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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ALLEN GONZALEZ et al., Defendants and Appellants.	B246141 (Los Angeles County Super. Ct. No. NA084747)

APPEAL from the judgments of the Superior Court of Los Angeles County, Mark C. Kim, Judge. Affirmed as modified.

Sally Patrone Brajevich, under appointment by the Court of Appeal, for Defendant and Appellant Allen Gonzalez.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant Ricky Padilla.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and William H. Shin, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * *

Allen Gonzalez and Ricky Padilla appeal the judgments following their convictions for multiple counts arising from a crime spree in February 2010. They raise various challenges to some of those counts, but we find no error warranting reversal. We correct certain sentencing errors and affirm the judgments as modified.

PROCEDURAL BACKGROUND

Following their crime spree in February 2010, appellants were charged with three counts of attempted willful, deliberate and premeditated murder (Pen. Code, §§ 187, subd. (a), 664;[1] counts 1, 3, 27); four counts of attempted murder (§§ 187, subd. (a), 664; counts 15, 16, 17, 18); four counts of assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2); counts 2, 4, 6, 8); two counts of shooting at an occupied motor vehicle (§ 246; counts 9, 11); one count of attempted carjacking (§§ 215, subd. (a), 664; count 10); one count of carjacking (§ 215, subd. (a); count 13); one count of first degree murder (§ 187; count 14); one count of kidnapping a victim under 14 years old (§§ 207, subd. (a), 208, subd. (a); count 28); one count of kidnapping for carjacking (§ 209.5, subd. (a); count 29); one count of assault with a firearm (§ 245, subd. (a)(2); count 30); and one count of attempted robbery (§§ 211, 664; count 31). Padilla was also charged with first degree residential burglary. (§ 459; count 12.) Gang enhancements were alleged for all counts (§ 186.22, subd. (b)) and firearm enhancements were alleged for all counts except count 12 (§ 12022.53, subds. (b)-(e)).

After a joint trial, the jury found Padilla guilty of counts 1, 2, 3, 4, 6, 8, 9, 10, 11, 12, 13, 14, 27, 30, and 31 and found all special allegations true, but deadlocked on counts 15, 16, 17, 18, and 28, so the trial court declared a mistrial on those counts. The jury found Gonzalez guilty of counts 1, 2, 3, 4, 6, 8, 9, 10, 11, 13, 27, 30, and 31 and found all special allegations true. The jury found Gonzalez not guilty on counts 14, 15, 16, 17, and 18, and deadlocked on count 28, so the court declared a mistrial on that count.[2] Padilla

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[1] All undesignated statutory citations are to the Penal Code unless otherwise noted.

[2] During trial, the trial court granted the prosecutor's motion to dismiss count 29 for both appellants.

was sentenced to life in prison without the possibility of parole, plus 137 years to life, plus 23 years four months, and Gonzalez was sentenced to 130 years to life in prison, plus 22 years. Both were assessed various fines, fees, and credits not at issue here. Both timely appealed.

FACTUAL BACKGROUND

1. Shooting in Compton on February 7, 2010 (Counts 14-18)

These counts are not at issue on appeal, so we only briefly summarize the underlying facts. On February 7, 2010, around 7:00 p.m., Tryquon Jenkins, his brother Chris Hazley, their cousin Sean McKinley, and friends Shamiah Ruffin and Jesse Holmes were standing near an intersection in Compton when a tan or brown Tahoe or Suburban pulled up with the passenger side facing them. The front passenger was identified as Padilla. He asked, "Where you from?" and McKinley replied, "It's the Mob over here," referring to a gang in Compton to which Jenkins belonged. Padilla then fired approximately five rounds at the group. McKinley was hit three times and died. Ruffin was hit in the leg and survived. Officers later recovered the Chevy Tahoe used in the shooting, which had been stolen from Daniel Virgen that morning.

2. Carjacking in Long Beach on February 10, 2010, at 1:55 p.m. (Counts 13, 28-31)

Three days later on February 10, 2010, around 1:55 p.m., Gonzalez and Padilla exited a white Nissan Sentra and approached Samuel Quezada-Tejeda as he buckled his three-year-old daughter into the back seat of his blue Honda Accord. Gonzalez carried a revolver and Padilla carried a semiautomatic gun. Padilla pointed his gun at Quezada-Tejeda's stomach and demanded money in Spanish, and Quezada-Tejeda responded he had only $10. Gonzalez also pointed a gun at him. Padilla took his car keys and got into his Honda while Gonzalez returned to the Nissan. Quezada-Tejeda asked them about 15 times to leave his daughter, who was in the back of his car crying. As Padilla drove away, Quezada-Tejeda ran after the car for a block. Padilla stopped, exited the car, pointed his gun at Quezada-Tejeda again, and told him to take his daughter, which Quezada-Tejeda did before Padilla drove away.

3. Culver City Residential Burglary on February 10, 2010, at 5:00 p.m. (Count 12, Against Padilla Only)

On February 10, 2010, around 5:00 p.m., Robert King heard the noise of something breaking while he was inside his house in Culver City. He saw a Hispanic man standing next to his neighbor's window and a blue Honda parked in the middle of the street in front of the house. While King was on the phone with the police, the driver of the Honda noticed him and began honking to alert the person standing in front of the neighbor's house. King described the person in front of the house as Hispanic wearing blue baggie shorts and a tan T-shirt. He also identified the license plate number for the car, which was the same as the license plate number for Quezada-Tejeda's car stolen earlier in the day.

An investigation of the house revealed that the window to the left of the front door had its screen removed, the window was open, and the glass was broken, which investigators determined was the point of entry. The screen from the window to the right of the front door had also been removed. Pieces of broken glass were found on the floor and on an ottoman inside the house. The screens on windows located at the side and rear of the house had also been partially removed and there were pry marks on the rear door of the house. Fingerprints found at the scene matched Padilla's right thumb print and Gonzalez's left thumb print. Ross McKenzie, the owner of the house, testified nothing was taken from the house, but the house was not in the condition described above when he left in the morning, he did not know appellants, and he did not give them permission to enter.

4. Attempted Carjacking and Shooting at Officers on February 10, 2010, at 9:25 p.m. (Counts 1-4, 6, 8-11, 27)

On February 10, 2010, at approximately 9:25 p.m., Monty Hill was at the Food 4 Less store on Rosecrans and Central Avenues in Compton. After making his purchases, he returned to his Suburban in the parking lot. As he put the Suburban into gear, he noticed a Hispanic man he identified as Gonzalez walking close to the back of the vehicle. Gonzalez walked up to the driver's door, opened it, and started shooting at Hill

without saying a word. At least one shot went near Hill's face before he slammed on the gas and tried to close the door. As he drove off, Hill heard two additional shots. Hill called 911 when he arrived home. He noticed a bullet hole in the driver's side back door and a bullet hole on the door jam inside his vehicle.

