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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JUVENAL CARDENAS MEJIA, Defendant and Appellant.	B251845 (Los Angeles County Super. Ct. No. BA329116)

APPEAL from a judgment of the Superior Court of Los Angeles County, Sam Ohta, Judge. Affirmed.

Randy S. Kravis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Senior Assistant Attorney General, Margaret E. Maxwell and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

Juvenal Cardenas Mejia appeals from the judgment entered after a jury convicted him of multiple offenses—including the first degree murder of a 23-day-old infant—arising from a gang-related assault on a Los Angeles street vendor in September 2007. Mejia fled to Mexico after the shooting and was tried separately from his co-conspirators, whose convictions we affirmed in *People v. Murillo* (Feb. 15, 2012, B226736) [nonpub. opn.] (*Murillo*). Mejia, who was not a gang member but collected "taxes" from street vendors on its behalf and identified the target vendor for the shooter, contends the evidence did not establish he intended to murder the vendor, who survived, or the baby and that his convictions for first degree murder and conspiracy cannot stand. He also contends the trial court committed instructional error, including the prejudicial denial of his request for an instruction on duress. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND[1]

1. *The Shooting*

The 18th Street gang is one of the largest, predominantly Hispanic criminal street gangs in Los Angeles and operates through cliques or sects ultimately controlled by members of the Mexican Mafia. Mejia was hired as a "paisa"[2] by the Columbia Lil Cycos (CLC), an 18th Street clique that claimed control of an area near MacArthur Park, to collect payments from unlicensed street vendors who sell their wares in the area. He collected "taxes" from 10 to 15 vendors a week for which he was paid about $50 and allowed to keep whatever merchandise he stole from the vendors.

Francisco Clemente, the vendor targeted in the attack, sold electronic items in the MacArthur Park area. He was approached on multiple occasions by gang members or associates who demanded money for the right to sell on the street. Several months before the September 2007 shooting six men who identified themselves as 18th Street gang

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[1] Our opinion in *Murillo* contains a more complete statement of the facts relating to the shooting and the gang's activities. The evidence presented at Mejia's trial largely tracked the evidence presented at the earlier trial.

[2] "Paisa" is a slang term, shortened from the Spanish word "paisano." In this context it refers to someone who performs work for a gang but is not a member of the gang.

members approached and told Clemente he had to pay to sell his merchandise or they would beat him up. When Clemente pulled out a knife, the men fled. In mid-August 2007 Clemente moved a few blocks away to avoid the threats and demands; but Mejia and another gang associate, who identified themselves as collectors for the "Cholos," insisted that Clemente pay them at his new location. On several occasions Clemente paid when he had money to avoid a beating; but when he told Mejia he did not have enough money, Mejia told him to move or the people who had previously threatened him would come and "send him to hell." A week or two before the shooting a man Clemente identified as Sergio Pantoja, the leader of the CLC clique, similarly threatened he would "send [Clemente] to hell" if he did not leave the street. Clemente refused to leave. Later, Mejia told Edgar Hernandez, the CLC clique member who had hired him to collect taxes from vendors, that a vendor would be shot for disrespecting Pantoja. Shortly before the shooting Mejia was overheard telling another paisa, "We're going to fix it later," when the paisa complained that Clemente was giving him trouble about payments.

On the evening of September 15, 2007 Mejia and several gang members gathered near Clemente's location to be instructed on the plans for the shooting. A young gang member named Rusty Macedo was assigned to be the shooter and was given a gun. Others were directed to watch for the police, and Mejia was told to point out Clemente for Macedo. According to Macedo, "[E]verybody knew what was going to be done before I shot the vendor. They knew the vendor was going to get shot, you know." The men then took their positions as instructed. Mejia, who did not appear to be nervous or afraid, twice walked with Macedo past Clemente's position and pointed him out. They then walked into a nearby video store. While Mejia stayed in the store, Macedo walked out of the store toward Clemente, who was standing with his girlfriend and a friend of hers, as well as the friend's baby. From a distance of seven or eight feet Macedo fired

several times, aiming at Clemente as he fell to the ground. Clemente, who was shot four or five times, survived the attack.[3] The baby, Luis Garcia, was shot in the chest and died.

2. *The Charges Against Mejia*

After fleeing to Mexico, Mejia was arrested and returned to the United States on February 8, 2012. The amended information, as further amended on the People's motion during trial, charged him with the murder of Garcia (Pen. Code, § 187, subd. (a)) (count 1);[4] the attempted willful, premeditated and deliberate murder of Clemente (§§ 664, 187, subd. (a) (count 2); assault with a semiautomatic firearm (§ 245, subd. (b)) (counts 3 & 4); attempted extortion (§§ 664, 520) (count 5); conspiracy to commit extortion (§§ 182, subd. (a)(1), 520) (count 6); and conspiracy to commit murder (§§ 182, subd. (a)(1), 187, subd. (a)) (count 7). As to the murder count, the People also alleged Mejia had intentionally killed Garcia while an active participant in a criminal street gang and the murder was carried out to further the activities of the gang. (§ 190.2, subd. (a)(22).) As to counts 1 and 2, the amended information alleged a principal had personally and intentionally discharged a firearm, causing great bodily injury or death. (§ 12022.53, subds. (b)-(e).) As to all counts the information alleged the crimes had been committed to benefit a criminal street gang.[5]

Mejia was convicted on all counts, and the jury found true the special circumstance allegation on the murder count and all enhancements. He was sentenced to life without the possibility of parole for first degree, special circumstance murder (count 1) plus 25 years to life for the firearm-use enhancement associated with that count.

