decline the invitation.

Defendant contends that substantial evidence did not support a finding of reckless indifference to life required under section 190.2 to support a LWOP sentence. We disagree because the record does not support defendant's argument. The same is true for his challenges on the basis of lack of substantial evidence as to the attempted murder convictions and the life imprisonment enhancement under section 664, subdivision (a).

We agree with defendant, however, that substantial evidence did not support the robbery convictions involving Loza and Gonzalez because there was no evidence they had a possessory interest in the marijuana that was stolen. We also agree that the section 12022.5 firearm enhancement must be reversed because defendant did not personally use a firearm to assault Loza as case law has interpreted that requirement in the enhancement.

Defendant contends the firearm enhancements under section 12022.53 were not supported by substantial evidence because defendant did not personally use a firearm. The record amply demonstrates defendant personally used a firearm as that term has been interpreted by the courts for purposes of section 12022.53. Finally, defendant correctly argues that the case must be remanded for resentencing based on a new law that applies retroactively and affords trial court's discretion to strike section 12022.53 firearm enhancements. Upon remand, the trial court should recalculate defendant's presentence custody credits.

FACTUAL BACKGROUND

Padilla lived with his wife and three grown children in a mobile home park. On January 19, 2013, Padilla and Vidal planned to sell defendant and his friends 120 pounds of marijuana for approximately $35,000.[2] Both Padilla and Vidal negotiated the sale. The marijuana was located in Padilla's living room. At the designated time for the sale, Padilla was home with Vidal. Loza, who was a friend and had been living with Padilla for a few months, also was inside Padilla's home.

Defendant and two confederates, an unidentified "tall" man (tall man) and an unidentified woman entered Padilla's home. Another unidentified man (third man) entered later. As noted, Padilla believed that defendant and his confederates planned to purchase a substantial amount of marijuana.

According to Padilla, defendant and his confederates were in the house for "about two minutes" when defendant and the tall man simultaneously pulled guns from their waistbands.[3] According to Padilla, defendant put his gun in Padilla's face. The tall man pointed his gun at Vidal's head. Padilla testified that someone tied his hand with a plastic zip tie, but he could not see who did it. Defendant or one of his confederates demanded Padilla lie on the ground, and Padilla initially refused but

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[2] The District Attorney's Office granted Padilla immunity.

[3] At the time of trial, Loza was deceased. Her testimony from the preliminary hearing was read to jurors. Loza testified that Vidal spoke to defendant and his confederates for approximately 30 minutes. This testimony is inconsistent with the surveillance video indicating that defendant was at Padilla's residence for less than 11 minutes.

eventually complied, lying down on his stomach. Padilla heard gunshots but could not see the shooter.

Loza was not in the living room with Vidal and Padilla when they spoke to defendant and his confederates. Loza testified that Vidal asked Loza for a pen and paper. Loza later heard Vidal and Padilla say "take everything you want." When she heard this, Loza looked up and observed the tall man stood next to her, pointing a gun at her face. At the same time, defendant pointed his gun at Vidal and Padilla. Loza observed defendant take Vidal and Padilla's phones. She also observed the tall man tie Padilla's hand with a zip tie. The tall man had the zip ties in a computer case he had been carrying. The tall man asked Loza if there was any money in the house.

Daniel Gonzalez was a neighbor and relative of Padilla's wife. He had been at Padilla's home but left before the drug transaction commenced. He returned, however, when he was pushed inside at gunpoint by the third man while the unidentified woman held open the door. Loza tried to exit when Gonzalez entered. The third man tried to hit Loza with his gun, causing the magazine to fall out of the gun. Gonzalez kicked the magazine, and Loza fell onto it, preventing the third man from retrieving it.

Gonzalez tried to run, and the tall man yelled "shoot." Defendant threw his gun to the third man, who shot multiple times. The third man shot at Gonzalez first, and then at Vidal and Padilla, firing approximately five shots. A bullet hit Gonzalez in his left arm, causing Gonzalez to bleed profusely. Vidal died as a result of a gunshot wound. Padilla was able to run out of the home.

After the shootings, defendant and his confederates took the marijuana from Padilla's living room and fled. Both defendant and the tall man carried the marijuana out of Padilla's home.

Padilla's daughter returned home just in time to hear gunshots. As she stood outside Padilla's home, she observed a man carrying a gun and marijuana enter a vehicle. She remembered a partial license plate from the vehicle, and it matched defendant's license plate. She called 911 after she saw Vidal lying on the ground. Zip ties were found in the trunk of defendant's vehicle.