Around 9:44 p.m., uniformed Los Angeles County Sheriff's Department Deputies Kevin Lawler and Dejay Barber responded to Hill's call in a marked police cruiser and spotted Gonzalez walking on 139th Street. Deputy Lawler lost sight of him as Gonzalez stopped behind a Trailblazer. Deputy Barber illuminated him with a spotlight, exited his patrol car, and pulled his gun. As Deputy Lawler exited the car, he heard gunshots but did not see where they were coming from and could not see Gonzalez. Deputy Barber saw muzzle flashes coming from where Gonzalez was hidden, so he took a tactical position behind the rear passenger side of the Trailblazer and fired two shots toward Gonzalez around the front of the car. At that moment, he was approximately 20 to 25 feet away from Gonzalez. The deputies then saw Gonzalez running away westbound. As he fled, he turned and fired more shots at them. They fired back. Gonzalez then jumped a fence out of the deputies' sight.

Los Angeles County Sheriff's Department Deputy David Perry and his partner also responded to the 139th Street area in search of the carjacking suspect. Deputy Perry heard gunshots and saw Gonzalez holding a chrome pistol and running westbound on 139th Street toward Parmalee Avenue. Gonzalez pointed the gun at Deputy Perry, and Deputy Perry fired at him. Gonzalez then ran into a driveway and yard area. He was eventually found hiding under a boat in the backyard and arrested. In the area where he was arrested, officers recovered keys to Virgen's Chevy Tahoe, a pink slip for Quezada-Tejeda's blue Honda, and numerous credit and other cards with the names of Daniel Virgen, Christina Gonzalez, and victims of an uncharged burglary earlier the same evening.

Surveillance footage from the Food 4 Less showed Padilla inside that store from 9:19 p.m. to 9:23 p.m. Surveillance footage from a nearby Little Caesars showed Padilla inside that restaurant from 9:51 p.m. to 9:58 p.m. Hill's receipt from the Food 4 Less

showed a time of 9:25 p.m. and Hill called 911 at 9:35 p.m., indicating the attempted carjacking took place within that 10-minute window.

Sometime that evening between 9:00 and 10:00 p.m., Padilla called his sister Crystal Padilla and asked her to pick him up. Driving a white Nissan, she arrived and saw her cousin Johnny Bracamontes exiting the Food 4 Less. When she asked where Padilla was, Bracamontes said "he got split up" from the group. She and Bracamontes drove to the Little Caesars and picked up Padilla and his girlfriend Karla Ibarra. The four then tried taking back streets through the neighborhood to avoid traffic and streets blocked by police, but they were stopped by police. Inside the car, officers recovered a Los Angeles Dodgers baseball cap, a sweatshirt with the word "Compton" on it, a Chicago Cubs baseball cap, a Little Caesars pizza, and a laptop computer later determined to have been stolen during the earlier uncharged burglary. Quezada-Tejeda's blue Honda was found in the Food 4 Less parking lot.

While in the back of the police car with Ibarra, Crystal Padilla said, "You guys did too much in one day, fool. Scar [(Gonzalez's gang moniker)] got too greedy. You guys did too much." Ibarra said Gonzalez would be "doing time for attempted murder" and Crystal added "on a cop" and said he was "caught [with] homeboy's gun on him." Ibarra also made a gang reference: "It's T.K.S. gang, homie. I don't give a fuck." They discussed having to go to jail for credit card fraud and the stolen laptop computer found in their car. During a cell phone call to an unknown person, Crystal said they were "all going to jail [b]ecause the little homey fucking shot at the *jura* [(police in Spanish)], and they got all of us for accomplices." Crystal Padilla eventually pleaded guilty to carjacking with a gun.

After his arrest, Gonzalez told police the gun he used was hidden under a brick in the backyard of a house near where he was arrested and it was "hot," meaning other murders had been committed with it. He also admitted he took the gun out of his pocket, aimed, and fired two shots at the deputies because they shined a spotlight on him and he was angry about what happened to a fellow respected Compton Varrio Tokers gang member named "Mouse" or "Big Mouse," also known as Felipe Valdovinos, who was

shot and killed by police in a taco truck robbery in 2009. He also said he was trying to shoot at the car and only trying to scare the deputies.

The police recovered Gonzalez's gun in the location Gonzalez identified. Ballistics review revealed the bullets and cartridges recovered from the McKinley shooting, the Food 4 Less parking lot, and the shootout location with police on 139th Street all came from the recovered gun. At the scene of the 139th Street shootout with police, investigators found three bullet holes in the Trailblazer.

5. Recorded Jail Calls

In a recorded call to his mother the next day while he was in custody, Padilla asked her to retrieve a gun located underneath an old videocassette recorder and to keep it in the car. When she asked him about the "other" gun, he said his friend had been caught shooting with it. She asked what happened the day before, and he said he had arrived at the Food 4 Less in a car with his "girl," "Juan," and his "friend." He then explained: "Juan and my friend were in the car, and my friend wanted to rob a man for his truck, and my friend got out of the car with the gun and he, he tried to grab him, but the fool, saw my friend, and my friend opened the door and the other fool stepped on the gas and he left, and my friend fired some shots like an idiot. And then he ran, and then the police were, they were following him, and my friend fired back at the police. [¶] . . . [¶] And he hit the damed [*sic*] police car." Padilla claimed he was inside the store the entire time.

In another recorded call to his grandmother and his friend Roberto Romero, Padilla told Romero, "We got caught up, fool, I was, we shot at the cops, fool." He instructed his grandmother to give Romero the gun underneath the videocassette recorder. His grandmother asked him if he shot at the police and he responded, "Yes." Following the phone call, a six-shot Colt revolver and six live rounds were recovered from Romero's residence.

In another recorded conversation in the jail cell with Bracamontes and an unidentified third person, Padilla said "we did a carjack" earlier in the day, then "we did a couple of houses," and then went to the Food 4 Less, where "we were going to gank somebody for their truck, and my Homey jumped out on them and they -- that's when

they drove off and my homey started dumping on the car, BOOM, BOOM, BOOM, BOOM. And the *jura* [(Spanish for police)] rolled up fool and the Homey broke. And the *jura* tried to chase my Homey down and my Homey, BOOM, BOOM, BOOM, BOOM. But they didn't get me next to him fool. They got me in a whole 'nother scene, fool, but they pinned us altogether."

6. Gang Evidence

Detective Dennis Salcedo, who was the lead investigator for the shootings at the Food 4 Less and with officers thereafter, testified as a gang expert. He explained the Compton Varrio Tokers was a Hispanic gang in Compton, and in late 2009 and early 2010 it had approximately 10 to 15 active members and 60 documented members. Members use the letters "TKS" and "CVTKS," and they use items and apparel bearing the letters "T" and "C."

