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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 THREE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VAHAGN JURIAN et al.,<br><br>Defendants and Appellants. | B244575<br><br>(Los Angeles County Super. Ct. No. BA382910) |
| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>VAHAGN JURIAN,<br><br>Defendant and Appellant. | B250118 |

APPEALS from judgments of the Superior Court of Los Angeles County, Gregory A. Dohi, Judge. Affirmed in part, reversed in part, and remanded with directions.

Law Offices of E. Thomas Dunn, Jr. and E. Thomas Dunn, Jr. for Defendant and Appellant Vahagn Jurian.

Law Office of John Steinberg and John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Zareh Manjikian.

Marks and Brooklier and Anthony P. Brooklier for Defendant and Appellant Khatun Vardanian.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Idan Ivri, Deputy Attorneys General, for Plaintiff and Respondent.

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Gombert (Mike) Yepremyan was shot and killed on November 18, 2009. Defendants and appellants Vahagn Jurian, Zareh Manjikian, and Khatun Vardanian were tried for his killing.[1] A jury convicted all defendants of conspiracy to commit assault by means of force likely to produce great bodily injury (Pen. Code[2], §§ 182, 245, subd. (a)(1)), and convicted Jurian and Manjikian of first degree murder (§ 187). Additionally, the jury made true findings with respect to Jurian and Vardanian that a principal in the offense was armed with a firearm (§ 12022, subd. (a)(1); and that Manjikian had personally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (b), (c), (d)).

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1 A fourth defendant, Hovik Dzhuryan, was also tried and convicted, but has abandoned his appeal.

2 All further statutory references are to the Penal Code unless otherwise specified.

The trial court sentenced Vardanian to probation for five years, Manjikian to prison for 50 years to life, and Jurian to prison for 25 years to life.

For the reasons discussed below, the judgments are affirmed in part, reversed in part, and remanded with directions.

## BACKGROUND

Viewed in accordance with the usual rules of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206), the evidence established the following.

1. *Prosecution evidence.*

a. *The victim sends an insulting text message.*

Denielle Wegrzyn was the girlfriend of Gombert "Mike" Yepremyan. On November 18, 2009, Wegrzyn was with her friends Ani Postachian and appellant Khatun Vardanian. At 5:19 p.m., Yepremyan sent Wegrzyn a text message in which he referred to Vardanian as a "bitch."[3] The text message said, "Why are you guys going to hookah lounge again? Every time you hang out with that bitch, you guys get hookah. I don't understand. [¶] Is there something cool about her and hookah that you enjoy so much?" Vardanian saw Yepremyan's text message and got angry, saying " 'Oh, I'm a bitch, huh?' " According to Wegrzyn, Vardanian "was just very angry that [Yepremyan] would say that and . . . she felt there was no reason for him to say or call her that."

Vardanian asked for Yepremyan's telephone number and Wegrzyn gave it to her. Vardanian said, " 'My brother's going to kick his ass.' " Vardanian then called someone to whom she

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[3] The parties stipulated that Yepremyan sent the insulting text message at precisely this time.

spoke in Armenian. Wegrzyn understood enough Armenian to know that Vardanian was giving the person Yepremyan's phone number. Wegrzyn testified Vardanian was acting "really frustrated and angry" during the phone call.

Wegrzyn subsequently spoke on the phone with and sent text messages to Yepremyan. She told him that Vardanian was taking her home early after finding out that Yepremyan had called her a bitch. When Vardanian drove Wegrzyn back to her car, which was parked at Vardanian's house, Vardanian said, " 'I hope we could still be friends.' " Wegrzyn drove home, but then sat in the car outside her house for a while trying to calm down. She spoke to Yepremyan a couple of times. He acted "busy" but "calm," and said he was going to meet up with some people. Wegrzyn testified she told Yepremyan to go home because "we don't know any of these people." Subsequently, Wegrzyn spoke on the phone to Vardanian. When Wegrzyn asked what was going on, Vardanian said: " 'Oh, my brother is actually meeting up with your boyfriend and friends.' " In another conversation, they talked about the developing situation. Wegrzyn told Vardanian: " 'I'm not hearing back from Mike, I don't know what's going on and I'm really worried.' " Vardanian apologized for what was happening and said, " 'If you want me to stop all of this, I'll stop all of this. I'll call my cousin,' " and [Wegrzyn] said " 'Yeah.' " After that conversation, Wegrzyn tried to contact Yepremyan, but she was not successful.

Cell phone records showed that Vardanian called her brother, Hovik Dzhuryan, at 6:02 p.m.[4] Vahe Kirakosyan, a

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[4] Dzhuryan had been a codefendant at trial and, like Vardanian, he had been convicted only of conspiracy to commit

friend of Dzhuryan's, had been working with him at a cell phone store that day. Their mutual friend Lazar Petrosyan was also present. The three of them were driving to North Hollywood when Vardanian texted Dzhuryan, and Dzhuryan informed his two friends that someone had called his sister a bitch. Kirakosyan testified Dzhuryan got mad, began texting someone, and then made a phone call during which he was mad and upset. Dzhuryan asked Vardanian for Yepremyan's phone number and she texted it to him. Dzhuryan called Yepremyan, asked him, "[C]an you prove she's a bitch[?],"and then yelled at Yepremyan.

Kirakosyan told police that Vardanian called Dzhuryan again, and Dzhuryan told her that he was going to call their older cousin, appellant Vahagn Jurian. Kirakosyan testified that Vardanian told Dzhuryan not to tell Jurian anything because she was embarrassed and "didn't want [Jurian] to find out." But Dzhuryan called Jurian anyway and told him that "this guy called our sister a bitch." Dzhuryan then said to Kirakosyan and Petrosyan, "[L]et's go meet up my cousin [*sic*]." Kirakosyan drove to a movie theatre parking lot where Jurian subsequently arrived. Jurian and Dzhuryan discussed "meeting" the guy who had called Vardanian a bitch. Dzhuryan told Jurian he was upset about the insult. Jurian told Dzhuryan to give him the person's phone number and that he would go talk to him. Jurian then "called the guy and said, oh, where are you? I want to meet you up [*sic*]."

Meanwhile, Yepremyan had been planning to spend the afternoon with his friends, Ohan Barsamian and Ali Hosseini. At

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aggravated assault. Although Dzhuryan appealed his conviction, his appeal was "dismissed as abandoned" on December 3, 2013.

some point, Yepremyan told Barsamian "he might get in a fight." At Hosseini's house, Yepremyan told his friends about the offending text he had sent Wegrzyn. Barsamian testified that among his Armenian friends calling a woman a "bitch" is more disrespectful than it would be in English: "It's just viewed as a little bit more derogatory and the people . . . will take it very harshly and kill for it, obviously. . . . [I]t's a big deal in the Armenian community, you don't say it in Armenian."[5]

Yepremyan began receiving phone calls. One was from someone who identified himself as Lazar (i.e., Petrosyan) and screamed something at Yepremyan over and over. Yepremyan told the caller " 'I don't know who you are.' " After the caller hung up, Yepremyan said the guy had just kept repeating "My name is Lazar." During another phone call, apparently made by Jurian, who sounded more friendly, Barsamian heard Yepremyan say that he had certain evidence but he did not want to say what it was. During this call, although Barsamian could not hear what the caller was saying, the tone of the conversation and Yepremyan's words indicated that the interaction was calm. Yepremyan was friendly and used the Armenian word "aper," which means something like "bro." Barsamian testified

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[5] Manjikian asserts, without any citation to the record, that "[i]n Armenian culture, calling a woman a bitch is a serious insult, the equivalent of calling her a whore." Jurian does the same thing: "[Dzhuryan] eventually contacted Jurian and told him that [Yepremyan] had insulted his sister, essentially accusing her of being a whore." While arguing against the new trial motions after the appellants were convicted, the prosecutor referred to "confront[ing] Mike about calling Khatun Vardanian a bitch, equivalent of a whore."

Yepremyan told the caller that "he doesn't want to disrespect" and "he has evidence," but "he didn't want to say what he knew." Asked what he had gleaned about the potential for violence after hearing Yepremyan speak to Petrosyan and Jurian, Barsamian testified he thought "something was wrong" after Petrosyan's call, and that "whoever called right after in a calm tone, he also asked if we had evidence because that was going to dictate what would happen to us that night. So I wasn't quite sure what all that meant . . . ."

According to Kirakosyan, Dzhuryan wanted to go with Jurian to the meeting with Yepremyan, but Jurian refused to let him, saying: "[Y]ou're too upset, I don't want you to come with me." Kirakosyan testified he never heard Jurian say he was going to hurt Yepremyan. Cell phone records showed that at 7:01 p.m. there was a call from Jurian's phone to Yepremyan's phone, and then at 7:05 p.m. there was a call from Jurian's phone to Jurian's friend, appellant Zareh Manjikian. Manjikian subsequently arrived at Artur Akopyan's house, together with Jurian, within an hour or so before the shooting.

Yepremyan, Hosseini and Barsamian drove around trying to find a suitable place for the meeting; they wanted some place public, well-lit and safe. Barsamian was reluctant to go because he did not know what might happen, but he went along to support his friends. Hosseini testified there was talk about meeting some people, and that they drove around in Yepremyan's car "waiting to see what was going to happen." They were "[w]orried" because "we didn't know who was contacting us," but when Hosseini suggested not meeting the opposing group, Yepremyan said he didn't want to look like a "pussy."

At Yepremyan's request, Hosseini texted their friend Jonathan Bezjian this message: "Mike needs people, there could be a fight, will you be able to come with us." They contacted Bezjian because he had martial arts training. Bezjian was under the impression that Yepremyan's group was having "a little problem with some guys . . . like, probably we're going to go and talk it out." However, Bezjian thought there was a possibility of a "brawl" because, "knowing [Yepremyan], he's been a hot head and this has happened before." When Yepremyan's group picked up Bezjian, he had a shotgun with him because he had been "jumped the day before" and was in no physical condition to fight. The others told him to take the shotgun back into his house, but Bezjian insisted on bringing it. The others relented, but made it clear the gun had to remain in the trunk of the car and that it was not to be used during the encounter. Bezjian put the unloaded gun into the trunk of the car, although he kept some shotgun ammunition with him in the back seat of Yepremyan's car. The group eventually decided to meet Jurian at a Sears parking lot at the corner of Laurel Canyon Boulevard and Victory Boulevard in North Hollywood.

While Yepremyan, Hosseini, Barsamian, and Bezjian were waiting at the Sears lot, two more men arrived: Gevork Pashayan and Edgar Asaturyan. Someone from Yepremyan's group had contacted Pashayan and asked him to come help, but because Pashayan did not have a car he asked his friend Asaturyan for a ride.

Thirty minutes later, Jurian and Manjikian drove into the Sears lot. At this time, the Sears store was still open, the parking lot was lit, and there were other cars around and lots of people coming and going.

b. *The shooting at the Sears parking lot.*

All five of Yepremyan's friends witnessed the shooting and gave conflicting testimony regarding events at the Sears parking lot. However, it is undisputed that when Jurian and Manjikian arrived for the Sears confrontation, it was just the two of them facing off against six others: Yepremyan and his five friends. It is also undisputed on appeal that, although no witness saw a gun in Manjikian's hand that night, he was the person who shot Yepremyan. There was overwhelming circumstantial evidence at trial that Manjikian had been the gunman: the gunshot, which inflicted a point-blank wound to Yepremyan's skull, occurred when Yepremyan and Manjikian were fighting; Jurian was standing some distance away from Yepremyan; and the shot rang out at just the moment when Manjikian's hand was close to Yepremyan's head.

(1) *Ohan Barsamian.*

Ohan Barsamian testified a black BMW drove up and two men got out. The driver, Jurian, and the passenger, Manjikian, walked up to Yepremyan's group and introduced themselves. Yepremyan asked, "[W]ho's the brother," and Jurian said he was.[6] Either Jurian or Manjikian asked who "Mike" was and Yepremyan said " 'I am.' "

According to Barsamian, Manjikian then asked Yepremyan "why are you saying these things" and "what evidence do you

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[6] There was testimony that in Armenian culture the word "brothers" could be used to denote the relationship between cousins. An Armenian-speaking police officer testified it was common in Armenian culture for a cousin to refer to an older cousin as "big brother." Bezjian testified that among Armenians the word "brother" could even refer to "a real good friend."

have to say . . . such things." Yepremyan said, "I don't want to offend you guys and . . . [that] he didn't mean it in those terms." Manjikian said that if Yepremyan had evidence, Manjikian wanted to know what it was. Yepremyan said he did not want to tell, but Manjikian "insisted." Manjikian kept repeating, "[S]ay it so we know." While Yepremyan and Manjikian were talking, Jurian was just standing nearby "trying to act tough." Yepremyan finally said he had heard from Wegrzyn (i.e., his girlfriend) that Vardanian "went to a sex shop to get . . . lubricant . . . and she had given a hand job . . . to her ex-boyfriend or friend." Either Jurian or Manjikian said, "How do you know; you weren't there, were you?," to which Yepremyan replied, " 'Well, of course I wasn't there.' " One of them said, " 'Then you don't know for sure that it happened.' " Manjikian said, " 'Okay . . . let's put all of that to one side,' " and then he shouted, " 'Who do you think you are calling her a bitch?' " When Yepremyan looked confused and simply shrugged, Jurian hit him in the face. After Jurian hit Yepremyan, Manjikian swung his arm in a right-hook punching motion at Yepremyan's neck or the back of his head and simultaneously "there was a flash and a bang." Barsamian thought Manjikian had hit Yepremyan with an open hand. Yepremyan fell to the ground, "began to shake and . . . twitch" and he had "a hole in his neck and then . . . blood started to come from there."