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[3] Clemente was shot in the right face and neck area, upper right chest and right abdomen. He suffered life-threatening wounds to his chest and head and spent 15 days in the hospital.

[4] Statutory references are to this code unless otherwise indicated.

[5] For simplicity on occasion this opinion uses the shorthand phrase "to benefit a criminal street gang" to refer to crimes that, in the statutory language, are committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (§ 186.22, subd. (b)(1); see *People v. Jones* (2009) 47 Cal.4th 566, 571, fn. 2.)

He was also sentenced to a consecutive indeterminate life term plus 25 years to life for attempted premeditated murder (count 2) and the related gun-use enhancement, a consecutive indeterminate life term for conspiracy to commit extortion (count 6) and consecutive aggregate determinate terms of 17 years eight months for the two aggravated assault convictions (counts 3 and 4) with gang enhancements. Sentence on the remaining two counts was stayed pursuant to section 654.

CONTENTIONS

Mejia contends there was insufficient evidence to support the jury's finding the murder of Luis Garcia was committed to benefit the 18th Street gang or with specific intent to promote criminal conduct by members of the gang. He alleges prejudicial instructional error based on the trial court's denial of his request for a duress instruction under CALJIC No. 4.40; the inaccurate description of the intent element of conspiracy to commit murder in the court's version of CALJIC No. 8.69; and the court's failure to instruct the jury sua sponte on the lesser included offense of conspiracy to commit assault with a firearm and that his pre- and post-offense comments should be viewed with caution under CALJIC Nos. 2.17 and 2.71.7. Mejia also contends the firearm-use enhancement on the murder conviction should have been stayed under section 654.[6]

After filing his opening brief Mejia sought and received permission to file a supplemental brief addressing the impact of the Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), in which the court held a defendant may not be convicted of aiding and abetting first degree premeditated murder under the natural and probable consequences doctrine. Mejia contends his murder conviction must be reversed because the trial court instructed, and the prosecutor argued, for conviction under this theory.

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[6] Mejia also contends, and the Attorney General acknowledges, that the abstract of judgment should be corrected to reflect the sentence on count 5 was stayed and the total determinate sentence imposed was 17 years eight months, not 17 years 18 months. We order that correction.

DISCUSSION

1. *There Was Sufficient Evidence To Impose the Gang Enhancement on Mejia for the Murder of the Garcia Infant*

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for 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 upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357; accord, *People v. Manibusan* (2013) 58 Cal.4th 40, 87.)

The California Street Terrorism Enforcement and Prevention Act, section 186.20 et seq., was enacted in 1988 to address the "crisis . . . caused by violent street gangs whose members threaten, terrorize, and commit a multitude of crimes against the peaceful citizens of their neighborhoods." (§ 186.21.) It has been amended several times, including by voter initiative, to broaden its scope with no discernible change in intent. (See *People v. Shabazz* (2006) 38 Cal.4th 55, 65 (*Shabazz*), quoting Ballot Pamp., Primary Elec. (Mar. 7, 2000) text of Prop. 21, § 2, subd. (h), p. 119 ["'Gang-related crimes pose a unique threat to the public because of gang members' organization and solidarity. Gang-related felonies should result in severe penalties. *Life without the*

possibility of parole or death should be available to murderers who kill as part of any gang-related activity.'"].) Section 186.22, subdivision (b), establishes alternative or additional penalties for felons whose crimes were committed "for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members."[7]

Mejia acknowledges the shooting was orchestrated by the 18th Street gang and targeted Clemente for his failure to pay taxes but argues there was no evidence the gang intended to kill the Garcia baby or that the killing benefited the gang in any respect. However, the gang's motive for shooting Clemente was the same motive that killed the infant, albeit accidentally. The statute requires only that the defendant intended to "promote, further, or assist" in criminal conduct by gang members that benefited the gang; it does not distinguish between particular crimes or results.

Moreover, the Supreme Court has repeatedly held that when a defendant intends to kill a victim but misses and instead kills a bystander, the intent to kill the intended victim is imputed to the resulting death of the bystander and the defendant is liable for the murder of the unintended victim. (See *Shabazz*, *supra*, 38 Cal.4th at p. 62; *People v. Concha* (2009) 47 Cal.4th 653, 664.) In *Shabazz* the Court relied upon the transferred intent doctrine to uphold the jury's imposition of the gang-murder special circumstance under section 190.2, subdivision (a)(22), when the defendant failed to kill the intended target and instead killed another person. As the Court explained, the transferred intent doctrine "'connotes a *policy*—that a defendant who shoots at an intended victim with intent to kill but misses and hits a bystander instead should be subject to the same criminal liability that would have been imposed had he hit his intended mark.'" (*Shabazz*, at p. 62, quoting *People v. Scott* (1996) 14 Cal.4th 544, 551.)

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[7] To prove a gang is a "criminal street gang," the prosecution must demonstrate it has as one of its "primary activities" the commission of one or more of the crimes enumerated in section 186.22, subdivision (e), and it has engaged in a "'pattern of criminal gang activity'" by committing two or more such "'predicate offenses.'" (§ 186.22, subds. (e), (f).)