After the 2009 taco truck robbery that resulted in the death of Compton Varrio Tokers member Valdovinos, Detective Salcedo observed graffiti at the scene with the statement "Mouse, R.I.P., T.K.S.," next to the word "Police" crossed out, and the statement "Fuck the Police." Crossing out the word "Police" was meant to display the gang's animosity toward the police. He observed other graffiti referring to the Compton Varrio Tokers with the statement "187 Kops," which is a reference to the California Penal Code section for murder.

At the time of trial, Gonzalez had tattoos referring to the Compton Varrio Tokers and the tattoo "R.I.P. Mouse." Padilla also had Compton Varrio Tokers tattoos and an "R.I.P. Downer" and "B. Mouse" tattoo.

Detective Salcedo opined committing burglaries benefits the gang by providing a source of income and benefits individual members by bolstering their reputation and status within the gang. Carjacking benefits the gang by providing a mode of transportation and enabling the commission of crimes in other cities, and it benefits individual members by increasing respect within the gang. Shooting at law enforcement officers would be considered the ultimate crime gaining the highest level of respect from other gang members and in jail. Compton Varrio Tokers committed crimes including

vandalism, theft, carjacking, robberies, assault with a deadly weapon, possession of firearms, possession and sale of narcotics, attempted murder, and murder. Detective Salcedo testified to four predicate convictions for Compton Varrio Tokers members, including Bracamontes's and Ibarra's convictions in the present case.

7. Defense Evidence

Crystal Padilla testified for the defense. At the time she was serving time for her role in the carjacking of Quezada-Tejeda's Honda. She testified she drove the white Nissan and dropped Gonzalez off. Padilla remained in the car as she left the area. She said she lied to the police when she told them Gonzalez was the one who committed the carjacking and drove off in the victim's vehicle.

DISCUSSION[3]

1. Padilla's Challenges

A. Sufficiency of the Evidence (Counts 1-4, 6, 8-11, 27)

Padilla argues insufficient evidence supported the counts related to the attempted carjacking of Hill at the Food 4 Less and the shooting at police officers immediately thereafter because Gonzalez was the sole direct perpetrator of those crimes and Padilla was not physically present when they were committed. We disagree.

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

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3 Appellants join each other's arguments to the extent they might benefit them. (Cal. Rules of Court, rule 8.200(a)(5).) For convenience, we have structured our discussion consistent with how the claims have been presented by each appellant, although we have considered all the arguments to the extent they might apply to both appellants.

Because there was no evidence Padilla was the direct perpetrator of the attempted carjacking and other crimes committed against Hill or the subsequent shooting at officers, the prosecution proceeded on the theory that Padilla directly aided and abetted the target crime of attempted carjacking of Hill, and he should be found guilty of the nontarget crimes of attempted murder, shooting at an occupied vehicle, attempted murder of a peace officer, and assault on a peace officer with a semiautomatic firearm because they were the natural and probable consequences of the attempted carjacking.

Section 31, which governs aider and abettor liability, provides in relevant part, "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed." "An aider and abettor is one who acts 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose of either committing, or of encouraging or facilitating commission of, the offense.'" (*People v. Chiu* (2014) 59 Cal.4th 155, 161 (*Chiu*).) "'[W]hile mere presence at the scene of an offense is not sufficient in itself to sustain a conviction, it is a circumstance which will tend to support a finding that an accused was a principal. [Citations.]' [Citation.] '"[C]ompanionship, and conduct before and after the offense"' are also relevant to determining whether a defendant aided and abetted a crime." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407 (*Miranda*).)

"'"A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime."' [Citations.] 'Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault.' [Citation.] [¶] A nontarget offense is a '"natural and probable consequence"' of the target offense if, judged objectively, the additional offense was reasonably foreseeable. [Citation.] The inquiry does not depend on whether the aider and abettor actually

foresaw the nontarget offense. [Citation.] Rather, liability '"is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted."' [Citation.] Reasonable foreseeability 'is a factual issue to be resolved by the jury.'" (*Chiu, supra*, 59 Cal.4th at pp. 161-162.)

Here, substantial evidence demonstrated Padilla directly aided and abetted the target crime of attempted carjacking. On the same day as the attempted carjacking of Hill, appellants had already successfully committed one armed carjacking, and they arrived together at the Food 4 Less in the same vehicle and at least Gonzalez was armed. Their plan was that "*we* were going to gank somebody for their truck," as Padilla said in his recorded jail conversation. (Italics added.) Although store surveillance footage showed Padilla inside the Food 4 Less between 9:19 p.m. and 9:23 p.m. and then inside the nearby Little Caesars from 9:51 p.m. to 9:58 p.m., the attempted carjacking took place between 9:25 p.m. and 9:35 p.m., so the jury could have inferred that Padilla was outside at the time of the carjacking to act as a lookout for Gonzalez. This inference was bolstered by Padilla's detailed description of the attempted carjacking during his recorded jail conversations, suggesting he personally witnessed it. The jury could have further concluded Padilla ducked inside the Little Caesars after the carjacking was unsuccessful. This evidence was sufficient to support Padilla's conviction as an aider and abettor of the target offense of attempted carjacking.

There was also substantial evidence to support the jury's finding that the nontarget crimes of attempted murder, shooting at an occupied vehicle, attempted murder of a peace officer, and assault on a peace officer with a semiautomatic firearm were the natural and probable consequences of the attempted carjacking.[4] The jury could readily

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[4] In supplemental briefing, Padilla contends his convictions for attempted premeditated murder as an aider and abettor based on the natural and probable consequences doctrine cannot stand following *Chiu*, which held "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Chiu, supra*, 59 Cal.4th at pp. 158-159.) Because Padilla's

conclude the crimes against Hill involving gun use were reasonably foreseeable consequences of Gonzalez's armed attempted carjacking. (*Miranda, supra*, 192 Cal.App.4th at p. 408 ["Crimes involving gun use have frequently been found to be a natural and probable consequence of robbery."].) Likewise, the jury could have reasonably concluded the assaults and attempted murders of the officers during Gonzalez's attempt to escape were the reasonably foreseeable consequences of the botched armed carjacking minutes earlier. (*People v. Fagalilo* (1981) 123 Cal.App.3d 524, 534 [assaults by cohorts during escape were natural and probable consequences of joint commission of robbery]; *People v. George* (1968) 259 Cal.App.2d 424, 429 [assault with deadly weapon during escape was natural and probable consequence of robbery].)