(2) *Jonathan Bezjian.*

According to Yepremyan's friend, Jonathan Bezjian, Jurian was initially "very respectful" as the meeting got underway. He and Manjikian asked Yepremyan for an apology. Jurian said, " 'We just want to know why did you say that and an apology would be nice, that's all we need, that's all we want is an apology.' " But Yepremyan "didn't want to apologize. Something about he has his reasons or . . . he knows something." Bezjian thought Jurian was being respectful and not very assertive, which caused Manjikian to step in. Manjikian got in Yepremyan's face and started talking, while Jurian "kind of drifted" away. Yepremyan refused to back down and said Vardanian had engaged in sexual relations with someone who was not her boyfriend. In response, Manjikian "approach[ed] [Yepremyan] more aggressively" and then got mad and "just kind of smack[ed]" Yepremyan with an open hand. Yepremyan retaliated by punching Manjikian and then approached to hit Manjikian again. However, Manjikian made a swinging motion and a gunshot rang out and there was a smell of gunpowder.

Bezjian never saw a gun in Manjikian's hand. When Bezjian heard the gunshot, Jurian was standing 30 feet away from Yepremyan and Manjikian. Bezjian saw the look on Jurian's face when the gun went off: Jurian "looked shocked. Eyes were wide open" and it was "almost like his jaw was going to drop. He looked shocked pretty much." Bezjian testified he never saw Jurian hit Yepremyan.

(3) *Grevorg Pashayan.*

Asked why he believed he had been invited to the meeting, Grevorg Pashayan testified for "backup" because "[w]henever we Armenians go somewhere for like an argument or anything like

that, we basically travel in big packs. [¶] So [Yepremyan] didn't know how many people were going to come meet him so he told us, can you come lookout if anything happens just in case." Pashayan saw two men get out of the BMW and then Jurian approached and shook hands with everyone. A conversation started between Manjikian and Yepremyan. Manjikian asked Yepremyan why he sent the text message. Yepremyan said "he didn't mean what he wrote and he was just trying to apologize." But Manjikian then "just started going off on Mike, telling him what right do you have sending text messages like this, you don't even know her." Again, Yepremyan "said that he's just trying to apologize. He's not trying to fight. All he came to do was to apologize." But Manjikian "came closer to Mike," "face-to-face," and "started . . . cussing about Mike's mom." Manjikian then shoved Yepremyan, who pushed him back, "and then [Manjikian] started punching." Jurian "tried to get into the fight, but [Pashayan] held him back." Pashayan testified he told Jurian, "[I]f the fight's going to happen, let it be a one-on-one fight."

While Pashayan was paying attention to Jurian, a gunshot rang out. Pashayan did not see who fired it; all he saw was smoke and Yepremyan falling to the ground. When the gun went off, Jurian "looked surprised" and "froze." Manjikian started running back to the BMW, but Jurian just stood there like "he had no idea what was going on." It was not until Manjikian yelled at Jurian to " 'Get over here, get over here,' " that Jurian himself ran to the BMW and they drove off. Pashayan testified he never saw a gun that night.

(4) *Ali Hosseini.*

Ali Hosseini testified he did not see Jurian and Manjikian arrive because he was in the store using the bathroom. Hosseini,

who is not Armenian, did not understand much of the initial discussion. Jurian was talking to Yepremyan, and Manjikian was "standing there, just hands in his pockets." But then Jurian swore at Yepremyan, saying " 'Who the fuck are you?' " or "Who the hell are you?' " After Yepremyan said something in English about a "hand job," Jurian hit him. When Yepremyan moved to strike back, Manjikian stepped in and hit Yepremyan in the side of the head with "a hooking motion" and Hosseini "saw a flash and . . . heard a noise." Hosseini did not see a gun in Manjikian's hand.

After Yepremyan was shot, Barsamian and Hosseini decided Bezjian should leave the area because his shotgun was still in the car trunk and they did not want the police to think it had anything to do with the shooting. Hosseini drove Bezjian home and then returned to the shooting scene.

(5) *Edgar Asaturyan.*

Edgar Asaturyan testified Pashayan called him that afternoon to ask him for a ride to the Sears parking lot in North Hollywood. When they arrived, he was introduced to a group of people he did not know. Asaturyan was not sure why he was there, other than to give Pashayan a ride. After arriving, Asaturyan learned the meeting had something to do with a text message. Fifteen minutes later, a black BMW arrived, two men got out, and Jurian shook everyone's hand. After introducing himself, Jurian "was quiet" and Manjikian started talking to Yepremyan about the text message. Initially the tone of the discussion was "not too intense," but as Manjikian tried to find out more about why Yepremyan had sent the text message, things got more intense. Jurian just stood by, listening. Yepremyan explained why he had used the word bitch.

Yepremyan and Manjikian began raising their voices after Manjikian said something insulting that made Yepremyan mad. Asaturyan gave inconsistent testimony as to how the physical violence started: sometimes he said the fight started when Yepremyan hit Manjikian, and other times he said it started when Manjikian hit Yepremyan. Manjikian made a swinging or throwing motion, and his hand hit the back of Yepremyan's neck, at which point Asaturyan heard a "firework pop" and saw blood. He did not see a gun.

c. *Jurian's and Manjikian's disappearance.*

There was evidence indicating that, a few hours after the shooting, Manjikian made arrangements for a trip to Puerto Rico. He apparently drove through the night to Las Vegas, where he paid cash for a one-way airline ticket and flew to San Juan, Puerto Rico, at 8:30 a.m. the next morning.

Jurian failed to come home on the night of the shooting (he had been living in Van Nuys with his parents and two sisters) and he did not return for more than six months.

d. *The police investigation.*

A Los Angeles Police Department officer received a call about the shooting in the Sears parking lot at 8:45 p.m. and arrived at the crime scene five minutes later. An expended nine-millimeter shell casing and an expended intact bullet were found on the ground.

Hovik Dzhuryan (Khatun Vardanian's brother) was arrested the day after the shooting. The call history on his cell phone had been erased. The police put him and Vardanian in an interview room and surreptitiously recorded them. Dzhuryan asked Vardanian what she was doing at the police station, to which Vardanian replied: "Brother listen I didn't tell them

anything. I just said that you heard what happened." Vardanian said it was Wegrzyn who had "talked." Vardanian also said, "I didn't say who you were with and where you were," and "They said do you know where your brother was. I said no. Brother what happened[?] You shouldn't have done anything."

There followed this colloquy:

"[Vardanian]: He [presumably a reference to Yepremyan] didn't die. My family, my cousins, wouldn't do something like this.

"[Dzhuryan]: Ok. Kat relax! This is not the place or the time right now. Everything is getting recorded no need to talk."

Vardanian also said: "I didn't give them the names. I didn't give them yours either. I said I called, he said did your brother get upset. He wanted to know what I did so he would say that about me so he would get upset at me. I told them that with Armenians that's a very important thing that what a sister did to be like that."

The medical examiner testified Yepremyan died from a single gunshot wound to the head. The bullet, traveling in a downward direction, had entered "the back of the head on the left side" and exited on "the right side of his neck." The entry wound showed signs of "muzzle abrasion" caused by "the end of the gun being in contact with the surface of . . . the scalp." This meant the muzzle of the gun had been in physical contact with Yepremyan's head when the shot was fired. The medical examiner testified she could not say whether the shot had been fired intentionally or accidentally.

When one of the eyewitnesses to the shooting mistakenly identified Vahe Kirakosyan's brother Gevork as the gunman, Gevork was arrested several weeks after Yepremyan's death and

spent two months in jail. Jacleen Simjian was Gevork's girlfriend. When the police came to arrest Gevork, Simjian went down the street to the house where Vardanian and Dzhuryan were living. Simjian later told Detective Thomas Townsend that during this visit she heard Vardanian and Dzhuryan laughing about Yepremyan's killing, saying "he deserved what he got, ha-ha." Simjian recanted this statement at trial (testifying that Vardanian and Dzhuryan had only been laughing at the fact Gevork Kirakosyan had been arrested), although she acknowledged having told Detective Townsend they were laughing about Yepremyan's death.

2. *Defense evidence.*

a. *Artur Akopyan testimony.*

Artur Akopyan testified he had known Manjikian for 15 years and Jurian for five years. Jurian had once worked for him. Akopyan testified that Jurian and Manjikian had been friends for all of the five years that Akopyan had known Jurian.

On the day of the shooting, the three of them met at Akopyan's house in Lake Balboa for 15 or 20 minutes, sometime between 7:00 and 8:00 p.m. Manjikian and Jurian came to say goodbye because Akopyan was traveling to Cyprus the next day, and Manjikian had plans to go to Puerto Rico in a few days for business, leaving before Akopyan returned from his trip. Jurian did not say anything about going away himself. The next morning, when Akopyan had unexpected transportation problems, he called Manjikian for a ride to the airport but he could not reach him.

b. *Detective Kirkpatrick's testimony.*

Detective Timothy Kirkpatrick testified that he interviewed Vardanian on November 19. Before telling Vardanian that

Yepremyan had been killed, Detective Kirkpatrick asked Vardanian what she said to her brother, Dzhuryan, after reading the text message calling her a bitch. Part of the recording of that interview read:

"Detective Kirkpatrick: Why did you tell [Dzhuryan] that you wanted [Yepremyan's] ass kicked?

"Khatun Vardanian: Huh?

"Detective Kirkpatrick: You told him you wanted [Yepremyan's] ass to be kicked.

"Khatun Vardanian: I was mad. I was upset, but –

"Detective Kirkpatrick: If you said it, it's all right, it's okay . . . .

"Khatun Vardanian: No, I like a lot of people's asses to be kicked, honestly. I mean, I have, you know, people are just rude.

"Detective Castro: Uh-huh.

"Khatun Vardanian: But that doesn't necessarily mean they're going to go do anything. I say I want everyone's ass kicked, but if my family kicked everyone's ass, they'd be pretty busy. I mean –

"Detective Castro: Uh-huh.

"Khatun Vardanian: It's just hot when you're mad, it's kind of – it's kind of saying, go to hell. I hope you burn in hell. It's the same thing to me.

"Detective Castro: Okay.

"Khatun Vardanian: It doesn't sound like a big deal. [¶] . . . [¶]

"Detective Kirkpatrick: Do you remember saying that?

"Khatun Vardanian: Yeah.

"Detective Kirkpatrick: Okay.

"Khatun Vardanian: I said I personally want to kick his ass."

Detective Kirkpatrick also testified that, during the same interview, Vardanian said she had told Dzhuryan "to drop it," to which "he responded that he just wanted to talk to [Yepremyan]." Vardanian said Dzhuryan told her "nothing's going to happen."

3. *Trial outcome.*

Following a six-week jury trial, Vardanian, Manjikian, and Jurian were convicted of conspiracy to commit assault by means of force likely to produce great bodily injury (§§ 182, 245, subd. (a)(1)), and Manjikian and Jurian were convicted of first degree murder (§ 187). In addition, enhancements for principal armed with a firearm were found true as to Vardanian and Jurian (§ 12022, subd. (a)(1)); and an enhancement for personally discharging a firearm causing death or great bodily injury was found true as to Manjikian (§ 12022.53, subds. (b), (c), (d)). The trial court sentenced Vardanian to probation for five years, Manjikian to prison for 50 years to life, and Jurian to prison for 25 years to life.

## CONTENTIONS

Appellants contend (1) the trial court erred by denying appellants' motions to sever their trials; (2) there was insufficient evidence to sustain appellants' convictions for conspiracy to commit aggravated assault; (3) there was insufficient evidence to sustain Jurian's and Manjikian's convictions for first degree murder; (4) there was insufficient evidence to sustain the arming enhancement against Vardanian; (5) the trial court gave an erroneous aiding and abetting instruction as it related to Jurian's liability for murder; (6) the trial court erroneously admitted certain testimony by Simjian; (7) the trial court erred by

excluding evidence that Jurian told his father the shooting had been an accident; (8) there was prosecutorial misconduct; (9) there was cumulative error; (10) the trial court erred by denying Manjikian's motion for a new trial; (11) the trial court erred by ordering the appellants to pay restitution for certain expenses related to Yepremyan's funeral; and (12) Manjikian is entitled to a resentencing hearing under newly enacted statutory law.

**DISCUSSION**

1. *Trial court did not err by refusing to grant defendants' severance motions.*

Appellants contend the trial court abused its discretion when it denied their motions for separate trials. We disagree.

a. *Background.*

Vardanian moved to sever her trial from that of Jurian and Manjikian, arguing the discrepancy in severity between the conspiracy charge she was facing and the murder charges they were facing would inevitably prejudice her in the jury's eyes. Jurian moved to be tried separately from Manjikian, arguing they had antagonistic defenses and that the weak case against him would be bolstered by the stronger case against Manjikian. Manjikian joined in both of his coappellants' severance motions.