Mejia contends the doctrine of transferred intent relied on in *Shabazz* to uphold the gang murder special circumstance should not be applied to the gang enhancement under section 186.22, subdivision (b), because that section concerns unlawful conduct that promotes gang activity rather than the gang murders targeted by section 190.2, subdivision (a)(22). Mejia also relies upon the Supreme Court's decision in *People v. Bland* (2002) 28 Cal.4th 313 (*Bland*), in which the Court barred the application of the doctrine of transferred intent to the crime of attempted murder.

In *Bland* the defendant had fired at a car driven by a rival gang member, killed the intended target and also wounded two passengers. (*Bland, supra,* 28 Cal.4th at p. 318.) The defendant challenged his convictions for attempted murder of the two passengers, raising the questions, in the Court's words, "how can a jury rationally decide which of many persons the defendant did not intend to kill were attempted murder victims on a transferred intent theory? To how many unintended persons can an intent to kill be transferred?" (*Id.* at p. 329.) The Court concluded the doctrine of transferred intent does not extend to what it described at one point as "an inchoate crime like attempted murder." (*Id*. at p. 327.) Because the gang enhancement under section 186.22, like the crime of attempted murder, requires proof of specific intent, Mejia argues it would be incongruous to allow the gang enhancement to be proved through the doctrine of transferred intent.

The gang enhancement, however, does not suffer from the vagaries that troubled the *Bland* Court. Instead of the burden of parsing an infinitely variable kill zone to determine whether the shooter intended to kill each and every person within that zone—the relevant inquiry in *Bland*—the gang enhancement requires a jury to find only that the defendant intended to promote, further, or assist in any criminal conduct by gang members. Once that threshold is crossed, any offense is subject to a gang enhancement. The application of the transferred intent doctrine is, if anything, more appropriate under section 186.22 than section 190.2; and the evidence at trial amply supported the jury's finding the baby's murder was committed for the benefit of the gang.

2. *Chiu Does Not Require Reversal of Mejia's First Degree Murder Conviction*

Mejia was convicted of aiding and abetting first degree murder and attempted willful, deliberate and premeditated murder. Based on the Supreme Court's recent decision in *Chiu, supra*, 59 Cal.4th 155, in which the Court concluded "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine" (*id.* at pp. 158-159), Mejia argues his convictions for these two crimes must be reversed because the jury was wrongly instructed under that doctrine.

As the Court explained in *Chiu*, "There are two distinct forms of culpability for aiders and abettors. 'First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted."'"[8] (*Chiu, supra,* 59 Cal.4th at p. 158.) "First degree murder, like second degree murder, is the unlawful killing of a human being with malice aforethought, but has the additional elements of willfulness, premeditation, and deliberation which trigger a heightened penalty. [Citation.] That mental state is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. . . . Although we have stated that an aider and abettor's 'punishment need not be finely calibrated to the criminal's mens rea' [citation], the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural

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[8] Under the natural and probable consequences doctrine, "'"[a] person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime."' [Citation.] 'Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.'" (*Chiu, supra,* 59 Cal.4th at p. 161.)

and probable consequences doctrine, especially in light of the severe penalty involved and the above stated public policy concern of deterrence." (*Id.* at p. 166.) For these reasons, the Court held "that punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine. We further hold that where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing a defendant to be convicted of that greater offense under the natural and probable consequences doctrine." (*Ibid*.)

Nonetheless, "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles. [Citation.] Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission. [Citation.] Because the mental state component—consisting of intent and knowledge—extends to the entire crime, it preserves the distinction between assisting the predicate crime of second degree murder and assisting the greater offense of first degree premeditated murder. [Citations.] An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder." (*Chiu*, *supra*, 59 Cal.4th at pp. 166-167.)

In *Chiu* the Court reversed the first degree murder conviction of a teenage defendant who had instigated a fight that resulted in murder; according to disputed testimony, the defendant had told his friend to grab the gun and shoot the victim. (*Chiu, supra,* 59 Cal.4th at p. 160.) The People pursued the defendant's conviction for first degree premeditated murder under a direct aiding and abetting theory, as well as a natural and probable consequences theory; and the trial court instructed the jury it could convict the defendant of first degree murder if it found he either directly aided and abetted the

murder or aided and abetted the target offense of assault, the natural and probable consequence of which was murder. (*Ibid*.) Finding the trial court had erred in instructing the jury on the natural and probable consequences doctrine, the Court turned to the issue of prejudice: "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Id*. at p. 167.)[9] Because the record indicated the jury may have relied on the natural and probable consequences doctrine in convicting the defendant, the Court reversed because it could not conclude beyond a reasonable doubt the jury had relied on a legally valid theory. (*Id*. at p. 168.)

Although the jury here was instructed under the natural and probable consequences doctrine, the verdicts are entirely incompatible with a conclusion the jury relied on that doctrine to convict Mejia of premeditated first degree murder and attempted deliberate and premeditated murder. The jury also found true the gang-murder special circumstance under section 190.2, subdivision (a)(22), which authorizes a penalty of death or life imprisonment without the possibility of parole if "[t]he defendant intentionally killed the victim while . . . an active participant in a criminal street gang, . . . and the murder was carried out to further the activities of the criminal street gang." CALJIC No. 8.80.1 expressly told the jury, "If you find that a defendant was not the actual killer of a human being, you cannot find the special circumstance to be true unless you are satisfied beyond a reasonable doubt that such defendant with the intent to kill aided, abetted, counseled, commanded, or assisted any actor in the commission of the murder in the first degree." The jury's finding Mejia aided and abetted the shooter with the intent to kill (rather than merely assault) Clemente is dispositive of his claim the jury

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[9] In discussing the question of prejudice the *Chiu* Court cited its earlier decision on the issue in *People v. Chun* (2009) 45 Cal.4th 1172, 1203-1205, in which the Court had explained, "[w]ithout holding that this is the only way to find error harmless," reversal for instructional error is not proper "'if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.'" (*Id.* at p. 1204.)

could have convicted him of first degree murder and attempted premeditated murder only because it believed those crimes were the natural and probable consequence of an assault.