Padilla argues he could not be found guilty of the crimes related to the shootings of the officers because they were not part of a continuous transaction with the attempted carjacking and he reached a place of temporary safety inside the Little Caesars when Gonzalez fled from the Food 4 Less parking lot. But none of the cases he cites addressed aider and abettor liability for nontarget offenses under the natural and probable consequences doctrine. Instead, his argument is essentially that he withdrew from the crime spree when he retreated to the Little Caesars. In order to effectively withdraw, however, Padilla was required to "'notify the other principals known to [him] of [his] intention to withdraw from the commission of [the] crime'" and "'do everything in [his] power to prevent its commission.'" (*People v. Fiu* (2008) 165 Cal.App.4th 360, 383 (*Fiu*).) As discussed below, there was no evidence whatsoever Padilla either notified Gonzalez of an intent to withdraw or took any steps to prevent the commission of the crimes. Thus, substantial evidence supported his conviction for the nontarget offenses.

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convictions were for *attempted* premeditated murder, we are bound to follow *People v. Favor* (2012) 54 Cal.4th 868, which "held that under the natural and probable consequences doctrine as applied to the premeditation allegation under section 664, subdivision (a) . . . , a trial court need only instruct that the jury find that attempted murder, not attempted *premeditated* murder, was a foreseeable consequence of the target offense." (*Chiu, supra*, at p. 162.)

B. Challenges Related to Withdrawal Instruction (Counts 1-4, 6, 8-11, 27)

Padilla also argues his convictions for the counts related to the Food 4 Less crimes and officer shootings must be reversed because (1) the trial court improperly limited CALJIC No. 3.03 on the defense of withdrawal to the target crime of attempted carjacking (count 10) when that instruction should have applied to the nontarget offenses committed against Hill and the officers (counts 1-4, 6, 8, 9, 11, 27); (2) the court improperly refused to give a supplemental withdrawal instruction in response to jury questions; (3) his counsel was ineffective by failing to object when the court limited the withdrawal instruction to the target offense and by failing to request a supplemental withdrawal instruction; and (4) he was denied his right to counsel when the trial court allowed Gonzalez's counsel to stand in for Padilla's counsel during discussions about the jury's questions on withdrawal. Each of these contentions lacks merit.

1. Procedural Context

Based on CALJIC No. 3.03, the trial court initially instructed the jury as follows with regard to the defense of withdrawal: "Before the commission of the crimes charged in Counts 1, 2, 3, 4, 6, 8, 9, 11 and 27, an aider and abettor may withdraw from participation in those crimes, and thus avoid responsibility for those crimes by doing two things: First, he must notify the other principals known to him of his intention to withdraw from the commission of those crimes; second, he must do everything in his power to prevent its commission. [¶] The People have the burden of proving that the defendant was a principal in and had not effectively withdrawn from participation in those crimes. If you have a reasonable doubt that he was a principal in and participated as an aider and abettor in a crime charged, you must find him not guilty of that crime, and any crime committed by a co-principal that was a natural and probable consequence of the same crime."

During deliberations, the jury submitted five questions to the court, two of which related to Padilla's withdrawal defense. In question 4, the jury asked, "If a principal and aiders and abetters commit a crime and one of the principals th[e]n leaves that vicinity -- goes to a close vicinity and by himself gets involved in a consequential crime minutes

later -- are the aiders and abetters still connected to the second crime since they had no opportunity to try to prevent the second crime?" In question 5, the jury asked, "In the aiding and abetting jury instructions for consequential activities it says the person must effectively withdraw -- does that mean he must have had previous or immediate knowledge of the ensuing crime (as opposed to a later crime he was not aware of)?"

The court held a hearing on the jury's questions, during which Gonzalez's counsel stood in for Padilla's counsel because Padilla's counsel was on vacation and would be "gone all week." When later asked by the court, Gonzalez's counsel affirmed that Padilla's counsel gave him authority to stand in for him, "including responses." Nevertheless, the court stated it was "going to get a waiver from Padilla that it is okay that you can stand in, including going over instructions." In discussing one of the other jury questions not relevant here, Gonzalez's counsel said he spoke with Padilla's counsel on the phone and explained the question and proposed answer, with which Padilla's counsel concurred.

The court then brought Padilla in during the discussion of jury questions 4 and 5 and the following exchange occurred:

"The court: . . . [¶] Mr. Padilla, previously you waived the attorney's appearance. Your attorney has asked that [Gonzalez's counsel] appear for him. Is that okay with you?

"Defendant Padilla: Is this the same -- the reason -- the same reason that he's not coming today or just because?

"The court: I don't know what his schedule conflict is. [¶] ([Gonzalez's counsel] and defendant Padilla confer sotto voce.)

"The court: [Gonzalez's counsel] is calling your attorney. [¶] ([Gonzalez's counsel] and defendant Padilla confer sotto voce.)

"The court: And telling him exactly what the question is and what the court's response should be. [¶] ([Gonzalez's counsel] and Defendant Padilla confer in sotto voce.)

"Defendant Padilla: Yes. That's fine.

"The court: Is it okay that [Gonzalez's counsel] stands in for you with the understanding that your attorney has been called with the exact question, and your attorney . . . is, in fact, either agreeing or disagreeing with what the court's response should be? Is it okay [Gonzalez's counsel] does that?

"Defendant Padilla: Yes, sir.

"The court: Do you waive his appearance for his responses?

"Defendant Padilla: Am I allowed to be here?

"The court: You can be here if you want to be here in the proceedings. Your attorney previously indicated Tuesday that he waived his appearance, and you waived your experience [*sic* -- likely "appearance"]. I want to confirm that you are waiving your appearance if all parties agree what the response should be.

"Defendant Padilla: Yeah, I'll waive.

"The court: Okay. Thank you."

Padilla then left the courtroom.

Earlier in the hearing the court expressed reluctance to give the jury additional or different instructions because they could be "open to a potential appellate issue," but the court proposed that the appropriate response to questions 4 and 5 would be to reread CALJIC No. 3.02, the instruction previously given on the natural and probable consequences theory of aiding and abetting and defining the target and nontarget crimes, and CALJIC No. 3.03, the instruction on the defense of withdrawal. But CALJIC No. 3.03 would be modified to apply only to count 10, the target crime of attempted carjacking, and not to "any offenses which you find beyond a reasonable doubt to be a natural and probable consequence." Gonzalez's counsel said, "That's fine, Your Honor," and Gonzalez's counsel indicated the change was "agreeable" with Padilla's counsel.