Pointing out that the conspiracy evidence was cross-admissible against all of the codefendants, that the murder and conspiracy charges were factually related, and that there was ample evidence Vardanian and Dzhuryan[7] had initiated the

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[7] Dzhuryan was tried and convicted along with Vardanian, Manjikian and Jurian, but has abandoned his appeal in this court.

conspiracy, the trial court denied Vardanian's severance motion. The trial court stated that its "primary reason for denying . . . is the cross-admissibility of the evidence."

As to Jurian's severance motion, the trial court concluded that any conflict between his defense and Manjikian's defense was speculative at that point in the proceedings and, if it ever materialized, it would not be so great that the jury would not be able to differentiate their degrees of culpability. The trial court also concluded: "[T]his is not a prejudicial instance of a weak case being joined with a strong case. Here there is sufficient independent evidence, if believed by a jury, against both Defendants Jurian and Manjikian." The severance motions of Jurian and Manjikian were denied.

b. *Legal principles.*

Section 1098 states a general preference for joint trials: "When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials."

A trial court's denial of a motion to sever is reviewed for abuse of discretion. (*Belton v. Superior Court* (1993) 19 Cal.App.4th 1279, 1285.) Severance is not required, or even justified, merely because two codefendants will present conflicting or antagonistic defenses. " 'Rather, to obtain severance on the ground of conflicting defenses, it must be demonstrated that the conflict is so prejudicial that [the] defenses are irreconcilable, and the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty.' [Citations.] Stated another way, ' "mutual antagonism" only exists where the acceptance of one party's defense will preclude the acquittal of the other.' " (*People v. Hardy* (1992) 2 Cal.4th 86, 168.)

" ' " ' "The burden is on the party seeking severance to clearly establish that there is a substantial danger of prejudice requiring that the charges be separately tried." [Citation.] [¶] "The determination of prejudice is necessarily dependent on the particular circumstances of each individual case, but certain criteria have emerged to provide guidance in ruling upon and reviewing a motion to sever trial." [Citation.] Refusal to sever may be an abuse of discretion where: (1) evidence on the crimes to be jointly tried would not be cross-admissible in separate trials; (2) certain of the charges are unusually likely to inflame the jury against the defendant; (3) a "weak" case has been joined with a "strong" case, or with another "weak" case, so the "spillover" effect of aggregate evidence on several charges might well alter the outcome of some or all of the charges; and (4) any one of the charges carries the death penalty or joinder of them turns the matter into a capital case. [Citations.]' " ' [Citations.]" (*People v. Vines* (2011) 51 Cal.4th 830, 855.)

"Cross-admissibility of evidence is sufficient but not necessary to deny severance. [Citation.] As the four-part test is stated in the conjunctive, joinder may be appropriate even though the evidence is not cross-admissible and only one of the charges would be capital absent joinder. [Citation.]" (*People v. Manriquez* (2005) 37 Cal.4th 547, 574.) "Cross-admissibility is the crucial factor affecting prejudice. [Citation.] If evidence of one crime would be admissible in a separate trial of the other crime, prejudice is usually dispelled. [Citation.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 530–531.)

c. *Discussion*.

Jurian argues the trial court erred by reasoning there was no danger of a prejudicial spillover effect from Manjikian's case.

Jurian asserts that, although nobody testified to having seen Manjikian in possession of a gun, the eyewitness descriptions of the shooting provided strong circumstantial evidence that Manjikian shot Yepremyan. We agree with this interpretation of the evidence, but not with Jurian's additional assertion that "the prosecution had *no* admissible evidence to show that Jurian . . . asked someone else to bring a weapon, or was even aware a weapon was in someone else's possession at the time of the shooting." Although there was no direct evidence that Jurian knew Manjikian had brought a gun to the Sears confrontation, that was a fair inference from the trial testimony because Manjikian's *only* apparent connection to the dispute was his friendship with Jurian.

There was evidence that almost immediately after learning from Dzhuryan that Vardanian had been insulted, Jurian contacted Manjikian. Jurian acknowledges it would be reasonable to infer that "*some* conversation about the meeting occurred between the two men before" they arrived at the Sears parking lot, but he argues it would not be reasonable to make any inferences about the subject of their conversation. We disagree. Given that Manjikian's actions at Sears demonstrated he knew all about both the insulting text message and Yepremyan's claim to have evidence of Vardanian's bad behavior warranting the insult, and given the evidence showing Jurian stood aside and let Manjikian take the more aggressive role in confronting Yepremyan (despite the fact they were outnumbered six to two), a reasonable jury could have concluded that Jurian recruited Manjikian into the conspiracy to assault Yepremyan and likely knew Manjikian was in possession of a gun.

Jurian argues there was a "possibility that Manjikian could have provided exonerating testimony, had there been separate trials" by testifying that Jurian knew nothing about the gun "and that Jurian's only purpose in going to the meeting was to seek an apology." But Jurian cites no evidentiary support for these speculative possibilities. Moreover, had the jury believed Manjikian's theory at trial—i.e., that Manjikian did not have a gun, and Yepremyan had been accidentally shot by one of his friends—it would have exonerated Jurian as well.

Manjikian asserts his severance motion should have been granted because his case was unfairly tainted by the strong conspiracy evidence against the other three defendants. He argues "there was no evidence that [he] had knowledge of the insult or any of the prior discussions between [Vardanian, Dzhuryan, and Jurian] that resulted in the meeting at the parking lot. Nor was there any evidence that [he] stepped into the confrontation until after [Yepremyan] either pushed or punched [Jurian]. Thus, the evidence of appellant's membership in a conspiracy to assault [Yepremyan] was extremely weak." Manjikian also argues that "[i]n a separate trial, none of the evidence preceding the meeting in the Sears parking lot would have been admissible against [him]." We disagree.

The circumstantial evidence demonstrated Jurian got Manjikian involved in the dispute within minutes of first talking to Yepremyan about setting up the meeting to discuss the insult and, as Jurian acknowledges, a reasonable jury could have concluded that Jurian filled Manjikian in on the details during the time they spent together prior to the Sears confrontation. Manjikian's aggressive conduct at Sears—both verbal and physical—revealed his active participation in the conspiracy.

Contrary to Manjikian's assertion, several witnesses testified he joined the confrontation *before* Yepremyan and Jurian ever tangled physically. That is, while Hosseini and Barsamian had Jurian striking Yepremyan first, Bezjian and Pashayan testified that it was Manjikian who struck or shoved Yepremyan first. And, although Asaturyan gave inconsistent accounts, the only inconsistency was whether Manjikian hit Yepremyan first or Yepremyan hit Manjikian first.

Manjikian properly asserts the evidence that Vardanian and Dzhuryan laughed about Yepremyan's death, and said he got what he deserved, probably would not have been admissible against him in a separate trial because they were statements made after the aim of the conspiracy had been achieved. (See Evid. Code, § 1223[8]; *People v. Pic'l* (1981) 114 Cal.App.3d 824,

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[8] "Under Evidence Code section 1223, three preliminary facts must be established for evidence of a coconspirator's [hearsay] declaration to be admissible: (1) that the declarant was participating in the conspiracy in question at the time of the declaration, (2) that the declaration furthered or was meant to further the conspiracy's objective, and (3) that the party against whom the evidence is offered was—at the time of the declaration—participating in the conspiracy, or would later participate in it. [Citations.] The party offering the coconspirator statements is required to present 'independent evidence to establish prima facie the existence of . . . [a] conspiracy.' [Citation.] As we have stated in the context of establishing criminal liability for a conspiracy, '[e]vidence is sufficient to prove a conspiracy to commit a crime "if it supports an inference that the parties positively or tacitly came to a mutual understanding to commit a crime. [Citation.] The existence of a conspiracy may be inferred from the conduct, relationship, interests, and activities of the alleged conspirators

886, disapproved on other grounds in *People v. Kimble* (1988) 44 Cal.3d 480, 498 [where conspiracy had terminated, implied hearsay statement was inadmissible under coconspirator exception to hearsay rule].) But, as Manjikian acknowledges, the trial court instructed the jury that this evidence was to be considered only against Vardanian and Dzhuryan, and we will assume the jury followed the court's instruction. (See *People v. Thompson* (2016) 1 Cal.5th 1043, 1118 ["We assume the jury followed this [jury] instruction."]; *People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 40 ["less drastic measures than severance, such as limiting instructions, often will suffice to cure any risk of prejudice"].) Manjikian also complains about Vardanian's police interview in which she responded to the news of Yepremyan's death by asserting that her family could not have done such a thing and that "[t]here had to be other people there." Manjikian could not have been prejudiced by this evidence because his ultimate defense was not mistaken identification as one of the Sears confrontation participants, but rather that—although he was present—someone else shot the victim.

In her appellate briefing, Vardanian does not specifically argue the severance issue, although she states that she is joining all other parties' claims to the extent they benefit her. The assertion that her joinder in the trial of the others was improper is not illuminated by the appellate arguments made by either Jurian or Manjikian and we decline to address Vardanian's claim. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363–364 ["Appellate counsel for the party

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before and during the alleged conspiracy." ' [Citation.]" (*People v. Clark* (2016) 63 Cal.4th 522, 562.)

purporting to join some or all of the claims raised by another are obligated to thoughtfully assess whether such joinder is proper as to the specific claims and, if necessary, to provide particularized argument in support of his or her client's ability to seek relief on that ground. If a party's briefs do not provide legal argument and citation to authority on each point raised, ' "the court may treat it as waived, and pass it without consideration. [Citations.]" ' [Citation.]"].)

In sum, we conclude the trial court did not abuse its discretion in denying appellants' motions for severance.

2. *There was sufficient evidence appellants entered a conspiracy to commit aggravated assault*.

All three appellants contend there was insufficient evidence to sustain their convictions of conspiracy to commit assault by means of force likely to cause great bodily injury. There is no merit to their claims.

a. *Legal principles.*

"The crime of conspiracy is defined in the Penal Code as 'two or more persons conspir[ing]' '[t]o commit any crime,' together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance thereof. (Pen. Code, §§ 182, subd. (a)(1), 184.) 'Conspiracy is a "specific intent" crime. . . . The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. . . . To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not only that the conspirators intended to agree *but also that they intended to commit the elements of that offense*.' [Citation.]" (*People v. Swain* (1996) 12 Cal.4th 593, 600.)

" ' " 'In contemplation of law the act of one [conspirator] is the act of all. Each is responsible for everything done by his confederates, which follows incidentally in the execution of the common design as one of its probable and natural consequences . . . .' " ' [Citations.] Thus, '[i]t is not necessary that a party to a conspiracy shall be present and personally participate with his co-conspirators in all or in any of the overt acts.' [Citation.]" (*People v. Morante* (1999) 20 Cal.4th 403, 417; see *People v. Salcedo* (1994) 30 Cal.App.4th 209, 215 ["proof of conspiracy serves to impose criminal liability on all conspirators for crimes committed in furtherance of the conspiracy"].) " 'Criminal conspiracy is an offense distinct from the actual commission of a criminal offense that is the object of the conspiracy.' [Citation.] Other than the agreement, the only act required is an overt act by *any* of the conspirators, not necessarily the defendant, and that overt act need not itself be criminal. [Citation.]" (*People v. Smith* (2014) 60 Cal.4th 603, 616.)

"[A] conspiracy may be established by direct evidence or circumstantial evidence, or a combination of both. It need not be shown that the parties entered into a definite agreement, but it is sufficient if they positively or tacitly come to a mutual understanding to accomplish the act and unlawful design." (*People v. Calhoun* (1958) 50 Cal.2d 137, 144; see also *People v. Zamora* (1976) 18 Cal.3d 538, 559 [noting "the well established rule that the unlawful design of a conspiracy may be proved by circumstantial evidence without the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy"].) "It is, of course, unnecessary that each conspirator see the others or know who all the members of the conspiracy are. [Citations.] [¶] It is likewise

unnecessary that each conspirator participate in the overt acts. [Citations.]" (*People v. Buffum* (1953) 40 Cal.2d 709, 725, disapproved on other grounds in *People v. Morante* (1999) 20 Cal.4th 403, 430.)

"[W]here a person joins a conspiracy after its formation and actively participates in it, he adopts the prior acts and declarations of his fellow conspirators pursuant to the conspiracy *to the extent that evidence of those acts and declarations is admissible against him*. [Citations.] And . . . it is admissible against him only to show such matters as the nature and objectives of the conspiracy in which he joins, and the incidents thereof, but not to prove his guilt of substantive crimes theretofore committed." (*People v. Weiss* (1958) 50 Cal.2d 535, 565, disapproved on other grounds in *People v. Johnson* (1980) 26 Cal.3d 557, 570–571.)

"In assessing a claim of insufficiency of evidence, the reviewing court's task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, 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.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies

mainly on circumstantial evidence. [Citation.] ' "Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant's guilt beyond a reasonable doubt. ' "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment." ' [Citations.]" ' [Citation.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

The reviewing court is to presume the existence of every fact the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa*, *supra*, 6 Cal.4th at p. 1206.) Even if the reviewing court believes the circumstantial evidence might be reasonably reconciled with the defendant's innocence, this alone does not warrant interference with the trier of fact's verdict. (*People v. Towler* (1982) 31 Cal.3d 105, 118.) It does not matter that contrary inferences could have been reasonably derived from the evidence. As our Supreme Court said in *People v. Rodriguez, supra,* 20 Cal.4th 1, while reversing an insufficient evidence finding because the reviewing court had rejected contrary, but equally logical, inferences the jury might have drawn: "The [Court of Appeal] majority's reasoning . . . amounted to nothing more than a different weighing of the evidence, one the jury might well have considered and rejected. The Attorney General's inferences from the evidence were *no more inherently speculative* than the majority's; consequently, the majority erred in substituting its own assessment of the evidence for that of the jury." (*Id.* at p. 12, italics added.)

b. *Discussion*.