3. *The Trial Court Properly Denied the Requested Duress Instruction*

A trial court must instruct on an affirmative defense when the defendant requests it, there is substantial evidence supporting the defense, and the defense is consistent with the defendant's theory of the case. (See *People v. Salas* (2006) 37 Cal.4th 967, 982; *People v. Breverman* (1998) 19 Cal.4th 142, 154.) "In determining whether the evidence is sufficient to warrant a jury instruction, the trial court does not determine the credibility of the defense evidence, but only whether 'there was evidence which, if believed by the jury, was sufficient to raise a reasonable doubt.'" (*Salas*, at p. 983.) We employ a de novo standard of review and independently determine whether the record contains substantial evidence supporting the requested instruction. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584; *People v. Sisuphan* (2010) 181 Cal.App.4th 800, 806.)

"Penal Code section 26 declares duress to be a perfect defense against criminal charges when the person charged 'committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused.'" (*People v. Vieira* (2005) 35 Cal.4th 264, 289-290.) "'The common characteristic of all the decisions upholding [a duress defense] lies in the immediacy and imminency of the threatened action: each represents the situation of a present and active aggressor threatening immediate danger; none depict a phantasmagoria of future harm.'" (*Id.* at p. 290; see also *People v. Saavedra* (2007) 156 Cal.App.4th 561, 567 ["[a]n essential component of [the duress] defense is that the defendant be faced with a direct or implied demand that he or she commit the charged crime"]; *People v. Heath* (1989) 207 Cal.App.3d 892, 900 ["Duress is an effective defense only when the actor responds to an immediate and imminent danger. '[A] fear of *future* harm to one's life does not relieve one of responsibility for the crimes he commits.'"].)

Mejia contends the trial court prejudicially erred when it refused to instruct the jury under CALJIC No. 4.40, which governs the duress defense.[10] Mejia points to testimony at trial that paisas can be subject to discipline by the gang if they refuse to carry out the gang's instructions. But, as the People respond, no one threatened Mejia or pressured him to engage in either the extortion or the shooting. (See *People v. Steele* (1988) 206 Cal.App.3d 703, 706 [duress instruction properly refused when threat or menace not accompanied by direct or implied demand that defendant commit the charged criminal act].) To the contrary, he was considered a trusted gang associate, had the power to discipline recalcitrant vendors and could call in gang members if needed. None of the testimony relied on by Mejia demonstrates a fear his life would be in immediate danger if he refused the direction to identify Clemente for the shooter.

Duress, moreover, is not a defense to a murder charge (*People v. Anderson* (2002) 28 Cal.4th 767, 779), even when the defendant is charged as an aider and abettor (*People v. Vieira, supra,* 35 Cal.4th at p. 290). The lone exception to this rule is felony-murder, when the defendant's mental state is limited to the intent to commit the underlying felony. (*Anderson*, at p. 784; see *People v. Cavitt* (2004) 33 Cal.4th 187, 197 ["[t]he mental state required [for felony-murder] is simply the specific intent to commit the underlying felony"].) Here, the jury was not even instructed on felony murder; and, as we have already discussed, Mejia was convicted of first degree murder on a direct aiding and abetting theory. A defense of duress, therefore, was not applicable to the murder and attempted murder charges even if he had proved the existence of an immediate threat to his life.

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[10] CALJIC No. 4.40 provides: "A person is not guilty of a crime [other than _____] when [he] [she] engages in conduct, otherwise criminal, when acting under threats and menaces under the following circumstances: [¶] (1) Where the threats and menaces are such that they would cause a reasonable person to fear that [his] [her] life would be in immediate danger if [he] [she] did not engage in the conduct charged, and [¶] (2) If this person then actually believed that [his] [her] life was so endangered. [¶] This rule does not apply to threats, menaces, and fear of future danger to [his] [her] life[,] [nor does it apply to the crime[s] of (crime punishable by death)]."

4. *Any Error in the Instruction for Conspiracy To Commit Murder Was Not Prejudicial*

Mejia contends the version of CALJIC No. 8.69 used by the trial court to instruct the jury on the elements of count 7 wrongly permitted the jury to find him guilty of conspiracy to commit murder without requiring they find he shared the specific intent to kill with the shooter and other conspirators. Specifically, the challenged instruction described the elements of the crime of conspiracy to commit murder as including proof that "1. Two or more persons entered into an agreement to kill unlawfully another human being; [¶] 2. *At least two of the persons* specifically intended to enter into an agreement with one or more other persons for that purpose; [¶] [and] 3. *At least two of the persons* to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being . . . ." (Italics added.)[11]