In the jury's presence, the court reread CALJIC No. 3.02. Before rereading CALJIC No. 3.03 on withdrawal, the court explained, "There was an error on the jury instructions and I have corrected it. In the initial instruction that you were given and read to you, it read, before the commission of the crimes charged in counts 1, 2, 3, 4, 6, 8, 9, 11, 27, those actually counts [*sic*] were put there in error. It should read as follows. You

will again have it in writing." The court then reread CALJIC No. 3.03 with the modification that it only applied to count 10 and with the addition of the following statement: "Additionally, the defense of withdrawal only applies to the originally aided and abetted offenses. The defense of withdrawal does not apply to any offenses that you find beyond a reasonable doubt to be a natural and probable consequence. [¶] This is in addition [to what] I read to you, you will have this in writing as well."

2. Limiting Withdrawal Instruction to the Target Offense

Padilla argues the trial court violated his due process rights by limiting the withdrawal instruction to the target offense of attempted carjacking in count 10. He failed to object on this ground in the trial court, so he forfeited this contention unless he can show the instruction resulted in a "miscarriage of justice." (*People v. Battle* (2011) 198 Cal.App.4th 50, 67.) As we explain, he cannot. "We determine whether a jury instruction correctly states the law under the independent or de novo standard of review. [Citation.] Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.] '"In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.] 'Instructions should be interpreted, if possible, as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.'" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

Padilla primarily argues the limitation of withdrawal to count 10, the target crime, meant the jury could find withdrawal for that count but still find him guilty for the other counts as nontarget crimes. This is plainly incorrect. In CALJIC No. 3.02, the jury was instructed that it must find Padilla aided and abetted the target crime of attempted carjacking before it could find him guilty of any nontarget offenses based on the natural and probable consequences doctrine. That point was reinforced by CALJIC No. 3.03, which told the jury if it harbored a reasonable doubt as to whether Padilla was a principal as an aider and abettor, it must find him not guilty of the target crime as well as "any

crime committed by a co-principal that was a natural and probable consequence of the same crime."

More problematic was the trial court's limitation of withdrawal to the target crime of carjacking, which appears to have been based on the court's incorrect assumption that withdrawal could only apply to target offenses and not nontarget offenses. (*Fiu, supra*, 165 Cal.App.4th at p. 384 [explaining withdrawal can apply to both target and nontarget offenses].) But we find no error on this record because "the trial court is required to instruct on a defense . . . only if substantial evidence supports the defense." (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054 (*Shelmire*).) As noted above, "[t]o be entitled to an instruction on the withdrawal defense, a defendant charged with aiding and abetting a crime must produce substantial evidence showing that (1) he notified the other principals known to him of his intention to withdraw from the commission of the intended crime or crimes, and (2) he did everything in his power to prevent the crime or crimes from being committed." (*Id.* at p. 1055; see *Fiu, supra*, 165 Cal.App.4th at p. 383.)

Here, there was no evidence of either requirement. Padilla may have initially split off from Gonzalez and entered the Food 4 Less before the carjacking, but based on the timing of the carjacking and the surveillance videos, the jury could have inferred Padilla continued to aid and abet Gonzalez by standing as a lookout during the carjacking and only fled into the Little Caesars when it failed. At no time did Padilla notify Gonzalez he intended to withdraw or do anything to stop Gonzalez from committing the attempted carjacking or any of the nontarget crimes. (See *Shelmire, supra*, 130 Cal.App.4th at p. 1055 [withdrawal instruction not warranted when there was no evidence defendant prevented the crimes from occurring and defendant "hung back" while his cohorts entered an apartment to burglarize it, waited until they reemerged, and fled with them].) Thus, because the evidence did not support giving any withdrawal instruction, the trial court could not have erred in limiting the withdrawal instruction to the target offense.

3. Refusing to Give Supplemental Withdrawal Instruction

Padilla argues the trial court improperly declined to give a supplemental instruction on withdrawal in response to the jury's questions. He forfeited this claim when his counsel affirmatively agreed to the court's proposed responses to the jury's questions. (*People v. Tully* (2012) 54 Cal.4th 952, 1056.) Even if not forfeited, Padilla cannot show error because, as explained above, no substantial evidence justified giving any withdrawal instruction, let alone a *supplemental* withdrawal instruction.

4. Ineffective Assistance of Counsel

Padilla argues his counsel rendered ineffective assistance because there was no tactical reason for his counsel to agree to limit CALJIC No. 3.03 to the target offense and to fail to request supplemental instructions on withdrawal in response to the jury's questions. "In assessing claims of ineffective assistance of trial counsel, we consider whether counsel's representation fell below an objective standard of reasonableness under prevailing professional norms and whether the defendant suffered prejudice to a reasonable probability, that is, a probability sufficient to undermine confidence in the outcome." (*People v. Carter* (2003) 30 Cal.4th 1166, 1211 (*Carter*); see *Strickland v. Washington* (1984) 466 U.S. 668, 694.) Padilla's claim fails at both steps. We have already identified the tactical reason not to object to the court's limitation of CALJIC No. 3.03 and not to request supplemental instruction—substantial evidence did not support the instruction for either target or nontarget offenses. (*Carter*, *supra*, at p. 1210 [counsel not ineffective for raising meritless objection].) For the same reason, Padilla could not have been prejudiced by his counsel's performance; in the absence of substantial evidence to justify the giving of any withdrawal instruction, there was no reasonable probability counsel's performance undermined confidence in the jury's guilty verdict.

5. Gonzalez's Counsel's Appearance for Padilla's Counsel

Padilla claims his state and federal constitutional rights to effective assistance of counsel were violated when Gonzalez's counsel stood in for his own counsel at the hearing on the jury's questions on withdrawal and the trial court failed to inquire about that conflict of interest. We reject his contentions.

Conflict of interest claims are a type of ineffective assistance claim under the state and federal constitutions, so a defendant must show "(1) counsel's deficient performance, and (2) a reasonable probability that, absent counsel's deficiencies, the result of the proceeding would have been different." (*People v. Doolin* (2009) 45 Cal.4th 390, 417, 421 (*Doolin*).) In this context, "deficient performance is demonstrated by a showing that defense counsel labored under an actual conflict of interest '*that affected counsel's performance*—as opposed to mere theoretical division of loyalties.'" (*Id.* at p. 417.) That includes "'whether counsel "pulled his punches," i.e., whether counsel failed to represent defendant as vigorously as he might have, had there been no conflict. [Citation.] In undertaking such an inquiry, we are . . . bound by the record. But when a conflict of interest causes an attorney not to do something, the record may not reflect such an omission. We must therefore examine the record to determine (i) whether arguments or actions omitted would likely have been made by counsel who did not have a conflict of interest, and (ii) whether there may have been a tactical reason (other than the asserted conflict of interest) that might have caused any such omission.'" (*Id.* at p. 418.)