(1) *Vardanian's claim*.

Vardanian asserts the evidence was insufficient to prove she was a member of the conspiracy because "[t]here is no actual evidence that she asked her brother [Dzhuryan] to assault Mike Yepremyan or that [Dzhuryan] agreed to do so." She notes that Wegrzyn (Yepremyan's girlfriend) did not know exactly what Vardanian said to Dzhuryan when she transmitted Yepremyan's phone number to him, so "[a]ny suggestion that it was contemplated that [Dzhuryan] would pass on an assaulting intent to . . . Jurian is based on pure speculation." She also argues conspiratorial intent "is completely inconsistent with" her subsequent instruction to Dzhuryan that he should not involve Jurian. We are not persuaded by these arguments.

As our Supreme Court has explained, the prosecution need not prove "that the parties entered into a definite agreement, but it is sufficient if they . . . tacitly come to a mutual understanding to accomplish the act and unlawful design." (*People v. Calhoun*, *supra*, 50 Cal.2d at p. 144.) That is, "the unlawful design of a conspiracy may be proved by circumstantial evidence without the necessity of showing that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy." (*People v. Zamora*, *supra*, 18 Cal.3d at p. 559.)

Here, the evidence showed Vardanian had been angered by Yepremyan's insulting text message and that, in reaction, she contacted her brother Dzhuryan and transmitted to him Yepremyan's phone number because she wanted Yepremyan physically punished. Vardanian later told Wegrzyn that Vardanian's brother would be meeting up with Yepremyan and his friends. During a police interview which occurred before

Vardanian learned of Yepremyan's death, she in effect admitted that she had asked Dzhuryan to assault Yepremyan:

"Detective Kirkpatrick: *Why did you tell* [*Dzhuryan*] *that you wanted Mike's ass kicked*?

"Khatun Vardanian: Huh?

"Detective Kirkpatrick: You told him you wanted Mike's ass to be kicked.

"Khatun Vardanian: *I was mad. I was upset*, but –" (Italics added.)

The fact Vardanian quickly went on to downplay the implications of this statement by explaining she wanted "everyone's ass kicked," and it just meant "go to hell," would not preclude a reasonable jury from inferring that her initial response—that she told Dzhuryan she wanted Yepremyan's ass kicked because she was mad and upset at his insulting text message—had been the more honest response. This inference is further supported by Vardanian's statement to police that she "personally want[ed] to kick [Yepremyan's] ass," her statement at the police station to Dzhuryan assuring him that she had not told the police anything, and the evidence Vardanian was heard laughing about Yepremyan's death and saying "he deserved what he got." Perhaps most damning of all was the inculpatory inference to be drawn from the evidence that, upon learning Yepremyan had been killed, Vardanian's initial response was to say, "oh, my God," and then: "*I didn't know it was going to be my cousins*." (Italics added.)

The weight of this evidence raised a reasonable inference that Vardanian intentionally set in motion a conspiracy to physically punish Yepremyan for having insulted her.

Vardanian argues that, even if the evidence did demonstrate she had initiated a conspiracy to assault Yepremyan, she successfully withdrew from that conspiracy by urging Dzhuryan not to contact Jurian. She notes Kirakosyan told police that, while Kirakosyan, Petrosyan and Dzhuryan were at the movie theatre parking lot, Vardanian told Dzhuryan not to call Jurian. However, the persuasiveness of this argument that Vardanian remorsefully tried to call off the assault is undercut by the evidence that she also told Dzhuryan not to tell Jurian anything because "she was embarrassed," and the evidence that she was subsequently heard gloating over Yepremyan's death.

In any event, it is well-established that "withdrawal [from a conspiracy] avoids liability only for the target offense, or for any subsequent act committed by a coconspirator in pursuance of the common plan. '[I]n respect of the conspiracy itself, the individual's change of mind is ineffective; he cannot undo that which he has already done. [Fn. omitted.]' [Citation.]" (*People v. Sconce* (1991) 228 Cal.App.3d 693, 702.) Hence, even a successful withdrawal would not have negated Vardanian's liability for the crime of conspiracy, which is the only offense for which she was convicted. "The conspiracy count is an independent accusation, [citations], based upon the criminality attaching to an unlawful agreement followed by the performance of some act in pursuance of the joint design" (*People v. Robinson* (1954) 43 Cal.2d 132, 138), and "a distinct offense from the actual commission of the offense forming the object of the conspiracy and . . . guilty parties may be legally convicted of both offenses" (*People v. Travis* (1959) 171 Cal.App.2d 842, 844). The overt acts charged here included Vardanian calling Dzhuryan and asking him to beat up

Yepremyan because he called her a bitch, and Vardanian giving Yepremyan's cell phone number to Dzhuryan.

Hence, even if Vardanian successfully withdrew from the conspiracy by telling Dzhuryan to call off the assault on Yepremyan, there was still sufficient evidence to sustain her conviction for simple conspiracy.

(2) *Jurian's claim*.

Jurian contends there was insufficient evidence to sustain his conviction of conspiracy to commit aggravated assault against Yepremyan because the evidence proved no more than that he "tried to play the peacemaker" by seeking an apology from Yepremyan for the insulting text message, and the only reason an altercation occurred at all was because Yepremyan was an "aggressive 'hothead.' " But while that was one version of events a reasonable jury could have gleaned from the evidence, an equally credible version was that after Dzhuryan passed on news of the insult to him, Jurian sent Dzhuryan home and proceeded to recruit Manjikian to join him in carrying out the conspiracy against Yepremyan.

Jurian's opening brief states: "We know Jurian did not have a weapon . . . ." Actually, we know no such thing; there was simply no evidence at trial on this point one way or the other. In any event, it hardly matters because the circumstantial evidence overwhelmingly demonstrated both that Manjikian had a weapon and that it was Jurian who recruited Manjikian into the conspiracy to assault Yepremyan. Moreover, when asked if anything had been said to indicate the people they were meeting were coming to commit violence, Barsamian testified that, during the initial flurry of phone calls to Yepremyan, Jurian issued a threat to Yepremyan by saying that whether or not he

(Yepremyan) actually "had evidence" of Vardanian's bad behavior "was going to dictate what would happen to us that night." This threat does not seem to manifest the state of mind of a "peacemaker."

As for Jurian's conduct at the Sears confrontation, while most of the eyewitness accounts had Manjikian being the more aggressive actor, two witnesses (Barsamian and Hosseini) testified Jurian threw the first punch. And while it is true that some witnesses testified Jurian looked completely shocked when Manjikian shot Yepremyan, it was for the jury to determine if that was because Jurian did not know Manjikian had brought along a gun, or merely because Jurian was surprised Manjikian used the gun at this particular moment in the confrontation. Moreover, Jurian did not immediately go to the police; rather, he did not go home at all that night and then disappeared for more than six months. (See *People v. Hill* (1967) 67 Cal.2d 105, 120 [" 'The flight of a person immediately after the commission of a crime . . . is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence.' "].) "[A] trial court is required by statute to instruct on flight when the prosecution relies on evidence of flight by a defendant as tending to show guilt [citation] . . . ." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1224.) The jury here was instructed on consciousness of guilt as manifested by flight.

There was sufficient evidence to sustain Jurian's conspiracy conviction.

(3) *Manjikian's claim*.

Manjikian contends there was insufficient evidence that he was part of the conspiracy because any hearsay statements uttered by Vardanian, Dzhuryan or Jurian prior to Manjikian's

personal involvement in these events were not admissible against him as coconspirator statements. But Evidence Code section 1223 provides, in pertinent part: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if: [¶] (a) The statement was made by the declarant while participating in a conspiracy . . . and in furtherance of the objective of that conspiracy; [¶] [and] (b) The statement was made *prior to* or during the time that the party was participating in that conspiracy." (Italics added.)

Manjikian acknowledges this rule, but then seeks to rely on two cases to establish a different rule, which he characterizes as follows: "A defendant who joins a conspiracy after its formation is liable only for the acts and declarations of co-conspirators during his membership." This implies that any coconspirator hearsay occurring before he joined the conspiracy cannot be used against him. However, the case law Manjikian cites does not support such a result. (See *People v. Van Houten* (1980) 113 Cal.App.3d 280, 289 [stating the general rule that " 'evidence of any acts or declarations of other conspirators prior to the time [that a late-joining coconspirator] becomes a member of the conspiracy may be considered by you in determining the nature, objectives and purposes of the conspiracy, but for no other purpose' "]; *People v. Skelton* (1980) 109 Cal.App.3d 691, 717, disapproved on other grounds in *People v. Figueroa* (1986) 41 Cal.3d 714, 731 [if *multiple* conspiracies are alleged, then "trial court was required to instruct the jury they were to determine whether there was *one* or *two* conspiracies and 'you will not consider any such acts or declarations against any defendant unless you find, beyond a reasonable doubt, that the

person doing the act, making the declaration, was a member of the same conspiracy as was that defendant.' "].)[9]

Manjikian argues Vardanian's police statement and the recorded conversation between Vardanian and Dzhuryan at the police station were inadmissible against him because they occurred *after* termination of the conspiracy. (See *People v. Saling* (1972) 7 Cal.3d 844, 852 ["It has long been the law in this state that a conspirator's statements are admissible against his coconspirator only when made during the conspiracy and in furtherance thereof. [Citations.] The conspiracy usually comes to an end when the substantive crime for which the coconspirators are being tried is either attained or defeated. [Citations.]"].) But any error in this regard was harmless because this evidence was not necessary in order to prove Manjikian's role in the conspiracy. Rather, his role in the conspiracy was demonstrated by the evidence that, after Vardanian saw Yepremyan's insulting text

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[9] Manjikian also cites CALJIC No. 6.19, but this instruction tends to undermine, rather than support, his claim: "Every person who joins a conspiracy after its formation is liable for and bound by the acts committed and declarations made by other members in pursuance and furtherance of the conspiracy during the time that [he] [she] is a member of the conspiracy. [¶] A person who joins a conspiracy after its formation is not liable or bound by the acts of the co-conspirators or for any crime committed by the co-conspirators before that person joins and becomes a member of the conspiracy. [¶] [*Evidence of any acts done or declarations made by other conspirators prior to the time that person becomes a member of the conspiracy may be considered by you in determining the nature, objectives and purposes of the conspiracy, but for no other purpose*.]" (Italics added.)

message, she contacted her brother Dzhuryan, who in turn contacted Jurian. Jurian then brought Manjikian along to the impending confrontation. There was ample evidence Manjikian quickly took the leading role in confronting Yepremyan in the Sears parking lot, demanding to know what evidence Yepremyan had to justify the insult; and—according to Bezjian, Pashayan and Asaturyan—Manjikian was the first person who engaged in physical violence with Yepremyan. Manjikian may have wanted the jury to believe that he just came along to keep Jurian company, but it was reasonable to conclude Manjikian ended up playing exactly the tough-guy enforcer role that Jurian had planned for him.

There was sufficient evidence to sustain Manjikian's conspiracy conviction.

3. *There was sufficient evidence to sustain the convictions of Manjikian and Jurian for first degree murder.*

Manjikian and Jurian contend there was insufficient evidence to sustain their convictions for first degree murder. Manjikian claims there was insufficient evidence to prove the premeditation and deliberation elements of first degree murder, while Jurian additionally claims there was insufficient evidence to prove he aided and abetted a first degree murder.

a. *Legal principles.*

The various types of premeditation and deliberation evidence have been described as follows: "The type of evidence which this court has found sufficient to sustain a finding of premeditation and deliberation falls into three basic categories: (1) facts about how and what defendant did *prior* to the actual killing which show that the defendant was engaged in activity directed toward, and explicable as intended to result in, the

killing – what may be characterized as 'planning' activity; (2) facts about the defendant's *prior* relationship and/or conduct with the victim from which the jury could reasonably infer a 'motive' to kill the victim, which inference of motive, together with facts of type (1) or (3), would in turn support an inference that the killing was the result of 'a pre-existing reflection' and 'careful thought and weighing of considerations' rather than 'mere unconsidered or rash impulse hastily executed' [citation]; (3) facts about the nature of the killing from which the jury could infer that the *manner* of killing was so particular and exacting that the defendant must have intentionally killed according to a 'preconceived design' to take his victim's life in a particular way for a 'reason' which the jury can reasonably infer from facts of type (1) or (2). [¶] Analysis of the cases will show that this court sustains verdicts of first degree murder typically when there is evidence of all three types and otherwise requires at least extremely strong evidence of (1) or evidence of (2) in conjunction with either (1) or (3)." (*People v. Anderson* (1968) 70 Cal.2d 15, 26–27 (*Anderson*).)

The *Anderson* categories " 'are descriptive, not normative.' [Citation.] They are simply an 'aid [for] reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' [Citation.]" (*People v. Cole* (2004) 33 Cal.4th 1158, 1224.)

" '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. . . . " [Citations.]' " (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

"A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime." (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.)