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[11] The trial court instructed the jury on the charge of conspiracy to commit murder using CALJIC No. 8.69, which, as given in this case, provided: "Defendants are accused in Count 7 of having committed the crime of conspiracy to commit murder and assault with a firearm in violation of section 182, subdivision (a)(1), of the Penal Code. [¶] Every person who conspires with any other person or persons to commit the crime of murder is guilty of a violation of Penal Code section 182, subdivision (a)(1), a crime. [¶] Murder is the unlawful killing of a human being with malice aforethought. [¶] A conspiracy to commit murder is an agreement entered into between two or more persons with the specific intent to agree to commit the crime of murder and with the further specific intent to commit that murder, followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. Conspiracy is a crime. [¶] The crime of conspiracy to commit murder requires proof that the conspirators harbored express malice aforethought, namely, the specific intent to kill unlawfully another human being. [¶] In order to find a defendant guilty of conspiracy, in addition to proof of the lawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the information to be an overt act and that the act found to have been committed was an overt act. It is not necessary to the guilt of any particular defendant that defendant personally committed an overt act, if he was one of the conspirators when the overt act was committed. [¶] The term 'overt act' means any step taken or act committed by one or more of the conspirators which goes beyond mere planning or agreement to commit a crime and which step or act is done in furtherance of the accomplishment of the object of the conspiracy. [¶] To be an 'overt act,' the step taken or act committed need not, in and of itself, constitute the crime or even an attempt to commit the crime which is the ultimate object of the conspiracy. Nor

According to Mejia, the phrase "[a]t least two of the persons"—which twice appears in the elements portion of CALJIC No. 8.69—permitted the jury to convict him of conspiracy to murder without finding he was one of the persons who specifically intended to kill. He relies on the decision in *People v. Petznick* (2003) 114 Cal.App.4th 663, in which the court of appeal reversed a similar conviction based on the same instructional defect. As the *Petznick* court explained, "Since the jury was aware that there were four participants, the instruction erroneously permitted the jury to find defendant guilty of conspiracy to commit murder without regard to whether or not he personally intended to kill so long as they found that at least two of the other participants harbored that intent." (*Id.* at p. 681.) We agree with Mejia this language in CALJIC No. 8.69 did not clearly or completely describe the specific intent element for conspiracy to commit murder in this case. Although Mejia was the only person on trial, the People proceeded on the theory he was one of several persons who had conspired to murder Clemente; pursuant to this instruction, the jury was not required to conclude Mejia, as opposed to at least two of the other co-conspirators, intended to kill.

This conclusion, however, is not dispositive. "In reviewing any claim of instructional error, we must consider the jury instructions as a whole, and not judge a single jury instruction in artificial isolation out of the context of the charge and the entire trial record. [Citations.] When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of instructions is no

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is it required that the step or act, in and of itself, be a criminal or an unlawful act. [¶] In order to prove this crime, each of the following elements must be proved: [¶] 1. Two or more persons entered into an agreement to kill unlawfully another human being; [¶] 2. At least two of the persons specifically intended to enter into an agreement with one or more other persons for that purpose; [¶] 3. At least two of the persons to the agreement harbored express malice aforethought, namely a specific intent to kill unlawfully another human being; and [¶] 4. An overt act was committed in this state by one or more of the persons who agreed and intended to commit murder."

longer determined under a strict test of whether a 'reasonable juror' *could* have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a 'reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (*People v. Dieguez* (2001) 89 Cal.App.4th 266, 276 (*Dieguez*); see *People v. Clair* (1992) 2 Cal.4th 629, 663; see generally *Neder v. United States* (1999) 527 U.S. 1, 15 [119 S.Ct. 1827, 144 L.Ed.2d 35] ["[t]he test is whether it appears '"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained"'"].) "No judgment shall be set aside, or new trial granted, in any cause, on the ground of misdirection of the jury . . . unless, after an examination of the entire cause, including the evidence, the court shall be of the opinion that the error complained of has resulted in a miscarriage of justice." (Cal. Const., art. VI, § 13.) "A miscarriage of justice occurs only when it is reasonably probable that the jury would have reached a result more favorable to the appellant absent the error." (*Dieguez*, at pp. 277-278.)

Under the circumstances here there is no likelihood the jury misapplied the law in the manner suggested by Mejia. Portions of CALJIC No. 8.69 preceding the "at least two" language stated, "A conspiracy to commit murder is an agreement entered into between two or more persons with the *specific intent . . . to commit that murder,* followed by an overt act committed in this state by one or more of the parties for the purpose of accomplishing the object of the agreement. . . . [¶] The crime of conspiracy to commit murder requires proof that *the conspirators harbored express malice aforethought, namely, the specific intent to kill unlawfully another human being.* [¶] In order to find a defendant guilty of conspiracy, in addition to proof of the unlawful agreement and specific intent, there must be proof of the commission of at least one of the acts alleged in the information to be an overt act and that the act found to have been committed was an overt act. It is not necessary to the guilt of any particular defendant that defendant personally committed the overt act, *if he or she was one of the conspirators when the overt act was committed*." (Italics added.) The jury was also instructed under CALJIC No. 3.31 that "[i]n the crimes of attempted murder, conspiracy to commit extortion,

conspiracy to commit murder, and attempted extortion, and the special circumstance and the gang crime allegations, there must exist a union or joint operation of act or conduct and a certain specific intent in the mind of the perpetrator. *Unless this specific intent exists the crime and or allegations to which it relates is not committed or is not true*. [¶] The specific intent required is included in the definitions of the crimes or allegations set forth elsewhere in these instructions." (Italics added.) A fair reading of these instructions together informed the jury that, while it did not have to find Mejia committed a particular overt act for the conspiracy, to convict him of the crime of conspiracy to commit murder it had to find he harbored the specific intent for the conspiracy, namely the intent to agree and the specific intent to kill.