Before the police arrived, Padilla hid the remaining marijuana because he was afraid that police would find it. Loza cleaned up the zip ties, casings, and marijuana that fell on the floor. She placed all the items in the trash, where the items later were recovered by a detective. A detective found five casings and one unfired round.

Surveillance video showed defendant's vehicle was at Padilla's home for less than 11 minutes. Gonzalez's home contained marijuana and a digital scale, but according to detective Scott Lasch, there was "nothing to connect" the marijuana in Gonzalez's home to the marijuana in Padilla's home, except that perhaps Padilla hid his marijuana in Gonzalez's home after the shootings.

PROCEDURAL BACKGROUND

Jurors convicted defendant of the first degree murder of Vidal. They further found that while the murder was committed defendant was engaged in the commission or attempted commission of a robbery or burglary. With respect to the murder,

jurors found defendant personally used a handgun within the meaning of section 12022.53, subdivision (b).

Jurors convicted defendant of the attempted murder of Padilla and Gonzalez. In connection with the attempted murders, jurors found both attempted murders were willful, deliberate, and premeditated, within the meaning of the life imprisonment penalty in section 664, subdivision (a). Jurors further found that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b).

Jurors convicted defendant of the assault with a firearm on Loza and found that in committing this crime, he personally used a firearm within the meaning of section 12022.5, subdivision (a).

Jurors convicted defendant of the first degree robbery of Vidal, Padilla, Loza, and Gonzalez. Jurors further found that in the commission of each robbery, defendant personally used a firearm within the meaning of section 12022.53, subdivision (b). Finally, jurors found defendant guilty of burglary of an inhabited dwelling. Jurors found that Padilla was present at the time of the burglary and that defendant personally used a firearm within the meaning of section 12022.53, subdivision (b).

The trial court sentenced defendant to an indeterminate term of life in prison without the possibility of parole plus 10 years and an additional indeterminate term of 14 years to life plus 20 years. The trial court also sentenced defendant to a determinate term of 26 years and 8 months in prison. Pursuant to section 654, the court stayed the sentence on assault with a firearm (count 4) and the robbery and burglary of Vidal (counts 5 and 9). The trial court subsequently modified portions of the sentence that had been stayed, including vacating the section 12022.53 enhancement on count 9 (burglary).

DISCUSSION

1. Defendant's Sentence Of Life Without The Possibility Of Parole Is Not Unconstitutional

Defendant challenges the constitutionality of his sentence of life without the possibility of parole, which was imposed pursuant to section 190.2. Defendant argues that the test is based on legal principles that are no longer viable under recent United States Supreme Court jurisprudence.[4]

Section 190.2 describes circumstances permitting imposition of the death penalty or life without the possibility of parole. One enumerated circumstance is that the murder was committed while the defendant was committing or aiding and abetting a robbery. (§ 190.2, subd. (a)(17)(A).) Section 190.2, subdivision (d) provides: "[E]very person, not the actual killer, who with *reckless indifference* to human life and as a *major participant*, aids, abets, counsels, commands, induces, solicits, requests or assists in the commission of a felony [including robbery] which results in the death of some person or persons, and who is found guilty of murder in the first degree therefore, shall be punished by death or imprisonment in the state prison for life without the possibility of parole . . . . " (§ 190.2, subd. (d), italics added.)

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[4] Defendant's contention arguably is forfeited because he failed to raise it in the trial court. (*People v. Jackson* (1996) 13 Cal.4th 1164,1231, fn. 17 [constitutional issue not raised in the trial court was forfeited]; see also *People v. Norman* (2003) 109 Cal.App.4th 221, 229 [defendant forfeited argument that sentence was cruel and unusual by failing to raise it in the trial court].) Nevertheless, we choose to consider it.

The foregoing test codifies the rule announced in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). (*People v. Clark* (2016) 63 Cal.4th 522, 616.) Both *Tison* and a prior United States Supreme Court case, *Enmund v. Florida* (1982) 458 U.S. 782, permit imposition of the death penalty for a felony murder when a defendant's involvement is substantial and demonstrates a reckless indifference to the risk of death. The two cases "help define the constitutional limits for punishing accomplices to felony murder." (*In re Loza* (2017) 10 Cal.App.5th 38, 46 (*Loza*).) "At one end of this *Edmund-Tison* continuum is ' "the minor actor in an armed robbery, not on the scene, who neither intended to kill nor was found to have had any culpable mental state." [Citation.]' [Citation.] At the other end are the 'actual killers and those who attempted or intended to kill. [Citation.]' [Citation.] 'Somewhere between them, . . . lies the constitutional minimum' showing required for the imposition of death or life without the possibility of parole." (*Ibid.*)