"In reviewing a sufficiency of evidence challenge [in a murder case, as in any other case], we view the evidence in the light most favorable to the verdict and determine whether *any* rational trier of fact could have found the essential elements of the crime proven beyond a reasonable doubt. [Citations.]" (*People v. Gonzalez* (2012) 54 Cal.4th 643, 653.) "The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. [Citations.]" (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citations.]' [Citation.]" (*People v. Thomas* (1992) 2 Cal.4th 489, 514.)

b. *Discussion*.

There was extremely strong motive evidence in this case. The jury could have reasonably concluded that Vardanian, who had been gravely insulted by Yepremyan, contacted her brother Dzhuryan for assistance in retaliating against Yepremyan. After yelling at Yepremyan on the phone, Dzhuryan reached out to his cousin Jurian and conveyed his and Vardanian's anger about the insulting text message. Jurian told Dzhuryan to go home, that

he would take care of it. There was evidence Jurian directly threatened Yepremyan by saying that what happened to him that night would be dictated by what Yepremyan had to say for himself at the meeting. Jurian then contacted his friend Manjikian and filled him in about the nature of Yepremyan's insulting text. Manjikian apparently brought a loaded gun to the Sears confrontation. By several eyewitness accounts, Manjikian then took a leading role in the confrontation, aggressively interrogating Yepremyan about the insult to Vardanian and whether Yepremyan actually had any "evidence" to justify his insult, and then fighting with Yepremyan.

There is no doubt that the jury could have drawn a reasonable inference that animus toward Yepremyan, caused by his insulting text message, gave rise to a motive to kill. In *People v. Cruz* (1980) 26 Cal.3d 233, the defendant murdered his wife, his 15-year-old step-grandson, and his 10-year-old step-granddaughter "because they treated him without respect and were always picking on him and making derogatory comments about him in the presence of others." (*Id*. at pp. 240–241.) Our Supreme Court concluded that "[d]efendant's pent-up resentment toward his victims establishes the prior relationship from which the jury reasonably could infer a motive for the killings." (*Id*. at p. 245.)

Hence, the jury could have reasonably concluded Manjikian made a premeditated and deliberate decision to kill Yepremyan once the confrontation had escalated from mere angry words to shoving and punching. The jury alternatively could have concluded that Manjikian intended all along to shoot Yepremyan. Further, the jury reasonably could have inferred that Jurian knew Manjikian had the gun, given that Manjikian had no

independent connection to the parties to the dispute and accompanied Jurian at Jurian's request, presumably to serve as "back up" in the confrontation. Although outnumbered six to two, Jurian and Manjikian expressed no hesitation about confronting Yepremyan's group, suggesting both knew the gun was available in case the other group got the upper hand. Both Jurian and Manjikian immediately fled the scene, apparently concealed the murder weapon (which was never found), and then disappeared for long periods of time. This flight demonstrated consciousness of guilt for the murder and also tended to establish premeditation and deliberation. (See, e.g., *People v. Moon* (2005) 37 Cal.4th 1, 27–28 [evidence of flight tended to demonstrate premeditation and deliberation].)

Manjikian argues the motive element was lacking as to him because the evidence did not show he had "any prior relationship" with Yepremyan "or that they had ever even met." But such a prior relationship was unnecessary; the evidence amply demonstrated that Jurian provided Manjikian with a motive by filling him in about the insulting text message. Manjikian's aggressive conduct toward Yepremyan at the Sears confrontation demonstrated he had either personally embraced Jurian's anger or that he was willing to pretend he had in order to be of service to Jurian.

Although the manner of killing—coming in the midst of a violent argument—could have suggested Manjikian's lack of premeditation and deliberation, that was an issue for the jury to decide. Bringing a gun to the Sears confrontation demonstrated Manjikian was prepared to use deadly violence. (See, e.g., *People v. Miranda* (1987) 44 Cal.3d 57, 87, disapproved on other grounds by *People v. Marshall* (1990) 50 Cal.3d 907 ["that defendant

brought his loaded gun into the store and shortly thereafter used it to kill an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance"]; *People v. Alcala* (1984) 36 Cal.3d 604, 626, superseded by statute on other grounds as stated in *People v. Falsetta* (1999) 21 Cal.4th 903, 911 ["when one . . . brings along a deadly weapon which he subsequently employs, it is reasonable to infer that he considered the possibility of homicide from the outset"].)

Jurian argues there was no evidence proving he knew Manjikian was going to commit murder, that he did anything to encourage Manjikian to do so, or that he "conducted himself in such a way as to aid or assist the perpetrator in committing the crime." But this argument ignores the serious insult to Vardanian, Jurian's threat to Yepremyan (about how Yepremyan's answers at the meeting would dictate what would happen to him), Jurian's conduct at the Sears confrontation (where he became angry at Yepremyan after initially acting calm), and the testimony from two witnesses that it was Jurian (not Manjikian) who started the physical fight with Yepremyan.

Hence, there was not only extremely strong motive evidence here, but also ample planning evidence (setting up a meeting with the specific intent to confront Yepremyan about his insulting text message) and even some manner of killing evidence (a contact gunshot wound to the back of Yepremyan's head that traveled in a downward direction and exited from his neck). "[T]here was . . . evidence from which a rational trier of fact could have concluded [that Jurian] premeditated before killing. [The evidence that Jurian knew Manjikian was armed] was admittedly not overwhelming, but 'we need not be convinced beyond a reasonable doubt that defendant premeditated the murder[ ].

The relevant inquiry on appeal is whether " '*any* rational trier of fact' " could have been so persuaded.' [Citations.]" (*People v. Wharton* (1991) 53 Cal.3d 522, 546, fn. omitted.)

In sum, there was sufficient evidence to sustain first degree murder convictions against Manjikian as the direct perpetrator and Jurian as the aider and abettor.

4. *Sufficient evidence supported the arming enhancement against Vardanian.*

Vardanian contends there was insufficient evidence to sustain the armed-principal enhancement against her (see § 12022, subd. (a)(1)) because there was no evidence she ever discussed use of a gun with Dzhuryan, and it was not reasonably foreseeable to her that a gun would be used during the confrontation with Yepremyan. There is no merit to this claim.

Section 12022, subdivision (a)(1), provides in pertinent part: "[A] person who is armed with a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment pursuant to subdivision (h) of Section 1170 for one year, unless the arming is an element of that offense. *This additional term shall apply to a person who is a principal in the commission of a felony or attempted felony if one or more of the principals is armed with a firearm, whether or not the person is personally armed with a firearm*." (Italics added.)

As the Attorney General properly points out, this enhancement applied to Vardanian because both she and Manjikian were principals in the conspiracy,[10] Manjikian was

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[10] "One who conspires with others to commit a felony is guilty as a principal. [Citation.]" (*In re Hardy* (2007) 41 Cal.4th 977, 1025.)

armed, and liability for the arming enhancement is entirely vicarious and has no knowledge requirement. Thus, it does not matter whether Vardanian was unaware that a gun was going to be used by one of her coconspirators. "[A] finding that a principal was armed in the commission of the charged substantive offense adequately establishes that another person who was jointly charged with the substantive offense and who also is found to have been a principal in the charged substantive offense is subject to the armed-principal enhancement specified under section 12022, subdivision (a)(1) . . . . [¶] . . . In other words, a defendant is 'armed with a firearm' within the meaning of this subdivision if he or she participates as a principal in a crime in which one or more principals is armed. [Citation.]" (*People v. Paul* (1998) 18 Cal.4th 698, 705–706, fn. omitted; see *People v. McGreen* (1980) 107 Cal.App.3d 504, 524–525, disapproved on other grounds in *People v. Wolcott* (1983) 34 Cal.3d 92, 101 ["we do not believe that the Legislature intended to impose a scienter burden upon the prosecution to prove that a principal knew or should have known that his confederate in the commission of a felony was carrying a firearm"]; see also *People v. Overten* (1994) 28 Cal.App.4th 1497, 1501 ["there is no requirement an aider and abettor know any principal is armed with a firearm to be found vicariously armed under section 12022, subdivision (a)(1)"].)

Hence, the arming enhancement was properly imposed on Vardanian.

5. *Jurian's first degree murder conviction must be reversed for instructional error.*

Jurian contends that due to an instructional error by the trial court, his conviction for first degree murder must be reduced to a conviction for second degree murder. This contention has

merit (although the People may choose, as an alternative remedy, to retry Jurian for first degree murder on a direct aiding and abetting theory).

After Jurian was convicted, our Supreme Court decided *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), holding that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]" (*Id.* at pp. 158–159.) *Chiu* concluded 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." (*Id.* at p. 166.)

*Chiu* based this conclusion on the following reasoning: "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. [Citations.] Additionally, whether a direct perpetrator commits a nontarget offense of murder with or without premeditation and deliberation has no effect on the resultant harm. The victim has been killed regardless of the perpetrator's premeditative mental state. 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 and probable consequences doctrine, especially in light of the severe penalty involved and the above-stated public policy concern of deterrence." (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

*Chiu* went on to hold, however, that "[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.]" (*Chiu*, *supra*, 59 Cal.4th at pp. 166–167.) In this situation, then, the appellate court must determine whether, beyond a reasonable doubt, there is a basis in the record for concluding that the first degree murder verdict was based on a valid theory: "Because we now hold that a defendant cannot be convicted of first degree premeditated murder under the natural and probable consequences doctrine, we must determine whether giving the instructions here allowing the jury to so convict defendant was harmless error. 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. [Citations.]" (*Id.* at p. 167.)

Here the trial court instructed the jury that Jurian could be found guilty of murder if "[d]uring the commission of assault with a firearm, a co-participant in that assault with a firearm

committed the crime of murder" and "a reasonable person in [Jurian's] position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault with a firearm," but "[i]f the murder was committed for a reason independent of the common plan of the assault with a firearm, then the commission of murder was not a natural and probable consequence of assault with a firearm." The jury was *not* instructed that Jurian could be convicted of only second degree murder under this theory.

As noted, *ante*, there was quite striking testimony from several witnesses that Jurian appeared completely shocked when the gun went off. Bezjian testified he saw the look on Jurian's face when the shot was fired and that Jurian "looked shocked. Eyes were wide open . . ." and it was "almost like his jaw was going to drop." Pashayan testified he was paying attention to Jurian when the shot was fired, and that Jurian "froze" and "looked surprised." Certainly a juror who was not convinced that Jurian was guilty of first degree murder for having directly aided and abetted Manjikian could have reasonably relied on this eyewitness testimony to conclude, under the instructions given by the trial court, that Jurian was guilty of first degree murder under a natural and probable consequences theory. Hence, reversal is required. (See *Chiu*, *supra*, 59 Cal.4th at p. 168 ["These events indicate that the jury may have been focusing on the natural and probable consequence theory of aiding and abetting . . . . Thus, we cannot conclude beyond a reasonable doubt that the jury ultimately based its first degree murder verdict on a different theory, i.e., the legally valid theory that defendant directly aided and abetted the murder."].)

In these circumstances, we conclude the erroneous instruction was not harmless and that Jurian's first degree murder conviction must be reversed unless the People accept a reduction of the conviction to second degree murder. "If the People choose to retry the case, they may seek a first degree murder conviction under a direct aiding and abetting theory." (*Chiu, supra,* 59 Cal.4th at p. 168; see also *In re Lopez* (2016) 246 Cal.App.4th 350, 354, 357 [holding *Chiu* is retroactive in habeas context].)

6. *Trial court properly admitted evidence Vardanian laughed about Yepremyan's death.*

Vardanian contends the trial court erred when it admitted evidence that Simjian heard Vardanian and Dzhuryan laughing about Yepremyan's death and saying that he "deserved what he got." Vardanian argues Simjian recanted this statement, it was inflammatory, and it had minimal probative value. We conclude the trial court did not err by admitting this evidence.

a. *Background.*

When Gevork Kirakosyan was mistakenly arrested for the shooting of Yepremyan, his girlfriend Simjian was nearby and immediately went to the house where Vardanian and Dzhuryan lived. Simjian initially told Detective Townsend in a recorded statement that Vardanian and Dzhuryan were laughing about Yepremyan being shot and saying he deserved what he got.

The trial court decided to admit the testimony, reasoning that although it was inflammatory, it was "relevant to disprove any claim that Ms. Vardanian had tried to leave the conspiracy.[11] If she's here continuing to express hostility toward

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11 The jury received a conspiracy withdrawal instruction.

the victim, it would go to motive. [¶] If she allegedly set into motion a series of events that resulted in the person's death, the fact that she believes that person deserved to die even weeks afterwards, that's still relevant to how she felt about Mr. Yepremyan. [¶] So it's relevant and although it is inflammatory, its probative value would outweigh its prejudicial effect."

At trial, Simjian recanted the statement, saying she now recalled that Vardanian and Dzhuryan were laughing about the fact that Gevork Kirakosyan had been arrested by mistake. Later in her testimony, Simjian acknowledged she had told Townsend that she heard Vardanian and Dzhuryan laughing about Yepremyan's death, but testified that she had said this because she "was mad at everybody" for Gevork Kirakosyan's wrongful arrest.

b. *Analysis*.