Again, this conclusion is confirmed by the jury's findings on the gang-murder special circumstance allegation and the first degree murder count. Unlike the *Petznick* jury's obvious confusion about the elements of conspiracy (see *People v. Petznick, supra,* 114 Cal.App.4th at pp. 680-681), the jury in this case asked no questions about the conspiracy instructions and plainly believed Mejia acted with intent to commit murder. Because its findings leave no doubt the jury concluded Mejia acted with the specific intent to commit murder, he suffered no prejudice as a result of the "at least two" phrases contained in CALJIC No. 8.69. (See *People v. Harrison* (2005) 35 Cal.4th 208, 252 [defendant's argument jury was confused by court's instruction rejected when there was "no reasonable likelihood the jury was confused and misconstrued or misapplied the instruction"].)

5. *The Trial Court Was Not Required To Instruct the Jury on the Lesser Included Offense of Conspiracy To Commit Assault*

"'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.' [Citations.] 'That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.'" (*People v. Rogers* (2006) 39 Cal.4th 826, 866; accord, *People v. Whalen* (2013) 56 Cal.4th 1, 68; see *People v.*

Breverman, *supra*, 19 Cal.4th at p. 154 [sua sponte duty].) "Nevertheless, 'the existence of "*any* evidence, no matter how weak" will not justify instructions on a lesser included offense. . . .' [Citation.] Such instructions are required only where there is 'substantial evidence' from which a rational jury could conclude that the defendant committed the lesser offense, and that he is not guilty of the greater offense." (*People v. DePriest* (2007) 42 Cal.4th 1, 50; accord, *Whalen*, at p. 68.) In deciding whether there is substantial evidence to support a lesser included offense instruction, the "court determines only its bare legal sufficiency, not its weight." (*People v. Moye* (2008) 47 Cal.4th 537, 556.)

On appeal we review independently whether a lesser included offense instruction was warranted. (*People v. Avila* (2009) 46 Cal.4th 680, 705.) The erroneous failure to instruct on a lesser included offense generally is subject to harmless error review under the standard of *People v. Watson* (1956) 46 Cal.2d 818. (*People v. Sakarias* (2000) 22 Cal.4th 596, 621; *People v. Breverman, supra,* 19 Cal.4th at p. 176.) Thus, reversal is required only if it is reasonably probable the jury would have returned a different verdict absent the error or errors committed by the trial court. (*Watson,* at pp. 836-837; see *People v. Prince* (2007) 40 Cal.4th 1179, 1267.) Under this standard, "[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions." (*People v. Lewis* (2001) 25 Cal.4th 610, 646.)

Mejia contends the trial court erred by failing to instruct the jury sua sponte on the lesser included offense of conspiracy to commit assault with a firearm. The parties agree that conspiracy to commit assault with a firearm, applying the elements test, is not a lesser included offense of conspiracy to commit murder.[12] (See, e.g., *People v. Birks*

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[12] The Supreme Court has applied "two tests in determining whether an uncharged offense is necessarily included within a charged offense: the 'elements' test and the 'accusatory pleading' test. Under the elements test, if the statutory elements of the greater offense include all of the statutory elements of the lesser offense, the latter is necessarily included in the former. Under the accusatory pleading test, if the facts actually alleged in the accusatory pleading include all of the elements of the lesser

(1998) 19 Cal.4th 108, 117; *People v. Cook* (2001) 91 Cal.App.4th 910, 918-919.) However, there is a split of authority—echoed by the parties—on the question whether conspiracy to commit assault with a firearm is a lesser included offense to conspiracy to commit murder under the accusatory pleadings test. In *Cook* the court held that under the latter test assault with a firearm could be a lesser included offense within conspiracy to commit murder when one considers the overt acts alleged as to the murder conspiracy. (*Cook*, at p. 920.) In reaching this conclusion the *Cook* court disagreed with the court in *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, in which the court held it was improper to consider the overt acts allegations when applying the accusatory pleading test; and, thus, conspiracy to commit assault with a deadly weapon could not be included within conspiracy to commit murder. (*Cook*, at pp. 920-921.)

Although we agree with the analysis in *Cook*,[13] the jury's findings on intent, discussed above, establish Mejia was not prejudiced by the court's failure to instruct on

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offense, the latter is necessarily included in the former." (*People v. Reed* (2006) 38 Cal.4th 1224, 1227-1228.)

[13] The *Fenenbock* court reasoned overt act allegations "do not provide notice of lesser included target offenses." (*People v. Fenebock, supra*, 46 Cal.App.4th at p. 1708.) "Because overt acts need not be criminal offenses or even acts committed by the defendant, the description of the overt acts in the accusatory pleading does not provide notice of lesser offenses necessarily committed by the defendant. Moreover, inasmuch as overt acts may be lawful acts, the overt acts do not necessarily reveal the criminal objective of the conspiracy." (*Id.* at p. 1709, fn. omitted.) This per se rule limiting analysis to the specific charging allegations and disregarding the overt acts alleged to have been committed in furtherance of the conspiracy conflicts with the very purpose of the lesser-included-offense doctrine and its accusatory pleading test, which comes into play only when the elements test is not satisfied. As explained in *People v. Birks, supra*, 19 Cal.4th 108, the issue is whether an information or indictment adequately notifies the defendant, for due process purposes, that he or she must be prepared to defend against any lesser offenses necessarily included in the greater offense expressly charged based on "the facts actually alleged in the accusatory pleading." (*Id.* at pp. 117-118.) If the defendant is on notice, the instructional rule ensures that neither the prosecutor nor the defendant may force the jury to confront an all-or-nothing choice. For this salutary purpose—which benefits both the prosecution and the defense (*People v. Barton* (1995) 12 Cal.4th 186, 196; *Birks*, at p. 119)—it can make no difference, for example, whether the facts actually alleged are that the defendants conspired to commit murder by means of