Defendant's challenge to the continuing viability of *Tison* is based on *Atkins v. Virginia* (2002) 536 U.S. 304, *Roper v. Simmons* (2005) 543 U.S. 551, and *Kennedy v. Louisiana* (2008) 554 U.S. 407. But those cases neither overrule *Tison* nor apply to defendant. All involved the imposition of the death penalty, and defendant fails to show that they are equally applicable to a sentence of life without the possibility of parole. Even if we assume arguendo that these cases apply to a sentence of life without the possibility of parole, they do not apply to defendant. *Atkins* applies to mentally retarded defendants. *Roper* applies to juvenile defendants. *Kennedy* involved the rape of a minor.

The United States Supreme Court has not held that an LWOP sentence is unconstitutional for a defendant convicted of

murder in the course of a robbery or burglary. Under *Tison*, the death penalty is permissible for a murder committed during the course of a robbery or burglary if a defendant's involvement is substantial and demonstrates a reckless indifference to the risk of death. (*Tison*, *supra*, 481 U.S. at pp. 137-138.) The *Tison* standard incorporated in section 190.2 applies here, and we must now determine whether defendant's conduct satisfied this test.

2. Substantial Evidence Supported The Finding That Defendant Acted With Reckless Indifference To Human Life

We turn to defendant's argument that "no rational jury could have found that [defendant] personally exhibited reckless indifference to human life beyond a reasonable doubt." Reckless indifference to human life is one of two requirements under section 190.2 to impose a LWOP sentence. Defendant admits that he was "a major participant in the robbery"—the other requirement under section 190.2, subdivision (d).

To evaluate defendant's challenge, we must view the evidence in the light most favorable to uphold the verdict, to determine whether a rational trier of fact could have found the elements beyond a reasonable doubt. (*People v. Banks* (2015) 61 Cal.4th 788, 804.) " ' "Although we must ensure the evidence is reasonable, credible, and of solid value, nonetheless it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts on which that determination depends. [Citation.] Thus, if the verdict is supported by substantial evidence, we must accord due deference to the trier of fact and not substitute our evaluation of a witness's credibility for that of the fact finder." ' " (*People v. Smith* (2005) 37 Cal.4th 733, 739.)

Reckless indifference to human life concerns defendant's subjective awareness that his " ' "participation in the felony involved a grave risk of death." ' " (*People v. Banks*, *supra*, 61 Cal.4th 788, 807.) The factors of major participant and reckless indifference overlap. (*People v. Clark* (2016) 63 Cal.4th 522, 614-615.) " '[T]he culpable mental state of "reckless indifference to life" is one in which the defendant "knowingly engag[es] in criminal activities known to carry a grave risk of death" [citation] . . . .' " (*In re Bennett* (2018) 26 Cal.App.5th 1002, 1021.) Where these factors identify nothing that "elevated the risk to human life beyond those risks inherent in any armed robbery" the special circumstance is inapplicable. (*People v. Clark*, *supra*, 63 Cal.4th at p. 623.)

The following nonexclusive factors are relevant to consider whether defendant acted with reckless indifference to human life: (1) the defendant's knowledge of weapons and use of a weapon even if the defendant did not kill the victim; (2) the defendant's presence at the scene of the crime and failure to aid the victim; (3) the duration of the felony; (4) the defendant's knowledge of a cohort's likelihood of killing; (5) the defendant's efforts to minimize risk of violence during the felony. (*People v. Clark*, *supra*, 63 Cal.4th at pp. 618-623.) No single factor is " 'necessary' " or " 'necessarily sufficient.' " (*In re Bennett*, *supra*, 26 Cal.App.5th at p. 1019.)

In *People v. Medina* (2016) 245 Cal.App.4th 778 (*Medina*), a two defendant case, the appellate court upheld the jury verdict against a challenge to the sufficiency of the evidence of reckless indifference to human life. The first defendant, Medina, was involved in setting up an attempted robbery, armed himself prior to going to the scene of the robbery, pointed his gun at the

victims, remained at the scene, and made no effort to alleviate the violence. (*Id.* at pp. 791-792.) There was evidence Medina was aware of the shooter's propensity for violence and assisted the shooter in escaping. (*Id.* at p. 792.) This constituted ample evidence to support the determination of reckless indifference to human life.