"Relevant evidence is defined in Evidence Code section 210 to mean (in pertinent part) '. . . evidence . . . having any tendency in reason to prove or disprove any disputed fact . . . .' [¶] This definition of relevant evidence is manifestly broad. Evidence is relevant when no matter how weak it is it tends to prove a disputed issue." (*In re Romeo C.* (1995) 33 Cal.App.4th 1838, 1843.) Motive is always a relevant fact. (See *People v. Sykes* (1955) 44 Cal.2d 166, 170 ["Motive is a material fact."]; *People v. Vidaurri* (1980) 103 Cal.App.3d 450, 461 ["defendant's motive—a state-of-mind fact—is relevant to prove that he committed the offense charged"]; *People v. Perez* (1974) 42 Cal.App.3d 760, 767 ["Motive is always relevant in a criminal prosecution."].)

" '[W]hen an objection to evidence is raised under Evidence Code section 352, the trial court is required to weigh the

evidence's probative value against the dangers of prejudice, confusion, and undue time consumption. Unless these dangers "substantially outweigh" probative value, the objection must be overruled. [Citation.] On appeal, the ruling is reviewed for abuse of discretion.' [Citation.]" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1008.) " 'The prejudice which exclusion of evidence under Evidence Code section 352 is designed to avoid is not the prejudice or damage to a defense that naturally flows from relevant, highly probative evidence.' [Citations.]" (*People v. Zapien* (1993) 4 Cal.4th 929, 958 (*Zapien*).) Instead, the prejudice to which the statute refers is " ' "prejudging" a person or cause on the basis of extraneous factors. [Citation.]' " (*Id.*) This prejudice "applies to evidence which uniquely tends to evoke an emotional bias against the defendant as an individual . . . ." (*People v. Karis* (1988) 46 Cal.3d 612, 638.)

Certainly the callousness manifested by Vardanian's reported reaction to Yepremyan's killing was inflammatory. However, her reaction also was extremely probative with respect to her claimed withdrawal from the conspiracy. The jury had been instructed on what was required to constitute withdrawal from a conspiracy, and during closing argument Vardanian's attorney argued the evidence showed that if there had been a conspiracy, Vardanian had withdrawn from it. Evidence that weeks after the murder Vardanian said Yepremyan deserved what he got suggested to the contrary—i.e., that Vardanian did not withdraw from the conspiracy prior to the Sears confrontation.

We conclude the trial court did not err by admitting Simjian's statement to the police.

7. *Exclusion of Jurian's "it was an accident" extra-judicial statement.*

Jurian and Manjikian contend the trial court should have admitted, under the excited utterance hearsay exception, evidence that Jurian told his father the shooting had been "an accident." This claim has no merit.

a. *Background.*

Prior to trial, the prosecution sought a ruling precluding the defense from presenting evidence that Jurian's father, Abraham—some 13 hours after the shooting—received a phone call from his son during which Jurian was upset and said the shooting had been an accident. The trial court ruled this evidence could only come in as a prior consistent statement if Jurian testified in his own defense and said the shooting had been an accident.

According to a statement taken by the police, Jurian's father reported that at 10:00 a.m. on the morning following the shooting, Jurian called him: "I asked him why he didn't come home. He said . . . I just called home because last night I was in a fight and my friend killed somebody, and I don't know what to do. He said he was crying. He's scared. He says, I don't want to go to jail." A follow-up report apparently stated Abraham also told police that Jurian said: "[D]uring the fight, the person took out the gun and struck him with it. When fighting with his fist, while striking the victim with the back part of the gun, the gun went off accidentally killing him." In addition, Abraham apparently told Detective Townsend "that his son named the person who he was with, but gave the name Arsen subsequently at the grand jury. Abraham Jurian admits that that was a lie on the part of his son." The prosecutor argued this last statement

went to the question of reliability because Jurian was "manufacturing a name when he's talking to his father."

Defense counsel argued the testimony should be admitted under the excited utterance hearsay exception, but the trial court disagreed: "[F]irst, the utterance has to occur before there was time to contrive and misrepresent. Here we have 13 hours. [¶] Second, . . . I don't believe anyone is contending that there actually was an Arsen involved . . . in the case. In other words, there has been time to contrive and misrepresent because something was contrived and misrepresented."

b. *Legal principles.*

Evidence Code section 1240 provides: "Evidence of a statement is not made inadmissible by the hearsay rule if the statement: [¶] (a) Purports to narrate, describe, or explain an act, condition, or event perceived by the declarant; and [¶] (b) Was made spontaneously while the declarant was under the stress of excitement caused by such perception." "[T]he basis for the circumstantial trustworthiness of spontaneous utterances is that in the stress of nervous excitement, the reflective faculties may be stilled and the utterance may become the instinctive and uninhibited expression of the speaker's actual impressions and belief. [¶] The crucial element in determining whether a declaration is sufficiently reliable to be admissible under this exception to the hearsay rule is . . . not the nature of the statement but the mental state of the speaker. The nature of the utterance—how long it was made after the startling incident and whether the speaker blurted it out, for example—may be important, but solely as an indicator of the mental state of the declarant. The fact that a statement is made in response to questioning is one factor suggesting the answer may be the

product of deliberation, but it does not ipso facto deprive the statement of spontaneity." (*People v. Farmer* (1989) 47 Cal.3d 888, 903–904, disapproved on other grounds by *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.)

Evidence of excited utterances may properly be excluded for unreliability. "In the final analysis the issue is whether the [purported excited utterance] has an indicia [*sic*] of reliability so as to permit its admission [as an excited utterance] in the absence of the declarant's testimony." (*People v. Gutierrez* (2000) 78 Cal.App.4th 170, 181.) Courts have routinely disallowed alleged excited utterance testimony where the declarant had a reason to lie. (See *People v. Fain* (1959) 174 Cal.App.2d 856, 861 [after accident, defendant-declarant had strong motive to lie about who was driving because he lost his driver's license for speeding violations and it had been returned only the day before]; *People v. Keelin* (1955) 136 Cal.App.2d 860, 870–871 [victim-declarant's identification of defendant was suspicious because victim had motive to lie]; *Dolberg v. Pacific Electric Ry. Co.* (1954) 126 Cal.App.2d 487, 488–489 [motorman, who had been driving defendant's train when it hit plaintiff's truck, had obvious reason to lie about how the accident occurred].)

Jurian had an obvious motive to be untruthful to his father about the shooting because he was scared and did not want to go to jail. And, as the trial court pointed out, Jurian's statement contained at least one known lie: that his companion at the Sears confrontation had not been Manjikian, but another person named Arsen. Given the apparent unreliability of this proffered evidence, the trial court did not abuse its discretion by excluding it.

8. *Prosecutorial misconduct.*

Jurian and Manjikian contend their convictions must be reversed because the prosecutor committed various acts of misconduct before and during the trial. We are not persuaded.

a. *Legal principles.*

"Under California law, a prosecutor commits reversible misconduct if he or she makes use of 'deceptive or reprehensible methods' when attempting to persuade either the trial court or the jury, and it is reasonably probable that without such misconduct, an outcome more favorable to the defendant would have resulted. [Citation.] Under the federal Constitution, conduct by a prosecutor that does not result in the denial of the defendant's specific constitutional rights—such as a comment upon the defendant's invocation of the right to remain silent—but is otherwise worthy of condemnation, is not a constitutional violation unless the challenged action ' "so infected the trial with unfairness as to make the resulting conviction a denial of due process." ' [Citations.]" (*People v. Riggs* (2008) 44 Cal.4th 248, 298.)

"To preserve a misconduct claim for review on appeal, a defendant must make a timely objection and ask the trial court to admonish the jury to disregard the prosecutor's improper remarks or conduct, unless an admonition would not have cured the harm. [Citation.]" (*People v. Davis* (2009) 46 Cal.4th 539, 612.) Requesting and obtaining curative admonitions or instructions to the jury play an important role in protecting against alleged prosecutorial misconduct. "Simply to object or make an assignment of misconduct without seeking a curative admonition is generally not enough. [Citation.]" (*People v. Bonin*

(1988) 46 Cal.3d 659, 689, disapproved on other grounds in *People v. Hill* (1998) 17 Cal.4th 800, 823, fn. 1.)

Jurors generally will be presumed to have followed an admonition to disregard improper evidence or comments, because "[i]t is only in the exceptional case that 'the improper subject matter is of such a character that its effect . . . cannot be removed by the court's admonitions.' [Citation.]" (*People v. Allen* (1978) 77 Cal.App.3d 924, 934–935.)

b. *Discussion*.

(1) *Questioning Akopyan about his gun ownership*.

Artur Akopyan testified as a defense witness that Manjikian and Jurian visited him on the evening of the shooting to say goodbye. He testified he was planning to travel to Cyprus the next day and Manjikian was planning to leave shortly for Puerto Rico.

Manjikian and Jurian argue the prosecutor committed misconduct by asking Akopyan, on recross-examination, if he owned a nine-millimeter handgun in November 2009. After the trial court overruled an objection on grounds of relevancy and lack of foundation, Akopyan testified that he did not. Subsequently, Jurian's attorney complained the question had been improperly asked on rebuttal because it should have been part of the prosecution's case-in-chief (as an attempt to show where the gun used to shoot Yepremyan came from). The trial court agreed "this is . . . more in the nature of the People's direct than it is cross. It was beyond the scope of cross," but added: "I didn't sustain an objection on that ground because there is some marginal connection here." Asked if he was trying to show that "Mr. Akopyan was the source of the weapon used in this case?,"

the prosecutor answered, "Yes." Asked for an offer of proof demonstrating a good faith basis for having put this question to Akopyan, the prosecutor said he had just learned some things leading him to believe Akopyan might have been the source of the murder weapon: that Akopyan had a nine-millimeter handgun registered to him which (according to preliminary information from a police firearms examiner) was the type of nine-millimeter handgun that could have rifling characteristics consistent with the bullet found at the shooting scene, and that Jurian and Manjikian were at Akopyan's house 40 minutes prior to the shooting. Despite Akopyan's testimony that he did not own a nine-millimeter handgun, defense counsel complained the question itself implied that Akopyan had provided Jurian and Manjikian with the murder weapon.

The trial court was displeased with the way the prosecution had handled this issue: "The fact that you came upon this theory is . . . on the border of what was permissible on cross. This is clearly far more in the nature of direct examination than it is of cross. [¶] Nevertheless, it is in front of the jury, we got to deal with it. It's unfair and, frankly, horrifying if this implication were to be left out in front of the jury and the gun doesn't match up with the bullet." The trial court also said, "I really disagree with the notion that this is something you can spring on a witness and call it rebuttal. It ain't."

The trial court subsequently ruled it would exclude all evidence of Akopyan's firearm ownership and that no further testing on the gun needed to be done. The trial court instructed the jury "to disregard any testimony involving possible ownership

of guns by Mr. Akopyan and not assume as true anything implied by any question."[12]

Manjikian argues the prosecutor lacked a good faith belief that Akopyan possessed the murder weapon. "It is well established that a prosecutor may not ' "ask questions of a witness that suggest facts harmful to a defendant, absent a good faith belief that such facts exist." ' [Citation.] In other words, 'a prosecutor may not examine a witness solely to imply or insinuate the truth of the facts about which the questions are posed.' [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1186 (*Young*).) However, in *Young*, the Supreme Court found there was no prosecutorial misconduct where, "contrary to defendant's assertion, the trial court did not find the prosecutor lacked a good faith belief for his question . . . ; instead, the court concluded it was unsure whether there was a factual basis for the question." (*Ibid.*) For this reason, *Young* found no prosecutorial misconduct. Here, the prosecutor offered a good faith explanation[13] for his question and, although the trial court was upset by the question, its reaction seemed to have more to do with the context in which the question had been asked (on cross-examination), rather than the nature of the question itself. The trial court did not make a finding that the prosecutor lacked a

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[12] Akopyan later turned a nine-millimeter handgun over to the police, whose testing confirmed it had not been used to shoot Yepremyan.

[13] As the prosecutor informed the trial court, computer records indicated Akopyan had guns registered in his name in November 2009, and it turned out that Akopyan did own a nine-millimeter handgun.

good faith basis for asking the question. In addition, the witness had answered in the negative, so the only disputed evidence before the jury was Akopyan's statement that at the time of the shooting he did *not* own a nine-millimeter handgun.

Jurian complains that "[d]espite [the trial court's] strong condemnation of the prosecutor's unfair tactics, the only remedy provided by the court was a brief instruction to the jury . . . to disregard any testimony involving Mr. Akopyan's possible ownership of guns. That remedy was ineffective." However, "[a] jury is presumed to have followed an admonition to disregard improper evidence particularly where there is an absence of bad faith." (*People v. Allen*, *supra*, 77 Cal.App.3d at pp. 934–935.) We will assume the jury followed the court's admonition to ignore all references to Akopyan and a gun.

We find no prosecutorial misconduct in this situation.

(2) *Prosecutor referred to the shooting as an "execution*."

During redirect examination of Ali Hosseini, the following colloquy occurred: "By [the prosecutor]: [¶] Okay. First, Mr. Hosseini, Mike's parents, have they been nonchalant about the death of their son being *executed in* a parking lot? [¶] . . . [¶] [Objections from three defense counsel.] The Court: Excuse me. Overruled, but I will ask you to rephrase it. [¶] [The Court:] Basically, they care, don't they? [¶] The witness: They do care." Manjikian's attorney later moved for a mistrial based on the prosecutor's use of the word "execution." The prosecutor acknowledged "it was a poor choice of words" and the trial court denied the motion, saying the comment was improper but "I didn't even catch it when it did come up . . . ."