The trial court has a corresponding duty to inquire about a possible conflict when it "'"knows or reasonably should know that a particular conflict exists,"' . . . even in the absence of objection by the defendant or his or her counsel." (*People v. Cornwell* (2005) 37 Cal.4th 50, 75 (*Cornwell*), overruled on other grounds by *Doolin, supra*, 45 Cal.4th at p. 421, fn. 22.) But "the duty to inquire is not triggered merely because of 'a vague, unspecified possibility of conflict.'" (*Cornwell*, at p. 75.) And as with the existence of a conflict itself, "'[a] conviction will be reversed on the ground the trial court failed to satisfy its duty to inquire into a possible conflict, or to adequately respond to its inquiry, only where the defendant demonstrates that an actual conflict of interest existed, *and that the conflict adversely affected counsel's performance.*'" (*Id.* at p. 76.)

Here, the trial court did not breach its duty of inquiry and Padilla was not deprived of effective assistance of counsel because there clearly was no actual conflict of interest.[5] Gonzalez's counsel acted as no more than a conduit for Padilla's counsel when he called Padilla's counsel, informed him of the jury's questions and the court's proposed responses, and secured his agreement. Even if Gonzalez's counsel had taken a more active role on Padilla's behalf, there would have been no conflict because appellants' interests were not adverse on Padilla's withdrawal defense. Nor can Padilla establish that any conflict prompted Gonzalez's counsel to forego arguments Padilla's own counsel would have made but for the alleged conflict. Padilla faults his own counsel for not arguing against limiting the withdrawal instruction to the target offense and not requesting a supplemental withdrawal instruction, so we fail to see how Gonzalez's counsel's failure to make the same arguments shows he acted under a conflict of interest that affected his performance. In any case, there were sound tactical reasons apart from any conflict for Gonzalez's counsel not to assert these arguments given there was insufficient evidence to support giving the withdrawal instruction at all.[6]

C. Jury Instruction on Burglary (Count 12)

Padilla argues the court's instruction defining "entry" for the purpose of burglary was erroneous and therefore violated his due process and jury trial rights.[7] After the

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5 In light of these conclusions, we need not address respondent's claim Padilla waived any conflict.

6 Padilla argues remand is required under *Wood v. Georgia* (1981) 450 U.S. 261 for the trial court to determine whether an actual conflict of interest exists. But in *Mickens v. Taylor* (2002) 535 U.S. 162, the United States Supreme Court interpreted *Wood* to require a showing that a conflict of interest must have affected counsel's performance before remand is necessary. (*Id.* at pp. 169-171; see *Cornwell, supra*, 37 Cal.4th at pp. 76-78 [*Wood* did not "require . . . an automatic remand for further hearing whenever a trial court has not inquired sufficiently into a potential conflict of interest."].) Here, Padilla has failed to make that showing.

7 Although respondent contends Padilla forfeited his challenge by not objecting in the trial court, he may raise this contention for the first time on appeal. (§ 1259; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.)

parties rested, Padilla moved to dismiss the burglary count pursuant to section 1118, arguing there was no showing of entry into McKenzie's house. In response, the prosecutor argued the "removed screen," "broken glass," and "front door wide open" constituted an entry. The prosecutor noted he would be requesting a "pinpoint" instruction on that issue pursuant to *People v. Valencia* (2002) 28 Cal.4th 1 (*Valencia*) (disapproved on other grounds by *People v. Yarbrough* (2012) 54 Cal.4th 889, 894). The trial court denied the section 1118 motion. Later during the discussion of the jury instructions, the court asked if there were any objections to CALJIC No. 14.50 on burglary "[a]s modified" by the prosecution and defense counsel responded, "No."

The jury was thus instructed pursuant to the modified version of CALJIC No. 14.50, which defined the entry element of burglary as follows: "A person enters a building if some part of his body or some object under his control penetrates the area inside the building's outer limits. *Removing an exterior window screen from the building is considered entering the building.*" (Italics added.) In closing argument, the prosecutor stated (all errors in original): "Well, there [are] a few reasons why we know they entered. But one of the things that should be aware of in it is the law is that if you remove a screen, that is considered an entry. And this in case we have more. We have that south front window is broken. And then we also have the front door to the house is open. So, clearly, they were inside the house. [¶] . . . [¶] [I]t could be that they just took off the screen, didn't even go in the house. And that would have been good enough. [¶] But we have the front door open, so we know they did more." In response, Padilla's counsel argued in closing "they proved the burglary, I think," so he was "not going to waste any time on that."

In *Valencia*, a neighbor observed the defendant using a screwdriver to remove a window screen from a bathroom window and trying unsuccessfully to open the window itself. The defendant had also evidently pulled a window screen away from a bedroom window and tried unsuccessfully to open that window as well. Several pry marks were also found on the bathroom window that could have been made by the defendant's screwdriver. (*Valencia*, *supra*, 28 Cal.4th at pp. 4-5.) After the close of evidence, the

trial court instructed the jury on entry for burglary as follows: "'Any kind of entry, partial or complete, will satisfy the element of entry. The entry may be made by any part of the body or by use of an instrument or tool. *In order for there to have been an entry, a part of the defendant's body or some instrument, tool or other object under his control must have penetrated the area inside where the screen was normally affixed in the window frame in question.*'" (*Id.* at p. 5.) Our Supreme Court found no error in the instruction, holding that "penetration into the area behind a window screen amounts to an entry of a building within the meaning of the burglary statute even when the window itself is closed and is not penetrated." (*Id.* at pp. 12-13.)

Respondent contends the instruction in this case was "substantially similar" to the instruction in *Valencia*, and Padilla contends that, unlike in *Valencia*, the instruction here eliminated the penetration requirement by instructing the jury that removal of a screen alone constituted entry. We need not decide who is correct because any error was harmless beyond a reasonable doubt. "Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Chun* (2009) 45 Cal.4th 1172, 1201.) While there may be multiple ways in which to determine prejudice when the jury is presented with a legally valid theory (entry requires penetration) and an alleged legally invalid theory (removal of screens alone constitutes entry) (see *id.* at p. 1203), Padilla contends reversal is required in this circumstance unless there is "a basis in the record to find that the verdict was actually based on a valid ground" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129). Assuming without deciding this is the correct standard for prejudice, it is easily met here because no evidence supported the allegedly invalid theory that the removal of the screens alone is sufficient for entry. While it might be conceivable in the abstract for a window screen to be removed without also penetrating the area behind it, there was no evidence that the removed screens in this case were structured in such a way that they could be removed without also penetrating the area behind them. To the contrary, the evidence showed a window was open and broken, strongly suggesting there was penetration of at least one

window following the removal of the screen. There were also pry marks on the back door, which almost certainly entailed a penetration into the outer boundary of the house. While the prosecutor suggested in closing argument that removal of the window screens was enough to constitute entry, he also suggested the breaking of the window constituted entry. Thus, the only conclusion the jury could have reached on this record was that removing the screens included penetrating the area behind them, which was a valid basis for the guilty verdict on this count.