The appellate court further held that sufficient evidence supported the special circumstance finding against a second defendant even though that defendant was not present the entire time and was not involved in planning the attempted robbery. (*Medina*, *supra*, 245 Cal.App.4th at pp. 792-793.) The remaining factors including the second defendant's knowledge of the shooter's propensity for violence, failure to provide aid, and the use of a gun were sufficient to demonstrate reckless indifference to human life. (*Ibid*.)

Loza, *supra*, 10 Cal.App.5th 38 also found sufficient evidence of reckless indifference to human life and is instructive here. In *Loza*, the petitioner was in a car with several people when the driver stopped the car to allow Eric Sanford into the car. Sanford said, "I just shot someone in the head." (*Id.* at p. 42.) Shortly afterwards, the petitioner agreed to hold open a gas station door so that Sanford could steal beer. (*Id.* at p. 42.) As they entered a gas station, the petitioner gave a gun to Sanford. (*Id.* at p. 43.) Sanford shot two persons inside the gas station and afterwards the petitioner yelled, "I can't believe you just shot them." (*Id.* at p. 43.)

The appellate court held that substantial evidence supported the conclusion that the petitioner acted with reckless indifference to human life. (*Loza*, *supra*, 10 Cal.App.5th at p. 52.) The appellate court relied on the following: "[M]ore than simply

knowing Sanford would use a gun during the robbery, petitioner supplied Sanford with it immediately beforehand." (*Id*. at p. 53.) The petitioner was present when Sanford demanded money and petitioner had time to "observe and react before the murder." (*Id*. at p. 53.) The petitioner made no attempt to prevent the shootings or to assist the victims. (*Ibid*.) The petitioner's surprise after the shootings did not prevent a finding of reckless indifference to human life. (*Id*. at p. 54.)

This case is similar to *Loza*. After his confederate yelled "shoot" when Gonzalez was trying to escape, defendant supplied the weapon used to shoot and kill Vidal. Defendant cannot claim ignorance that the weapon would be used to kill Vidal because he provided the weapon immediately after the tall man yelled "shoot." Defendant brought a gun to the drug transaction. Defendant was present throughout the robbery and murder and provided the vehicle in which he and his confederates fled the scene. Defendant had the opportunity to "observe and react" before the murder and could have stopped the murder by maintaining possession of his gun and refraining from using it. Moreover, defendant did not assist Vidal after the shooting. Instead, he grabbed marijuana from Padilla's living room and fled the scene. The totality of the circumstances support the jury's finding that defendant acted with reckless indifference to human life.

This case is not one in which defendant did not see the shooting and did not know it would happen. (Cf. *Banks*, *supra*, 61 Cal.4th at p. 807; *In re Bennett*, *supra*, 26 Cal.App.5th at p. 1023.]) Defendant's argument that there was no evidence that when he "tossed his gun to the man who dropped his gun's magazine, he expected that it would be used to shoot anyone,

rather than merely to facilitate the robbery" ignores critical evidence. The fact that defendant threw his gun to the shooter after the tall man yelled "shoot" strongly supported the inference that defendant expected his gun would be used to shoot Vidal and other persons present who could identify defendant and his confederates or stop them from taking the marijuana.

3. Substantial Evidence Supported The Convictions For Attempted Murder Of Padilla And Gonzalez

Defendant challenges the sufficiency of the evidence to support the convictions for the attempted murder of Gonzalez and Padilla. Defendant also challenges the sufficiency of the evidence to support the penalty provision finding that the attempted murders were willful, deliberate and premeditated. We review the record in the light most favorable to the judgment. (*People v. Vang* (2001) 87 Cal.App.4th 554, 563.) "Substantial evidence includes circumstantial evidence and the reasonable inferences flowing from it." (*Ibid.*) We conclude that both the attempted murder conviction and the penalty provision are supported by substantial evidence.

a. Attempted murder

Attempted murder requires the specific intent to kill. Our high court explained: "to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing—which means that the person guilty of attempted murder as an aider and abettor must intend to kill." (*People v. Lee* (2003) 31 Cal.4th 613, 624.)