Manjikian acknowledges Hosseini had already testified to the circumstances of the shooting and, although use of the word "executed" may have been a little strong, it was not a complete distortion of the evidence. (See *People v. Millwee* (1998) 18 Cal.4th 96, 138 [prosecution's reference to victim's death as an "execution" was not misconduct because "the challenged term simply served as a shorthand means of describing an intentional and premeditated murder"].) Moreover, it was an isolated and fleeting remark. (See, e.g., *People v. Huggins* (2006) 38 Cal.4th 175, 208 [prosecutor's fleeting reference to biblical "judgment day," if misconduct, "was only a small part of [his] argument" and did not prejudice defendant].)

There was no prosecutorial misconduct.

(3) *Query as to lawyers hired by defendants.*

During his direct examination of Jacleen Simjian, the prosecutor asked her about the events surrounding the arrest of her boyfriend, Gevork Kirakosyan:

"Q. By [the prosecutor]: You knew it was serious, right?

"A. As far as I knew, I didn't really know much about it being serious. No.

"Q. Well, were you aware if Gevork had been going around talking to attorneys prior to being arrested?

"A. Yes.

"Q. Okay. And you were aware that he had been accompanied by—

"[Defense counsel]: Objection, Your Honor—

"The Court: . . . Sustained."

Then, during the prosecutor's redirect examination of Simjian, the following colloquy occurred:

"Q. . . . [Y]our father was present when you got the call about the search of Gevork's house, right?

"A. Yes.

"Q. And your father told Gevork he should go talk to the police right away, right?

"A. Yes.

"Q. And that's what Gevork said he was going to do, right?

"A. Yes.

"Q. But in the interim, he spoke to defendant Jurian and defendant Dzhuryan's father—"

At this point the trial court sustained a defense objection to the question on Evidence Code section 352 grounds, called for the next question, and the following colloquy occurred:

"Q. By [the prosecutor]: Okay. *Was it Gevork's idea to go talk to a lawyer?*

"A. *I don't know*.

"Q. Okay. As far as you knew, Gevork was going to go to the police—

"The Court: Excuse me. We are definitely—we're going to leave it. We're going to move on to a different area." (Italics added.)

Following Simjian's testimony, the trial court reproached the prosecutor, saying: "[Y]ou went into an area that I specifically said don't go into which is were there any attempts by the parents of the defendants to try and get lawyers for anybody. [¶] I specifically ruled in my pretrial rules that it had nothing to do with anything, cannot be attributed to the defendants. Why did you do that?" When the prosecutor said he thought that the questioning by Vardanian's attorney had been about to go into the subject, the court said, "Just because you think a door's been

open doesn't mean you get to walk through it without my permission."

Manjikian argues it was misconduct for the prosecutor to try to introduce evidence that had been previously ruled inadmissible. " ' "It is, of course, misconduct for a prosecutor to 'intentionally elicit inadmissible testimony.' [Citations.]" ' " (*People v. Tully* (2012) 54 Cal.4th 952, 1035.) However, even if the prosecutor had been improperly heading toward an impermissible subject, he never got there because of the witness's answer and the trial court's intervention. As the trial court said: "Motion for mistrial is denied and here's why. [¶] First, the witness answered, 'I don't know.' So there is no information before the jury as to who got in touch with whom to get lawyers involved. So no harm no foul there."

Manjikian does not dispute the trial court's determination that there was no prejudice accruing from this situation. We conclude there was no prosecutorial misconduct.

(4) *Jail cell searches*.

Manjikian contends the prosecutor committed misconduct by ordering searches of his and Jurian's jail cells before the trial began, thereby gaining improper access to privileged documents.

According to the prosecutor, he asked Detectives Townsend and Kirkpatrick, shortly before trial began, to have the Sheriff's Department search the jails cells of Jurian and Manjikian for any "additional evidence" relating to the case, specifically, communications between the two defendants themselves or with witnesses. Items taken from the cells by jail personnel were then reviewed by the detectives, who testified they were aware that they were not to inspect any documents that might be covered by the attorney-client privilege, but that they believed the materials

had been pre-screened by Sheriff's deputies. Detective Townsend testified he knew that he was not to examine " 'anything to do with an attorney.' " However, it appears errors might have been made in the process of seizing items from appellants' jail cells. For example, Detective Kirkpatrick was unaware that even documents written by a defendant at the request of counsel and relating to trial tactics might be privileged, even though the document was not written on attorney letterhead or marked "attorney/client privilege."

All of the seized items were shown to defense counsel. When a complaint was made that some of the seized documents might be privileged, the prosecutor turned everything over to the trial court and instructed the detectives to cease any review of items still in their possession. Detective Kirkpatrick testified he did not uncover any investigative leads in the items taken from Manjikian's cell; Detective Townsend testified he turned over to the prosecution only a single letter taken from Jurian's cell. The prosecutor confirmed that he examined the letter from Jurian's cell; as to Manjikian's cell, the prosecutor said he was told that nothing relevant had been found.

Following a hearing on the matter, the trial court made findings. "What happened here, I believe, is misconduct . . . by the deputies who didn't screen the material carefully enough. There may be misconduct in the procedures followed generally by the Sheriff's Department. [¶] The bottom line was that the prosecution team got material that they weren't supposed to get. It is privileged under the attorney/client communication privilege. It is attorney work product because the attorneys asked their clients to do this. [¶] And it's part of the general

Sixth Amendment right . . . to help prepare your own defense. That stuff shouldn't have been turned over."

The court said the prosecutor should have sealed up all the items and turned them over to the court immediately upon realizing there might be a privilege problem; however, it was acknowledged that the prosecutor did turn the items over a few days later. The trial court continued: "This misconduct however, isn't as egregious as that in the cases cited by the defense . . . . It's not so outrageous. It's more in the nature of sloppiness or negligence rather than intentional violation of privileges and protections. So that brings us to the question of prejudice. [¶] And my tentative finding here would be there's very little, if any, prejudice. Having reviewed the materials, they are kind of cryptic in a lot of ways. [¶] I don't think they necessarily tip the defense's hand as to any major issue. . . . [¶] So I'm finding no prejudice." And when denying Manjikian's subsequent new trial motion, the court said: "No evidence from that search was ever introduced in this trial, it was all kept out, and there's no showing, apart from speculation, of any advantage that the prosecution might have received from the materials that were received from the defendant's [*sic*] cells."

Manjikian argues that, "[a]lthough the prosecution did not introduce evidence from the searches of appellant's jail cell, the conduct had a chilling effect on the defense." Manjikian does not, however, offer any specific suggestion indicating how the defense had been harmed by what happened. We conclude the appellants have failed to show any prosecutorial misconduct.

(5) *Lying to the grand jury.*

Manjikian contends there was prosecutorial misconduct because the trial court "found that the prosecutor lied when he *told the grand jury* that police recorded Ani Postachian's statement." (Italics added.) Manjikian says nothing more about this claim, failing to even cite any portion of the record (which includes the grand jury transcript) that shows the prosecutor lying to the grand jury.

What the record does indicate is that the trial court (during its ruling on Manjikian's new trial motion) said to the prosecutor: "Saying something false *before* the grand jury knowing that it's false without a defense lawyer or a judge to call you on it, that's wrong." (Italics added.) Subsequently, the following colloquy occurred: "[The prosecutor:] Just so the record is clear, when the court indicates something was misrepresented to a grand jury, I'm assuming that has to do with a witness, she was told she was tape recorded when she was not tape recorded. [¶] The Court: That's precisely what I'm talking about."

We agree with the Attorney General that "it is unclear where in the record of the grand jury proceedings the prosecutor actually lied *to* the grand jury, and appellant Manjikian fails to provide any citation." (Italics added.) Apparently the incident referred to was an attempted ruse by the prosecutor to convince a witness that her conversation with a police officer had been tape recorded when, in fact, it had not. When the prosecutor responded to the trial court by saying, "I just want to make sure what the court is indicating [is] that the court would have handled things different, but it is not finding any misconduct," the court said: "There is no statute that I can point to that you

violated. There's no [rule] of professional conduct that I can say you broke."[14] Manjikian does not dispute this assertion.

We conclude there was no prosecutorial misconduct.

(6) *Prosecutor's arguments to the jury*.

Manjikian contends the prosecutor committed misconduct during both opening statement and closing argument. We disagree.

" ' "[T]he prosecution has broad discretion to state its views as to what the evidence shows and what inferences may be drawn therefrom." ' [Citation.]" (*People v. Welch* (1999) 20 Cal.4th 701, 752.) "To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner. [Citations.] In conducting this inquiry, we 'do not lightly infer' that the jury drew the most damaging rather than the least damaging meaning from the prosecutor's statements." (*People v. Frye* (1998) 18 Cal.4th 894, 970, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.)

Regarding the opening statement, Manjikian contends the prosecutor committed misconduct "by using the opening statement to argue his *theory* of the case to the jury" when he argued the killing had been premeditated. (Italics added.) But

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[14] The Attorney General also points out that "violations of prosecutorial rules at grand jury proceedings become immaterial and harmless once a petit jury has convicted the individuals in question of the crime beyond a reasonable doubt." (See *People v. Becerra* (2008) 165 Cal.App.4th 1064, 1072 [defendant's conviction shows perjury before grand jury "was immaterial and would not warrant reversal" after trial].)

"[t]he purpose of the opening statement is to inform the jury of the evidence the prosecution intends to present" and "[n]othing prevents the statement from being presented in a story-like manner that holds the attention of lay jurors *and ties the facts and governing law together in an understandable way*." (*People v. Millwee*, *supra*, 18 Cal.4th at p. 137, italics added; see also *People v. Dennis* (1998) 17 Cal.4th 468, 518 ["The function of an opening statement is not only to inform the jury of the expected evidence, but also to prepare the jurors to follow the evidence and more readily discern its materiality, force, and meaning."].)

As to closing argument, Manjikian contends the prosecutor improperly argued that Manjikian changed defense strategy during the trial, which "improperly suggested that his trial attorney concluded the defense was weak and that he was grasping for straws."

The prosecutor said: "At some point [Manjikian's attorney] changed from, my guy wasn't there to, okay, let's go with [a different shooter] shot Mike. And it's transparent." The trial court properly overruled a defense objection to this remark because the apparent reference to a tactical shift—from claiming Manjikian had never been at the Sears confrontation to asserting that Yepremyan had actually been killed with a gun brought to the scene by someone in his own group—did not misrepresent what had happened. As the trial court later remarked while denying Manjikian's new trial motion: "It would be inappropriate to talk about lawyers' tactics as somehow being indicative of a defendant's guilt. However . . . I'm keeping in mind that there was some basis for the argument apart from things that happened out of the presence of the jurors. The jurors could tell by the nature of the cross-examination that many questions were

aimed at a mistaken . . . identification defense and then later closing argument had to do with a different shooter. Be that as it may, even if it was inappropriate, I constantly told the jurors . . . over and over, 'What the lawyers say is not evidence.' "

The record indicates that the prosecutor was not implying he had inside knowledge of defense strategy; rather, he was referring to a flaw in the defense case that the jury would have witnessed. (See, e.g., *People v. Bemore* (2000) 22 Cal.4th 809, 846 ["prosecutor has wide latitude in describing the deficiencies in opposing counsel's tactics and factual account" and "may highlight the discrepancies between counsel's opening statement and the evidence"].)

There was no prosecutorial misconduct in this situation.

9. *Cumulative error.*

Appellants contend the cumulative effect of the alleged errors require reversal. However, as we have concluded, the only error at trial was the misinstruction of the jury regarding Jurian's potential liability for first degree murder on a natural and probable consequences theory, and that error will be remedied. Hence, the claim of cumulative error fails. (See *People v. Seaton* (2001) 26 Cal.4th 598, 639; *People v. Bolin* (1998) 18 Cal.4th 297, 335.)

10. *New trial motion by Manjikian.*

Manjikian contends the trial court erred when it denied his new trial motion based on insufficiency of the evidence to sustain his convictions. There is no merit to this claim.

A trial court must grant a defendant a new trial when the verdict is contrary to the evidence. (§ 1181, subd. (6).) "In considering a motion for a new trial on the ground of insufficiency of the evidence to support the verdict, the trial court

independently weighs the evidence, in effect acting as a '13th juror.' . . ." (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6.) "The court extends no evidentiary deference in ruling on a section 1181(6) motion for new trial. Instead, it independently examines all the evidence to determine whether it is sufficient to prove each required element beyond a reasonable doubt *to the judge,* who sits, in effect, as a '13th juror.' [Citations.] If the court is not convinced that the charges have been proven beyond a reasonable doubt, it may rule that the jury's verdict is 'contrary to [the] . . . evidence.' [Citations.]" (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 133.)

The trial court found there was sufficient evidence to conclude beyond a reasonable doubt that Manjikian's state of mind satisfied the test for premeditation and deliberation. The court reasoned: "You go, you don't want to fight, but you're prepared for a fight. You don't want to kill someone necessarily, but you are prepared to do it depending on how things play out. If that's how it went down, it is a premeditated murder." Manjikian argues this "conditional premeditation" theory "has no foundation in law" and is contrary to the way premeditation and deliberation is measured by the *Anderson* standard. Not so. As we have already noted, when discussing application of the *Anderson* factors, bringing a loaded weapon to the site of planned hostilities raises a fair inference that it might be used. (See *People v. Miranda*, *supra*, 44 Cal.3d at p 87 ["that defendant brought his loaded gun into the store and shortly thereafter used it to kill an unarmed victim reasonably suggests that defendant considered the possibility of murder in advance"]; *People v. Alcala*, *supra*, 36 Cal.3d at p. 626 ["when one . . . brings along a deadly weapon which he subsequently employs, it is reasonable

to infer that he considered the possibility of homicide from the outset"].)