the lesser included offense of conspiracy to commit assault. That is, by not only convicting Mejia of first degree murder and attempted premeditated murder but also finding true the gang-murder special circumstance, the jury necessarily concluded he intended to kill Clemente and conspired with others to accomplish that purpose and did not simply aid and abet (or conspire) to commit an aggravated assault. Accordingly, the trial court did not commit prejudicial error in failing to instruct the jury on the lesser included offense of conspiracy to commit assault with a firearm.

6. *The Trial Court's Failure To Instruct the Jury with CALJIC Nos. 2.71 and 2.71.7 Constituted Harmless Error*

Mejia contends the trial court erred in failing to instruct the jury under CALJIC Nos. 2.71 and 2.71.7,[14] which together admonish jurors to treat out-of-court oral admissions attributed to a defendant with caution.[15] Although the People conceded in

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assault with a firearm or conspired to commit murder with an overt act allegation that they obtained firearms in furtherance of the conspiracy. Accordingly, we agree with the analysis and conclusion in *Cook*: The allegations of overt acts in an accusatory pleading charging defendants with conspiracy to commit murder may identify lesser included target offenses with sufficient clarity to trigger the trial court's sua sponte duty to instruct on the lesser included offense(s).

[14] CALJIC No. 2.71 provides: "An admission is a statement made by [a] [the] defendant which does not by itself acknowledge [his] [her] guilt of the crime[s] for which the defendant is on trial, but which statement tends to prove [his] [her] guilt when considered with the rest of the evidence. [¶] You are the exclusive judges as to whether the defendant made an admission, and if so, whether that statement is true in whole or in part. [¶] [Evidence of an oral admission of [a] [the] defendant not contained in an audio or video recording and not made in court should be viewed with caution.]"

CALJIC No. 2.71.7 provides: "Evidence has been received from which you may find that an oral statement of [intent] [plan] [motive] [design] was made by the defendant before the offense with which [he] [she] is charged was committed. [¶] It is for you to decide whether the statement was made by [a] [the] defendant. [¶] Evidence of an oral statement ought to be viewed with caution."

[15] "The purpose of the cautionary instruction is to assist the jury in determining if the statement was in fact made[,]" including whether the statement was reported accurately. (*People v. Beagle* (1972) 6 Cal.3d 441, 456.) "It is a familiar rule that verbal admissions should be received with *caution* and subjected to careful scrutiny, as no class of evidence is more subject to error or abuse. Witnesses having the best motives are generally unable

their brief in this court that the failure to give these instructions was error (see, e.g., *People v. McKinnon* (2011) 52 Cal.4th 610, 679; *People v. Mungia* (2008) 44 Cal.4th 1101, 1134), the Supreme Court last month held in *People v. Diaz* (2015) 60 Cal.4th 1176) that CALCRIM No. 58 (the official instruction covering the same matter as CALJIC No. 2.71) need not be given sua sponte, "because courts are now required to instruct the jury, in all criminal cases, concerning the general principles that apply to their consideration of witness testimony." (*Diaz,* at p. 1185.) We need not consider whether the *Diaz* ruling should be applied in this case, however, because the trial court's failure to instruct with CALJIC Nos. 2.71 and 2.71.7 was not prejudicial in any event.[16]

"In determining whether the failure to instruct requires reversal, 'we apply the normal standard of review for state law error: whether it is reasonably probable the jury would have reached a result more favorable to defendant had the instruction been given.' [Citations.] '"Since the cautionary instruction is intended to help the jury to determine whether the statement attributed to the defendant was in fact made, courts examining the prejudice in failing to give the instruction examine the record to see if there was any conflict in the evidence about the exact words used, their meaning, or whether the admissions were repeated accurately."' [Citations.] "This court has held to be harmless the erroneous omission of the cautionary language when, in the absence of such conflict,

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to state the exact language of an admission, and are liable, by the omission or the changing of words, to convey a false impression of the language used. No other class of testimony affords such temptations or opportunities for unscrupulous witnesses to torture the facts or commit open perjury, as it is often impossible to contradict their testimony at all, or at least by any other witness than the party himself.'" (*People v. Bemis* (1949) 33 Cal.2d 395, 399; accord, *People v. Diaz* (2015) 60 Cal.4th 1176,1185.)

[16] The Supreme Court in *Diaz* likewise found it unnecessary to apply its ruling to the case before it: "We need not decide whether the new rule we announce today—eliminating the court's sua sponte duty to give the cautionary instruction on defendant's extrajudicial statements—applies retroactively because, in any event, the omission of the cautionary instruction was harmless." (*Diaz, supra,* 60 Cal.4th at p. 1185.) In determining harmless error the Court used the *Watson* standard for state law error: "Whether it is reasonably possible the jury would have reached a result more favorable to defendant had the instruction been given. (*People v. Watson* (1956) 46 Cal.2d 818, 835-836.)" (*Diaz,* at p. 1185.)

a defendant simply denies that he made the statements. [Citation.] Further, when the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution."'" (*People v. McKinnon, supra,* 52 Cal.4th at pp. 679-680; accord, *People v. Dickey* (2005) 35 Cal.4th 884, 905-907; *People v. Diaz, supra,* 60 Cal.4th at pp. 1190-1191.)