The following substantial evidence supported the conclusion that defendant aided the shootings of Gonzalez and Padilla with knowledge of the third man's intent to kill and with the purpose of facilitating the third man's accomplishment of the intended killing. Defendant and his confederates planned to come to Padilla's home armed. Defendant and the tall man simultaneously drew their weapons, suggesting a preexisting plan and the intent to kill any person who attempted to escape. The third man, who also was armed, prevented Gonzalez from assisting Padilla or Vidal. Moreover, defendant did not throw his gun to the third man until the tall man yelled, "shoot." This supported the reasonable inference that defendant knew the third man intended to kill. Both defendant and the third man were close to the victims, who the third man shot multiple times at close range. The fact that defendant supplied the weapon immediately before the shooting after the word "shoot" had been announced also supported the inference that defendant intended to facilitate the killing of Gonzalez and Padilla.

b. Penalty provision

Defendant argues that imposition of life imprisonment under section 664, subdivision (a)[5] was error for the same reasons there was not substantial evidence that defendant did not have the requisite state of mind for aider and abettor liability for the attempted murders of Gonzalez and Padilla. Defendant's

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[5] Section 664, subdivision (a) provides in pertinent part: "[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole."

argument, however, conflates the standard for aider and abettor liability for attempted murder with the standard for imposing life imprisonment under section 664, subdivision (a).

As set forth above, we have concluded there was substantial evidence of defendant's requisite state of mind for aider and abettor liability for the attempted murders. But that is not the fulcrum on which imposition of the life imprisonment penalty in section 664, subdivision (a) balances. Instead, imposition of that penalty depends on whether the murder was committed willfully and with premeditation and deliberation, not on whether defendant personally acted with willfulness premeditation and deliberation. Our Supreme Court has recognized this analytic distinction in *Lee*, *supra*, 31 Cal.4th 613 and *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*).

In *Lee*, our high court rejected the lower appellate court's holding that "section 664 (a) requires personal willfulness, deliberation, and premeditation on the part of an attempted murderer who is guilty as an aider and abettor." (*Lee*, *supra*, 31 Cal.4th at p. 619.) The high court reasoned that the express language of section 664, subdivision (a) "requires only that the *murder attempted* was willful, deliberate, and premeditated for an attempted murderer to be punished with life imprisonment." (*Id*. at pp. 621-622.) The high court also reasoned that as a matter of public policy, "the Legislature reasonably could have determined that an attempted murderer who is guilty as an aider and abettor, but who did not personally act with willfulness, deliberation, and premeditation, is sufficiently blameworthy to be punished with life imprisonment." (*Id.* at p. 624.)

In *Favor*, our high court echoed *Lee's* rationale. "In *Lee*, we held that the premeditation penalty provision of section 664(a)

'must be interpreted to require only that the murder attempted was willful, deliberate, and premeditated, but not to require that an attempted murderer personally acted willfully and with deliberation and premeditation, even if he or she is guilty as an aider and abettor.' " (*Favor*, *supra,* 54 Cal.4th at p. 877.) The high court elaborated, "[b]ecause section 664(a) 'requires only that the attempted murder itself was willful, deliberate and premeditated' [citation], it is only necessary that the attempted murder 'be committed by one of the perpetrators with the requisite state of mind.' " (*Favor*, at p. 879.) Focusing on *Lee's* public policy argument, the *Favor* court reiterated "because an aider and abettor must share the specific intent of the direct perpetrator and have knowledge of the perpetrator's criminal purpose," section 664, subdivision (a) reflects the Legislature's determination that an aider and abettor who did not personally act with willfulness, deliberation, and premeditation, was sufficiently blameworthy to be punished with life imprisonment. (*Favor*, *supra*, 54 Cal.4th at pp. 877-878.)

Here, ample evidence showed that the attempted murder was committed willfully and with premeditation and deliberation. Premeditation may occur in a brief period of time. (*People v. Perez* (1992) 2 Cal.4th 1117, 1127.) " 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance. [Citations.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . ." ' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

Considering evidence of planning, motive, and method may assist in assessing whether the attempted murder " ' " 'was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' " ' " (*People v. Booker* (2011) 51 Cal.4th 141, 173.) A close-range shooting without any provocation supports a finding of premeditation. (*People v. Marks* (2003) 31 Cal.4th 197, 230.) "The lack of provocation by the victim leads to an inference that an attack was the result of a deliberate plan rather than a 'rash explosion of violence.' " (*People v. Miranda* (1987) 44 Cal.3d 57, 87 overruled on another ground in *People v. Marshall* (1990) 50 Cal.3d 907, 933, fn. 4.)

The evidence supported the jury's conclusion that the attempted murders were committed willfully, deliberately, and with premeditation. No one inside Padilla's home provoked defendant or his confederates. Defendant and the tall man entered Padilla's home armed and drew their weapons within two minutes. This evidence supported the conclusion that defendant, the tall man, and the third man planned in advance to kill and coordinated their actions to make sure no one could escape and Gonzalez could not enter unaccompanied.