The evidence showed Manjikian had been made aware of the brewing dispute regarding the insulting text message, that he was recruited to assist in the physical confrontation of Yepremyan, and that he brought along a gun. This evidence demonstrated Manjikian had prepared for the possibility of committing a murder, even if at the moment of his arrival at the Sears parking lot he was not yet sure he would kill Yepremyan. The evidence fairly showed that at some point before pulling the trigger, Manjikian made a decision to shoot Yepremyan, thus providing the element of premeditation and deliberation.

The trial court's denial of Manjikian's new trial motion did not constitute an abuse of discretion. (See *People v. Lewis* (2001) 26 Cal.4th 334, 364 [" 'A trial court's ruling on a motion for new trial is so completely within that court's discretion that a reviewing court will not disturb the ruling absent a manifest and unmistakable abuse of that discretion. [Citation.]' [Citation.]"].)

11. *Trial court did not err by awarding the requested amount of funeral expenses as victim restitution.*

The trial court ordered the appellants, jointly and severally, to pay victim restitution to Yepremyan's parents. Included in that award was $14,200 for a video, including an original musical score, that was shown at Yepremyan's funeral service. Jurian contends the award constituted an abuse of discretion because "*no evidence* was adduced to show that the creation of such a video was a necessary expense directly caused by defendants' criminal conduct, somehow appropriate to the culture of the victim's family, or sufficiently similar to any other

item of restitution previously approved by our appellate courts." We do not agree.

a. *Legal principles.*

"In 1982, California voters passed Proposition 8, also known as The Victims' Bill of Rights. At the time this initiative was passed, victims had some access to compensation through the Restitution Fund, and trial courts had discretion to impose restitution as a condition of probation. [Citations.] Proposition 8 established the right of crime victims to receive restitution directly 'from the persons convicted of the crimes for losses they suffer.' (Cal. Const., art. I, § 28, subd. (b).)" (*People v. Giordano* (2007) 42 Cal.4th 644, 652.) "Penal Code section 1202.4 now requires restitution in every case, without respect to whether probation is granted." (*Id.* at p. 653.) Section 1202.4, subdivision (f), provides: "[I]n every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order, based on the amount of loss claimed by the victim or victims or any other showing to the court."

"[T]he standard of proof at a restitution hearing is by a preponderance of the evidence, not proof beyond a reasonable doubt." (*People v. Baker* (2005) 126 Cal.App.4th 463, 469.) " ' "The standard of review of a restitution order is abuse of discretion. 'A victim's restitution right is to be broadly and liberally construed.' [Citation.] ' "When there is a factual and rational basis for the amount of restitution ordered by the trial court, no abuse of discretion will be found by the reviewing court." ' [Citations.]" [Citation.]' [Citation.]" (*People v. Keichler* (2005) 129 Cal.App.4th 1039, 1045 (*Keichler*). "A trial court

abuses its discretion when it determines [a restitution] award amount using other than 'a rational method that could reasonably be said to make the victim whole' or when an award is arbitrary or capricious." (*People v. Draut* (1999) 73 Cal.App.4th 577, 582, italics omitted.)

b. *Discussion*.

In its Final Restitution Order, the trial court properly noted that funeral expenses are an appropriate subject for restitution and then enumerated the funeral-related amounts sought by Yepremyan's parents: "That figure includes $950.00 for catering, $2,040.00 for the rental of a banquet hall, $4,799.14 for a tablet, $7,511.00 for mortuary expenses (including the casket), $1,454.74 for clothing, $1,035.00 for interment and recording, $4,900.00 for the gravesite, and $14,200.00 for the production of a video, with an original musical score, commemorating Gombert Yepremyan's life. The prosecution has submitted documentation supporting the claims."

The court awarded Yepremyan's parents the entire amount they sought. It explained: "While there must be some limitation on a defendant's liability for funeral expenses, the Yepremyan family's request . . . is within reason. Courts have considerable latitude in fashioning restitution orders and can take into consideration the cultural practices and the customs of the victim. (See *People v. Keichler* (2005) 129 Cal.App.4th 1039 [court properly ordered restitution for traditional Hmong healing ceremony after hearing testimony about its cultural significance].) It is altogether fitting that the Yepremyan parents commemorate the life of their 19-year-old son, which was suddenly and violently cut short, with an appropriate ceremony.

As the trial court's order in the *Rubics* case[15] . . . demonstrates, the amount sought in this case is not unprecedented. [¶] The court reverses its earlier tentative ruling, in which it halved the restitution order for the commemorative video, and grants the restitution request in full."

Jurian argues the propriety of this order depends on "whether the parents' decision to make a videotape and to commission an original musical score for it—to the tune of $14,200—created an economic loss *caused by* defendants' crimes or whether the parents' discretionary expenditure must be borne by them alone." Jurian acknowledges that "[w]hen a defendant's criminal act causes a death, certain things are commonly required or simply necessary in a decent society—a coffin, a grave, a marker, and other similar things associated with a funeral service," but asserts "the economic loss must be the 'direct result' of the defendant's criminal conduct. Here, the purchase and production of the videotape simply was not *directly caused by* the defendants' criminal conduct. Instead, it was the product of a discretionary decision made by the victim's parents and not a necessity associated with a proper burial." Correctly noting that the propriety of the funeral expense cost had not been at issue in *Rubics*, Jurian argues that "the portion of the restitution order requiring that the defendants pay the entire cost of the video production amounted to a windfall to the parents, and the amount of restitution was not based on any discernable method of calculation. It allows the parents to

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**15** *People v. Rubics* (2006) 136 Cal.App.4th 452 (*Rubics*), overruled on another ground by *People v. Martinez* (2017) 2 Cal.5th 1093. In *Rubics*, the court approved a $44,414 restitution order for funeral expenses.

recover an exorbitant discretionary expenditure which is not associated with most funerals and which was not directly caused by defendants' conduct. Neither is there any compelling cultural, religious or other reason given to justify the expenditure . . . ."

We are not persuaded by Jurian's arguments. First, the cost of holding a funeral for Yepremyan was clearly the "direct result" of the defendants' criminal conduct. This is not a case like *Rubics* in which the issue was whether a defendant could be made to pay restitution to compensate the economic losses flowing from the death he caused during a vehicle accident, rather than losses stemming from Rubics's actual crime: leaving the scene of an accident.[16] Second, the trial court's order states that the court based the restitution amounts on bills submitted

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[16] Our Supreme Court disapproved of the appellate court's reasoning in *Rubics*: "By its terms, section 1202.4 authorizes—indeed, requires—courts in Vehicle Code section 20001 cases to award direct victim restitution for losses resulting from the defendant's crime: that is, flight from the scene of the accident without identifying himself or herself, rendering aid, or otherwise fulfilling the statutory requirements. [Citation.] Where the flight leads to a delay in the victim's access to medical care, for example, and the victim's injuries are exacerbated as a result, those costs are properly characterized as the 'result of the commission of a crime' for the purposes of a restitution order. [Citation.] Similarly, the cost of tracking down a defendant who has fled the scene of the accident may be recoverable because such losses, too, result from the defendant's unlawful flight. Section 1202.4 does not, however, permit courts to order direct victim restitution for losses that occur as a result of an underlying accident that involves no criminal wrongdoing." (*People v. Martinez*, *supra*, 2 Cal.5th at p. 1107, fn. omitted.)

by the prosecutor, and Jurian has not disputed the accuracy of those bills.

Finally, we would point out that the contested funeral expense was incurred long before anyone was convicted for Yepremyan's killing, and thus at a time when his parents could not have known they might someday be compensated for their costs associated with creating a "life of" video.

We conclude the trial court's restitution award was rational and based on factual evidence, that it was neither arbitrary nor capricious (see *People v. Draut*, *supra*, 73 Cal.App.4th at p. 582) and, therefore, that the trial court did not abuse its discretion by making it.

12. *Sentencing claims based on new law*.

Manjikian contends he is entitled to the benefit of two new statutory amendments that went into effect on January 1, 2018. We agree.

Section 3051 has now been amended to require youth offender parole hearings for state prisoners who were 25 years or younger when their offenses were committed, replacing the former "under 23" limit. (See section 3051, subd. (a)(1) ["A youth offender parole hearing is a hearing by the Board of Parole Hearings for the purpose of reviewing the parole suitability of any prisoner who was 25 years of age or younger . . . at the time of his or her controlling offense."].) Manjikian was under 25 when he shot Yepremyan. Therefore, this matter is remanded for the limited purpose of allowing the parties the opportunity to make a record of Manjikian's characteristics and circumstances at the time of his offense, for use in his future youth offender parole hearing, as set forth in *People v. Franklin* (2016)

63 Cal.4th 261.[17] "The goal of any such proceeding is to provide an opportunity for the parties to make an accurate record of the juvenile offender's characteristics and circumstances at the time of the offense so that the Board, years later, may properly discharge its obligation to 'give great weight to' youth-related factors (§ 4801, subd. (c)) in determining whether the offender is 'fit to rejoin society' despite having committed a serious crime 'while he was a child in the eyes of the law' [citation]." (*Id*. at p. 284.)

Manjikian also argues his case should be remanded to the trial court for resentencing because section 12022.53 has been amended to give trial courts the discretion to dismiss firearm enhancements prescribed by this statute. "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).)

We conclude this statute applies retroactively to Manjikian on remand because his case is not yet final. The seminal case of *In re Estrada* (1965) 63 Cal.2d 740 (*Estrada*) stands for the principle that "When the Legislature has amended a statute to reduce the punishment for a particular criminal offense, we will assume, absent evidence to the contrary, that the Legislature intended the amended statute to apply to all defendants whose judgments are not yet final on the statute's operative date."

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[17] "The statutory text makes clear that the Legislature intended youth offender parole hearings to apply retrospectively, that is, to all eligible youth offenders regardless of the date of conviction." (*People v. Franklin*, *supra*, 63 Cal.4th at p. 278.)

(*People v. Brown* (2012) 54 Cal.4th 314, 323, citing *Estrada*, at pp. 742–748.) "The rule in *Estrada* has been applied to statutes governing penalty enhancements, as well as to statutes governing substantive offenses." (*People v. Nasalga* (1996) 12 Cal.4th 784, 792.) *Estrada* has also been applied to circumstances where there is not *actual* reduction of a penalty, but only the *possibility* of such a reduction. (*People v. Francis* (1969) 71 Cal.2d 66, 76, see also *People v. Superior Court (Lara)* (2018) 4 Cal.5th 299.) For the foregoing reasons, we conclude that the discretion to strike firearms enhancements under sections 12022.5 and 12022.53 may be exercised as to any defendant whose conviction is not final as of January 1, 2018.

The Attorney General argues we should not remand because the record shows that the trial court would not, in any event, have exercised its discretion to reduce Manjikian's sentence. We disagree.

The Attorney General likens this case to *People v. Gutierrez* (1996) 48 Cal.App.4th 1894, which denied a remand so the trial court could exercise newly-created discretion to strike Three Strikes prior convictions in the interest of justice because the trial court's sentencing comments indicated it would not have exercised such discretion had it been available. "In the present case, the trial court indicated that it would not, in any event, have exercised its discretion to lessen the sentence. It stated that imposing the maximum sentence was appropriate. It increased appellant's sentence beyond what it believed was required by the three strikes law, by imposing the high term for count 1 and by imposing two additional discretionary one-year enhancements. Under the circumstances, no purpose would be served in remanding for reconsideration." (*Id*. at p. 1896.)

We are not persuaded. Manjikian received a cumulative sentence of 50 years to life, which consisted of two mandatory 25-years-to-life terms (a mandatory 25-years-to-life enhancement under former section 12022.53, subdivision (d), plus a mandatory 25-years-to-life term for first degree murder under section 190). Hence, unlike in *Gutierrez*, the trial court here was in no position to exercise any discretion whatsoever when it sentenced Manjikian. Moreover, contrary to the Attorney General's assertions, the trial court's comments at sentencing and in denying Manjikian's new trial motion did not come close to constituting a forewarning that any remand for resentencing would be a useless exercise. We will remand to allow the trial court to reconsider the length of Manjikian's sentence given the court's new authority to strike the firearm-use enhancement.

## DISPOSITION

The judgments are affirmed in part, reversed in part, and remanded with directions. Vardanian's conspiracy conviction is affirmed. Jurian's conspiracy conviction is affirmed. Jurian's first degree murder conviction is reversed unless the People accept a reduction of this conviction to second degree murder. If the People choose to retry this charge, they may seek a first degree murder conviction against Jurian under a direct aiding and abetting theory. Manjikian's conspiracy and first degree murder convictions are affirmed and remanded with directions; his case is remanded for the limited purpose of having the trial court determine whether or not to strike Manjikian's section 12022.53, subdivision (d), firearm use enhancement, and to allow the parties an adequate opportunity to make a sufficient record of Manjikian's juvenile characteristics and circumstances at the time of his offense as set forth in *Franklin*.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

EDMON, P. J.

We concur:

LAVIN, J. DHANIDINA, J.*

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