Mejia identifies three statements recounted by witnesses that warranted a cautionary instruction: (1) his statement to Macedo identifying Clemente as the targeted vendor; (2) his preshooting statement the gang would take care of Clemente later; and (3) his statements to Hernandez about the shooting, including his statement a vendor would be shot for disrespecting Pantoja. Although Mejia asserts the jury should have been instructed to view these statements with caution because of their unreliability, he fails to identify any evidence that suggests the witnesses who described these statements testified falsely. Macedo, who testified as part of a sentencing agreement, was a principal in the crime; and the jury was instructed under CALJIC Nos. 3.11 and 3.12 that Macedo's testimony required corroboration before it could form the basis for convicting Mejia. The jury was also instructed under CALJIC No. 3.18 to view his testimony that tended to incriminate Mejia with caution. There would be no point in cautioning the jury further as to this statement with CALJIC Nos. 2.71 and 2.71.7.

The other statements were made by nonaccomplice witnesses. Hernandez testified as part of a sentencing agreement, a fact the jury was instructed could be considered "for the purpose of determining the believability of that witness." (CALJIC No. 2.23.) And the jury was also told as part of the general instruction on assessing credibility (CALJIC No. 2.20) that the believability of a witness may be affected by a prior conviction for a felony and whether the witness is testifying under a grant of immunity. Maria Morales, the juice bar employee who overheard Mejia tell another paisa Clemente would be taken care of later, had no such inherent bias; but the jury was instructed it could consider her ability to see or hear the statement she attributed to Mejia, her demeanor and manner while testifying, as well as any inconsistencies in her testimony. As the Supreme Court

explained in *Diaz*, "'[W]hen the trial court otherwise has thoroughly instructed the jury on assessing the credibility of witnesses, we have concluded the jury was adequately warned to view their testimony with caution.'" (*Diaz*, *supra*, 60 Cal.4th at p. 1196, quoting *People v. McKinnon*, *supra*, 52 Cal.4th at p. 680.)

In short, Mejia has failed to identify any basis for concluding the court's failure to instruct under CALJIC Nos. 2.71 and 2.71.7 was prejudicial.

7. *Section 654 Does Not Bar Imposition of Sentence for the Firearm-use Enhancement Under Section 12022.53, Subdivisions (d) and (e)*

Section 654 prohibits separate punishment for multiple offenses arising from the same act or from a series of acts constituting an indivisible course of criminal conduct. (*People v. Rodriguez* (2009) 47 Cal.4th 501, 507.)[17] Mejia contends section 654 prohibits sentencing him with two separate enhancements of the first degree murder conviction—the special circumstance under section 190.2, subdivision (a)(22), and the firearm-use/death-or-great-bodily-injury enhancement under section 12022.53, subdivisions (d) and (e)—each of which applies because the jury concluded the shooting was committed to further the activities of the 18th Street gang.

In *People v. Ahmed* (2011) 53 Cal.4th 156 (*Ahmed*) the Supreme Court concluded sentence enhancements, not just substantive criminal offenses, may be subject to section 654 if the specific sentencing statutes themselves do not otherwise state whether more than one enhancement may be imposed. (*Id*. at p. 159.) If section 654 does apply, "the analysis must be adjusted to account for the differing natures of substantive crimes and enhancements." (*Id*. at p. 160.) "[E]nhancement provisions do not define criminal acts; rather, they increase the punishment for those acts. They focus on aspects of the criminal act that are not always present and that warrant additional punishment." (*Id*. at p. 163, citations and fn. omitted.) "[W]hen applied to multiple enhancements for a single crime,

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[17] Section 654, subdivision (a), provides, "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other."

section 654 bars multiple punishment for the same *aspect* of a criminal act." (*Id*. at p. 164.) Significantly, the Court chose the word "*aspect*" to avoid confusion with statutes containing the words "circumstances" (for example, § 190.2), factors or elements. (See *Ahmed, supra*, 53 Cal.4th at p. 163, fn. 3.)

Here, the two separate enhancements imposed on the murder conviction penalized different aspects of Mejia's crime: The gang-murder special circumstance applied because the murder was carried out for a gang purpose; the means used to commit the offense did not matter. The section 12022.53, subdivisions (d) and (e), firearm-use enhancement applied because the gang-related crime was accomplished through the use of a firearm. Thus, one enhancement focused on the purpose for the underlying murder, while the other focused on the means the gang member used to accomplish the crime. Sentencing under both enhancements did not violate section 654.

DISPOSITION

The judgment is affirmed. The abstract of judgment is ordered to be corrected to reflect that the term imposed on count 5 was stayed pursuant to section 654 and that the determinate term of Mejia's sentence is 17 years eight months instead of 17 years 18 months. The superior court is directed to prepare a corrected abstract of judgment and forward it to the Department of Corrections and Rehabilitation.

PERLUSS, P. J.

We concur:

ZELON, J.

STROBEL, J.*

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* Judge of the Los Angeles County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.