As soon as Gonzalez tried to flee, the third man yelled, "shoot" and defendant provided the gun to shoot Gonzalez. The third man also shot at Padilla as he fled. Their orchestrated actions suggested premeditation in advance of entering Padilla's home. The fact that tall man fired multiple shots at two victims trying to escape in two different directions in a relatively confined area further supported the conclusion that defendant and his confederates deliberated over a period of time, albeit a brief period. Further the evidence identifies a motive to kill to

prevent Gonzalez and Padilla from identifying defendant and his confederates. (See *People v. Perez*, *supra*, 2 Cal.4th at p. 1126.) Strong evidence supported the jury finding on the penalty provision.

4. No Substantial Evidence Supported The Robbery Convictions Involving Gonzalez And Loza

Defendant argues that the convictions for robbery of Gonzalez and Loza must be reversed because neither victim had actual or constructive possession of the marijuana taken from Padilla's home. Respondent further argues sufficient evidence supported the conclusion that Gonzalez and Loza actually possessed the stolen marijuana because they had "direct physical control over the marijuana bundles in the living room." As we shall explain, no substantial evidence supported the conviction for the robbery of Loza and Gonzalez.

a. Background

Jurors were instructed that, "Each person who takes personal property in the possession of another, against the will *or* from that person or immediate presence of that person, accomplished by means of force or fear and with the specific intent permanently to deprive that person of the property, is guilty of the crime of robbery in violation of Penal Code section 211." (Italics added.) The italicized word should have been "and," instead of "or." (CALJIC No. 9.40 [defining robbery].)

The prosecutor argued, that robbery was "basically what you think robbery is. The victim had property. [¶] In this case the property is marijuana. . . ." The prosecutor further argued

that robbery was "taking something from somebody's property by force or fear against their will."

b. No substantial evidence supported the convictions for robbery of Gonzalez and Loza

"Robbery is the taking of personal property in the possession of another from his person or immediate presence, against his will, accomplished my means of force or fear." (*People v. Bonner* (2000) 80 Cal.App.4th 759, 763.) A robbery cannot be committed against a person who is not in possession of the stolen personal property. (*People v. McKinnon* (2011) 52 Cal.4th 610, 687.) The prosecutor made clear that the property in this case was the marijuana. As we shall explain, no substantial evidence supported the conclusion that Gonzalez and Loza possessed the marijuana stolen from Padilla's home.

c. Actual possession

"By requiring that the victim of a robbery have possession of the property taken, the Legislature . . . excluded as victims those bystanders who have no greater interest in the property than any other member of the general population." (*People v. Scott* (2009) 45 Cal.4th 743, 757-758.) Actual possession requires direct physical control or an ownership interest (*People v. Hutchinson* (2018) 20 Cal.App.5th 539, 547), neither of which was demonstrated in this case.

People v. Fiore (2014) 227 Cal.App.4th 1362 (*Fiore*) is instructive. *Fiore* involved an ostensible marijuana sale that turned into a robbery. The defendant drove his friend, the buyer Fields to the sale. Fields had learned of the seller from Gault, who was present at the sale. (*Ibid.*) There was evidence that

Fields, the defendant, Gault, and the seller discussed the sale. (*Id*. at p. 1368.) Fields left briefly and returned with an AK-47. (*Ibid*.) Gault testified that the defendant held a black pistol to his face and ordered him on the ground. (*Id*. at p. 1369.) The defendant took the marijuana and he and Fields fled together after Fields threatened to kill everyone in the house including Gault. (*Id*. at p. 1369.)

On appeal, the defendant challenged the sufficiency of the evidence to support the robbery conviction arguing that the marijuana did not belong to Gault. (*Fiore*, *supra*, 227 Cal.App.4th at p. 1385.) The appellate court found insufficient evidence that Gault owned, had control over, or had an obligation to protect the marijuana. (*Id*. at p. 1387.) Although Gault was present he did not negotiate the sale. (*Id*. at p. 1386.) Gault had permission to handle the marijuana for a limited purpose but had no right or duty to resist the property's taking. (*Ibid*.) Even though Gault handled the marijuana it did not belong to him and he did not have possession of it. (*Id*. at pp. 1386-1387.)

In this case there was even less evidence that Loza or Gonzalez had an ownership interest in the marijuana than there was as to the victim in *Fiore*. Whereas Gault was present throughout the negotiations and introduced Fields to the seller, neither Loza nor Gonzalez were present during the marijuana sale, and no evidence suggested that they knew the buyers or played a role in introducing the buyers and sellers. No evidence showed that Loza or Gonzalez had an ownership interest in the stolen marijuana or would benefit from the sale. No evidence indicated that they had physical dominion over the stolen marijuana.