2. Gonzalez's Challenges

A. Sufficiency of the Evidence (Counts 1, 3)

Gonzalez argues his convictions for attempted premeditated murder of Deputies Lawler and Barber must be reversed because there was insufficient evidence he acted with the specific intent to kill or with premeditation and deliberation. We disagree.

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Ramos* (2011) 193 Cal.App.4th 43, 47 (*Ramos*).) "Evidence of intent to kill is usually inferred from defendant's acts and the circumstances of the crime. [Citation.] Firing a gun toward a victim at a close range in a manner that could have inflicted a mortal wound had the bullet been on target supports an inference of intent to kill." (*Id.* at p. 48; see *Smith, supra*, 37 Cal.4th at p. 741.) The intent to kill must be evaluated separately for each victim. (*People v. Leon* (2010) 181 Cal.App.4th 452, 464 (*Leon*).)

Here there was sufficient evidence to demonstrate Gonzalez's specific intent to kill the deputies. When the deputies arrived, Gonzalez immediately ducked behind the Trailblazer and aimed at least three shots at the deputies as they exited their patrol car. As he fled the scene, he fired more shots at Deputy Barber from a distance of approximately 20 to 25 feet, and three bullet holes were found inside the Trailblazer behind which Deputy Barber was hiding. Gonzalez also admitted to police he took the gun out of his pocket, aimed, and fired two shots at the deputies because he was angry about what happened to Compton Varrio Tokers member Valdovinos. While he also said he was trying to shoot at the car and only trying to scare the deputies, the jury was

entitled to discredit that statement and believe he intended to kill the officers when he shot at them. Nor does the fact that he missed necessarily undermine his intent to kill, as Gonzalez contends. (See *Smith, supra*, 37 Cal.4th at p. 741.)

This same evidence was also sufficient to support the jury's finding Gonzalez acted with premeditation and deliberation. "'"Deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .'"'" (*Leon, supra*, 181 Cal.App.4th at p. 467.) "Appellate courts typically rely on three kinds of evidence in resolving the question raised here: motive, planning activity, and manner of killing. [Citations.] These factors need not be present in any particular combination to find substantial evidence of premeditation and deliberation." (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) The evidence reflected Gonzalez hid behind the Trailblazer and aimed and fired multiple rounds at the officers from short range only after they began to exit their patrol car. There was also evidence Gonzalez was angry about Valdovinos's death. This evidence was sufficient to support the jury's finding of deliberation and premeditation.

B. Admission of Padilla's Statements Implicating Gonzalez

Gonzalez claims the trial court violated his confrontation rights by admitting Padilla's recorded statements in custody implicating Gonzalez in the crimes related to the Food 4 Less and officer shootings, citing *Bruton v. United States* (1968) 391 U.S. 123 and *People v. Aranda* (1965) 63 Cal.2d 518 (hereafter *Aranda/Bruton*). We find this argument forfeited because Gonzalez failed to object on *Aranda/Bruton* grounds in the trial court. (*People v. Hajek* (2014) 58 Cal.4th 1144, 1206 (*Hajek*).) Even if this claim were not forfeited, this Division held in *People v. Arceo* (2011) 195 Cal.App.4th 556 that *Aranda/Bruton* only applies to testimonial statements under *Crawford v. Washington* (2004) 541 U.S. 36 and Gonzalez conceded in his opening brief Padilla's statements in

custody were not testimonial under *Crawford*.[8] (*Arceo, supra*, at pp. 574-575.) The only question is whether Padilla's statements fell within a state law hearsay exception (*id.* at p. 575), a point Gonzalez does not argue and we therefore decline to address. Pursuant to *Arceo*, we find no error in the admission of Padilla's recorded statements.

C. Instruction on Gang Evidence

The prosecution requested the trial court modify CALJIC No. 17.24.3, the limiting instruction on gang evidence, to add a single sentence allowing the jury to consider gang evidence to prove motive, intent, and/or identity. As modified, the instruction told the jury, "Evidence has been introduced for the purpose of showing criminal street gang activity and of criminal acts by gang members other than the crimes for which the defendants are on trial. [¶] Except as you will be otherwise instructed, this evidence, if believed, may not be considered by you to prove that defendant is a person of a bad character or that he has a disposition to commit crimes[.] [I]t may be considered by you for determining if it tends to show that the crime or crimes charged were committed for the benefit of, at the direction of, or in association with a criminal street gang with the specific intent to promote, further, assist any criminal conduct by gang members. *It may also be considered by you as evidence of motive, intent and/or identity.* [¶] For the limited purpose for which you may consider this evidence, you may weigh it in the same manner as you do all other evidence in the case. [¶] You are not permitted to consider such evidence for any other purpose." Padilla's counsel objected to the italicized

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[8] In conflict with his opening brief, Gonzalez argued in his reply brief Padilla's recorded phone calls while in custody were testimonial under *Crawford* because calls in jail are routinely recorded. Even if we considered this argument, the circumstances of Gonzalez's candid recorded conversations would not necessarily "'"lead an objective *witness* reasonably to believe that the statement[s] would be available for use at a later trial,"'" especially when law enforcement was not involved in any questioning. (*People v. Jefferson* (2008) 158 Cal.App.4th 830, 843; see *Hajek, supra*, 58 Cal.4th at p. 1203 [conversation "cannot be deemed testimonial within the meaning of *Crawford* because it was not a conversation involving an agent of the police"].)

modification, and the trial court overruled the objection. Gonzalez's counsel did not object. The instruction was thereafter read to the jury as modified.

Gonzalez claims the trial court erred in giving the italicized language pursuant to *People v. Rivas* (2013) 214 Cal.App.4th 1410 (*Rivas*).[9] In *Rivas*, two defendants were convicted of first degree murder and firing a gun into an occupied vehicle, along with gang enhancements. (*Id.* at pp. 1413-1414.) At trial, the prosecution offered evidence that one of the defendants had been involved in a prior gang-related vehicle shooting. (*Id.* at p. 1418.) The trial court instructed the jury as follows: "'You may consider evidence of gang activity only for the limited purpose in [*sic*] deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancements or whether the defendant had a motive to commit the crimes charged *or for the purpose of identity.*'" (*Id.* at p. 1421.) The Court of Appeal found the addition of the word "identity" erroneous under the facts of the case (although the error was harmless) because "[t]he trial court's placement of the word 'identity' at the end of the instruction made it at best ambiguous, and at worst told the jury that it could consider the [prior] shooting incident as evidence that defendants, particularly [the defendant involved in that shooting], had a modus operandi of participating in shootings from vehicles. Certainly the court erred under state law by shaping the litigation as it did and then inviting the jury to consider evidence of [gang] activity to establish defendants' identities as the perpetrators of the murder . . . and the other charged crimes." (*Id.* at p. 1421.)

This case is distinguishable from *Rivas* because none of the predicate crimes introduced to support the gang allegations were similar to the prior vehicle shooting the

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9 Respondent contends Gonzalez forfeited this argument by not objecting in the trial court. However, it is clear any objection would have been futile after the trial court overruled Padilla's objection. (*People v. Wilson* (2008) 44 Cal.4th 758, 793.) Also, he was not required to object because the error would have affected his substantial rights. (*Rivas, supra*, 214 Cal.App.4th at p. 1421.) And Padilla has expressly joined Gonzalez's argument, and Padilla's counsel objected in the trial court, so we would address the merits of this claim anyway.

court in *Rivas* found so troubling. Neither Padilla nor Gonzalez were involved in the two prior crimes committed by other Compton Varrio Tokers members or the 2009 shooting of Compton Varrio Tokers member Valdovinos. Although Padilla and Gonzalez were obviously involved in the other two predicate crimes committed by Ibarra and Bracamontes as part of the crimes charged in this case, those convictions do not create the type of risk identified in *Rivas*. Thus, unlike in *Rivas*, there was no risk the instruction here "invit[ed] the jury to consider evidence of [gang] activity to establish defendants' identities as the perpetrators of the murder . . . and the other charged crimes." (*Rivas, supra*, 214 Cal.App.4th at p. 1421.) The instruction otherwise properly allowed the jury to consider gang evidence as proof of motive, intent, and identity. (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049 (*Hernandez*).)[10]

3. Sentencing

A. Stay of Sentences on Counts 10 and 30

Appellants contend the trial court erred in not staying the execution of concurrent prison terms imposed for counts 10 (attempted carjacking of Hill) and 30 (assault with a firearm against Quezada-Tejeda) pursuant to section 654. The attempted carjacking in count 10 was part of the trio of crimes committed against Hill in the Food 4 Less parking lot, along with count 11 (shooting at an occupied vehicle) and count 27 (attempted murder). The trial court sentenced Gonzalez to a concurrent term of 28 years six months on count 10; 15 years to life on count 11, stayed pursuant to section 654; and a consecutive term of 35 years to life on count 27. The court sentenced Padilla to a concurrent term of 23 years six months on count 10; 15 years to life on count 11, stayed pursuant to section 654; and a consecutive term of 27 years to life on count 27. The assault with a firearm in count 30 was part of the trio of crimes committed against Quezada-Tejeda in Long Beach, along with count 13 (carjacking) and count 31

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10 Gonzalez claims *Rivas* stands for the proposition that "[g]ang evidence is not admissible to prove motive, intent or identity." We do not interpret *Rivas* that way, which is directly contrary to controlling Supreme Court authority. (See *Hernandez, supra*, 33 Cal.4th at p. 1049; *Carter, supra*, 30 Cal.4th at p. 1194.)

(attempted robbery). The court sentenced Gonzalez to a consecutive term of 25 years to life on count 13; a concurrent term of 12 years on count 30; and a concurrent term of 22 years on count 31. The court sentenced Padilla to a consecutive term of 15 years to life on count 13; a concurrent term of seven years on count 30; and a concurrent term of 12 years on count 31.

Section 654, subdivision (a) provides: "An act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. An acquittal or conviction and sentence under any one bars a prosecution for the same act or omission under any other." "The test for determining whether section 654 prohibits multiple punishment has long been established: 'Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.'" (*People v. Britt* (2004) 32 Cal.4th 944, 951-952.) But if the objectives were "consecutive even if similar" or "different even if simultaneous," multiple punishment is permitted. (*Id.* at p. 952.) "'A trial court's implied finding that a defendant harbored a separate intent and objective for each offense will be upheld on appeal if it is supported by substantial evidence.'" (*People v. Racy* (2007) 148 Cal.App.4th 1327, 1336-1337.)

The trial court properly refused to stay both appellants' sentences on the attempted carjacking of Hill in count 10 because there was substantial evidence of simultaneous but different objectives in stealing Hill's car and attempting to murder him. Padilla's recorded statements demonstrated appellants intended to carjack someone before Gonzalez approached Hill in the Food 4 Less parking lot. While Gonzalez and Padilla had both used guns to carjack Quezada-Tejeda earlier in the day, neither appellant shot at Quezada-Tejeda during the carjacking; instead, they pointed their guns at him while Padilla demanded his car keys and money. In contrast, Gonzalez walked up to Hill's driver side door, opened it, and started shooting at Hill's head without saying a word.

Gonzalez then shot at Hill's car as he escaped. Those acts were inconsistent with intending only to steal Hill's car and demonstrated a different objective of killing him.

The trial court also properly refused to stay Padilla's sentence on the assault on Quezada-Tejeda in count 30 because there was substantial evidence Padilla committed two separate assaults on Quezada-Tejeda with a firearm, only the first of which served the objective of robbing him and stealing his car. Both appellants initially assaulted Quezada-Tejeda when they pulled their guns on him in order to rob him and steal his car. But as Padilla drove away, he stopped, exited the car, and committed a *second* assault by pointing his gun at Quezada-Tejeda again as Quezada-Tejeda asked for his daughter. By that point, the robbery had been unsuccessful and the carjacking was complete, so Padilla must have harbored a separate objective to intimidate Quezada-Tejeda as he retrieved his daughter.

Respondent concedes Gonzalez's sentence on count 30 should have been stayed and we agree. As noted, Gonzalez assaulted Quezada-Tejeda with a firearm in order to rob him and steal his car. But as Padilla drove away in Quezada-Tejeda's car, Gonzalez got into the white Nissan and left the scene. Thus, Gonzalez harbored only one objective in committing the assault with a firearm, attempted robbery, and carjacking and we will modify the judgment to stay Gonzalez's sentence on count 30.

B. Sentencing Error on Count 10

The parties agree the trial court erred by imposing the midterm of three years six months instead of two years six months for the attempted carjacking in count 10 for both appellants. (§§ 215, 664.) We will modify the judgments accordingly to correct this error.

DISPOSITION

We modify the judgment as to Gonzalez to stay execution of his sentence of 12 years on count 30 and to reflect the correct midterm sentence of two years six months on count 10, for a total 27 years six months for that count. We modify the judgment as to Padilla to reflect the correct midterm sentence of two years six months on count 10, for a total of 22 years six months on that count. The trial court is directed to forward corrected

abstracts of judgment for each appellant to the Department of Corrections and Rehabilitation.

As modified, the judgments are affirmed.

FLIER, J.

WE CONCUR:

BIGELOW, P. J.

GRIMES, J.