Respondent's contrary argument principally relies on purported evidence unsupported by the record. No evidence supported respondent's assertion that Loza "verified the identity" of the buyers or even knew they were marijuana buyers. No evidence supported respondent's assertion that Loza "help[ed]" Vidal with calculations for the sale. Vidal requested pen and paper from Loza, but there was no indication that she participated in any sales calculations. Loza testified that she was not in the same room as Padilla, Vidal, and defendant when they were negotiating the sale of the marijuana; that testimony was undisputed. Padilla further testified that Loza was "kind of far away." Respondent correctly points out that Loza cleaned the home after the shootings and swept marijuana in the trash, but this evidence is no more indicative of possession than her possession of the casings and zip ties she also swept in the trash.

Turning to Gonzalez, respondent emphasizes that police found marijuana and a digital scale in Gonzalez home. The fact that Gonzalez may have possessed marijuana located in Gonzalez's home does not support the inference that Gonzalez owned or exercised physical control over the stolen marijuana. Put differently, the fact that both Gonzalez and Vidal owned the same type of property does not support the inference that either had an ownership interest in the other's property.[6]

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[6] Because we reverse for insufficient evidence we need not consider defendant's argument that an incorrect jury instruction requires the reversal of the robbery convictions identifying Gonzalez and Loza as victims.

d. Constructive possession

For constructive possession, courts have required that the alleged victim of a robbery have a " 'special relationship' " with the owner of the property such that the victim had authority or responsibility to protect the stolen property on behalf of the owner. (*People v. Scott*, *supra*, 45 Cal.4th at p. 750.) For example, such a special relationship exists between a store owner and store employees as well as store security guards. (*Id*. at p. 751.) In contrast, a visitor to a business does not have constructive possession of the business's property. (*People v. Nguyen* (2000) 24 Cal.4th 756, 764.)

The record does not support that Gonzalez and Loza shared a special relationship with Padilla or Vidal such that they had authority or responsibility to protect the marijuana belonging to Padilla and Vidal. Loza had no role in the marijuana negotiations and did not participate in the discussion between defendant, his confederates and Padilla and Vidal. Although Loza was inside the house, she was in a different room. Her presence in the house was not linked to the marijuana sale, but to the fact that she was temporarily living with Padilla.

Gonzalez was not present during the negotiations and there was no link between him and the stolen marijuana. No evidence suggested that Gonzalez had the responsibility to protect it. Nor was there evidence that Vidal or Padilla expressly or impliedly requested Loza's and Gonzalez's assistance in stopping the theft of the marijuana. Nor was there evidence of a relationship such that Loza or Gonzalez was responsible for the preservation of the marijuana. (Cf. *People v. Gordon* (1982) 136 Cal.App.3d 519, 529 [parents were responsible to protect property belonging to their son].) In short, Gonzalez and Loza were "simply caught up in the

events of the moment" when defendants and his friends robbed Vidal and Padilla. (*People v. Galoia* (1994) 31 Cal.App.4th 595, 598.)

5. Only The Section 12022.5 Firearm Enhancement Must Be Reversed

It is undisputed that defendant was not the shooter of Vidal, Padilla and Gonzalez. It also is undisputed that he did not point his gun at Loza or try to strike her with it. Those acts were committed by his confederates. Based on these undisputed facts, defendant argues that the section 12022.53, subdivision (b) as to the first three counts (murder of Vidal and attempted murder of Gonzalez and Padilla) and the section 12022.5, subdivision (a) enhancement as to count 4 (assault of Loza) must be reversed. Both firearm enhancements require that defendant personally *use* his firearm.

We review the sufficiency of the evidence to support an enhancement under the same standard we apply to evaluate the sufficiency of the evidence to support the convictions. (*People v. Wilson* (2008) 44 Cal.4th 758, 806 (*Wilson*).) "Proof of firearm use during a felony does not require a showing the defendant ever fired a weapon. 'Although the use of a firearm connotes something more than a bare potential for use, there need not be conduct which actually produces harm but only conduct which produces a fear of harm or force by means or display of a firearm in aiding the commission of one of the specified felonies. "Use" means, among other things, "to carry out a purpose or action by means of," to "make instrumental to an end or process," and to "apply to advantage." (Webster's New Internat. Dict. (3d ed. 1961).) The obvious legislative intent to deter the use of firearms in the commission of the specified

felonies requires that "uses" be broadly construed.' " (*Wilson*, *supra*, 44 Cal.4th at p. 806.)

The section 12022.53 firearm use enhancements were properly imposed with respect to the murder of Vidal and the attempted murder of Padilla and Gonzalez. Defendant pointed his gun at Vidal and Padilla. Additionally, defendant threw his gun to the shooter. The following rule applies here: "[U]se encompasses a situation where the defendant is armed and uses his firearm in furtherance of a series of related offenses that culminates in a fatal or near fatal shooting even though the defendant does not personally fire the actual shot."[7] (*People v. Berry* (1993) 17 Cal.App.4th 332, 335.)

In contrast, with respect to the assault of Loza, there was no evidence that defendant personally used his firearm. With respect to the assault with a firearm the prosecutor relied on the third man raising the gun to hit Loza and the tall man pointing the gun at her face. The tall man, not defendant pointed a gun at Loza. The third man hit Loza with his gun. Defendant did not use his firearm in these offenses. Therefore, the section 12022.5 firearm enhancement on count 4 must be reversed.

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[7] Contrary to defendant's argument, *People v. Cole* (1982) 31 Cal.3d 568 does not compel a different result. *Cole* considered section 12022.7, which governs personal infliction of great bodily injury. (*Id.* at p. 572.) It does not consider the term "use," which is dispositive in this case.

6. The Case Must Be Remanded For Resentencing At Which Time the Trial Court Is Directed To Correct Defendant's Presentence Conduct Credits

With respect to his sentence defendant argues: (1) the case must be remanded for the trial court to exercise its discretion whether to strike the section 12022.53 firearm enhancements; (2) defendant must be awarded additional presentence custody; (3) a restitution fine and suspended parole revocation restitution fine must be stricken because they were not included in the oral pronouncement of judgment; (4) if it is not stricken, the parole revocation restitution fine does not apply to defendant because of his LWOP sentence.

Respondent agrees that the case must be remanded for the trial court to exercise its sentencing discretion on the firearm enhancements. Respondent also acknowledges that defendant's presentence custody credits should be corrected. Respondent further acknowledges that the oral pronouncement of judgment did not include the restitution and parole revocation fines. Although respondent points out that our high court has held that the failure to object to the imposition of the fines forfeits the issue on appeal, respondent requests that we nevertheless consider it.

a. Remand is necessary for the trial court to exercise its discretion on the firearm enhancements

We agree with the parties that remand is necessary to enable the trial court to exercise its discretion whether to strike or impose the section 12022.53 firearm enhancements. At the time defendant was sentenced the court did not have discretion to

strike any or all of the enhancements; it now does. The parties also agree the statute retroactively applies to defendant, and remand for resentencing is necessary. (*People v. Woods* (2018) 19 Cal.App.5th 1080, 1090; see also *People v. McDaniels* (2018) 22 Cal.App.5th 420, 426-427.)

b. Upon remand the trial court shall correct defendant's presentence custody credits

As the parties agree, defendant was not awarded credit for time he spent in custody outside of California. Upon remand, the trial court should include these credits in its sentence. (*In re Watson* (1977) 19 Cal.3d 646, 654.)

c. The trial court did not impose a restitution or parole revocation fine; the people forfeited any argument that the trial court should have imposed those fines

Although the trial court's oral pronouncement of judgment did not include a restitution fine or parole revocation fine, the abstract of judgment contains a $5,000 restitution fine and a $5,000 parole revocation fine. As the parties agree, the court's oral pronouncement trumps the abstract of judgment. (*People v. Mitchell* (2001) 26 Cal.4th 181, 185.) Our Supreme Court has held the People's failure to object in the trial court results in forfeiture of the claim that the trial court erred in not imposing the same fines that are at issue here. (*People v. Tillman* (2000) 22 Cal.4th 300, 302-303.) Because this issue is forfeited, we do not consider it.

DISPOSITION

Defendant's convictions for the robberies of Gonzalez and Loza are reversed (counts 7 and 8). The section 12022.5 firearm enhancement added to the assault of Loza (count 4) is reversed. In all other respects the judgment is affirmed. The sentence is vacated, and the case is remanded to the trial court for resentencing, including whether to exercise its discretion to strike the firearm enhancement pursuant to section 12022.53, subdivision (h).

NOT TO BE PUBLISHED.

BENDIX, J.

We concur:

ROTHSCHILD, P. J.

CHANEY, J.