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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GEORGE ANGEL QUINTANA et al., Defendants and Appellants.	B248542 (Los Angeles County Super. Ct. No. KA098952)

APPEALS from judgments of the Superior Court of Los Angeles County, Mike Camacho, Judge. Reversed.

Sara H. Ruddy, under appointment by the Court of Appeal, for Defendant and Appellant George Angel Quintana.

Deborah L. Hawkins, under appointment by the Court of Appeal, for Defendant and Appellant Corey Antonio Gardner.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, David

C. Cook, Kathy S. Pomerantz and Scott Taryle, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

George Angel Quintana (Quintana) and Corey Antonio Gardner (Gardner) (collectively defendants) appeal from judgments of conviction entered after a jury found them guilty of second degree murder (Pen. Code, § 187, subd. (a)) and found true the allegation the crime was committed for the benefit of a criminal street gang (*id*., § 186.22, subd. (b)). The trial court sentenced defendants to terms in state prison of 15 years to life.

On appeal, defendants claim instructional error, insufficient evidence to support their convictions, and that their convictions were barred by double jeopardy, collateral estoppel and Penal Code section 654's prohibition against subsequent prosecution after an acquittal or conviction based on the same conduct. We agree with defendants' claim of instructional error and reverse on that basis.

FACTS

A. *Prosecution*

1. *The Murder*

Early in the morning on January 30, 2011, Rene Pichardo (Pichardo) was having a gathering in the front yard of his house on Howellhurst Drive in Baldwin Park. Maria Robles (Robles), Benjamin Gonzalez (Gonzalez), Athena Scott (Scott), and her boyfriend, Diego Sparling (Sparling), were present at the house.

Scott is Gardner's cousin. Scott testified at trial she considered Gardner to be like a brother to her because her mother had helped raise him when he was a teenager. She also knew Quintana because he had grown up with Gardner and because she had lived in a house owned by Quintana's grandfather. Scott had previously dated Gardner's friend, Andrew Aguilar (Aguilar), but Scott and Aguilar had broken up a year before. According to Scott, Gardner and Quintana were members of the Eastside gang; Sparling was a member of the Northside gang and had a gang tattoo on his head. Scott had been friends with Pichardo since high school and knew he was not a gang member. There was no evidence at trial that Pichardo was a member of any gang.

Late on the night prior to the murder, Aguilar telephoned Pichardo's younger brother, Robert, and asked to "hang out" with him. Robert warned him not to come over to the house because Scott was there with Sparling, her new boyfriend.

Gonzalez was in Pichardo's front yard with a group of friends when he saw Quintana, Gardner, and Aguilar arrive at the house together. Gonzalez testified the three looked "serious," and they were not making eye contact with anyone. The three men then looked in Sparling's direction, and one of them yelled, "Eastside Bolen," the name of a street gang in Baldwin Park. According to Gonzalez, the three "rushed" Sparling and began hitting him. Sparling backed up and tried to defend himself by swinging back at them. As they fought, Quintana, Gardner,

Aguilar and Sparling stumbled through the gate at the head of the driveway and into the backyard.[1]

Robles was in the backyard with Scott and other friends when she heard the sound of a fight breaking out in the front yard. She walked toward the gate, but it swung open quickly and hit her in the back as she tried to move away. Robles testified she turned and saw Quintana, Gardner and Aguilar hitting Pichardo in the stomach, chest, head, and lower back. Pichardo was kneeling down, trying to protect his head.[2] Robles never saw a weapon.

According to Robles, at some point Aguilar broke away from the fight and ran toward the back of the yard. Quintana and Gardner continued to hit Pichardo. Robles and Scott tried to break up the fight by throwing beer bottles and shouting at the group, but they continued to fight. Robles yelled for Gonzalez and some of the other men to come help.

Gonzalez testified that he followed the fight through the gate and into the backyard where he saw Pichardo struggling with someone—Gonzalez could not tell who that person was. The person was holding on to Pichardo and throwing punches at Pichardo's torso. Gonzalez did not see a weapon. Pichardo put someone in a headlock, and Gonzalez went over and hit that person to try to break up the fight. The person in the headlock held on to Pichardo. Other guests then came into the backyard,

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[1] At the preliminary hearing, Gonzalez testified that he did not see Quintana, Gardner and Aguilar rush Sparling. He was unable to explain the discrepancy and stated that he did not remember his preliminary hearing testimony.

[2] Robles did not recall testifying previously that only two people were attacking Pichardo.

and the fight ended with Quintana, Gardner and Aguilar being chased out to the front yard.

Scott testified that she was standing in the backyard when the gate swung open to reveal three individuals fighting. She recognized Quintana and Pichardo, but not the third individual. She saw Quintana swinging at Pichardo's face and Pichardo fighting back, swinging at both men with his fists. Quintana hit Pichardo in the face, while the other person hit Pichardo in the face and chest. Even after Pichardo put Quintana in a headlock, Quintana kept hitting Pichardo in the chest, back and side.[3] Scott saw Gonzalez and some of the other men, one of whom she acknowledged was a "big guy," come into the backyard and join the fight. She saw Gonzalez fighting with the person whom Pichardo did not have in a headlock. These new men were not trying to stop the fight, she admitted. Scott never saw a weapon being wielded by anyone that night.

Scott testified she could not see Sparling anywhere. She and Robles ran to the back of the yard, where they found Aguilar and Sparling hitting each other. Scott screamed, "Babe," and Aguilar and Sparling stopped fighting. Aguilar ran toward the gate, screamed "stop," and then ran to the front of the house. Scott and Robles followed Aguilar to the front of the house.[4]

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[3] In a February 14, 2011 interview, Scott told the police that Pichardo had the other person in a headlock, and she pushed or pulled Quintana away from Pichardo. Robles testified that it was Quintana in the headlock, but she previously testified that she did not know who Pichardo had in a headlock.

[4] Scott did not recall testifying previously that she saw Quintana still fighting with Pichardo when she passed by them.

When Aguilar stopped in the middle of the street, Scott yelled at him and pushed him.

Gardner then drove up in a white car. According to Robles, Scott yelled at Gardner, "You, I can't believe it's you."[5] Gardner drove the car in reverse toward Robles, Scott and a group of people who were gathered in the street. People threw bottles at the car and hit and kicked it; Sparling punched the car window. Aguilar jumped into the car, and Gardner drove away.

Quintana then got into a truck parked in front of the house. There was blood on the driver's side door. Scott told him, "I see you." Quintana told her he did not care and drove away.

Pichardo walked to the front of the house, where he collapsed, bleeding from stab wounds to his chest and below his neck. The paramedics were called and took Pichardo to Los Angeles County/USC Medical Center, where he immediately underwent emergency surgery. Pichardo had been stabbed three times in the right chest; one of these stab wounds, near his neck, was superficial, but the other two penetrated his ribcage. He had been stabbed three times on his sides; one of the wounds was in the area of his liver and another by his kidney. Five of the wounds were potentially fatal. Pichardo died 11 days later as a result of his wounds.

2. *The Investigation and Subsequent Events*

Detective Gary Breceda of the Baldwin Park Police Department arrived at Pichardo's house at about 5:30 a.m. He

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[5] Scott testified that she did not say anything when she saw it was Gardner driving the car.

spoke to Scott, who told him Quintana, Gardner and Aguilar had been at the house.

Detective Breceda proceeded to Aguilar's house on Vineland Avenue in Baldwin Park. He observed a white Nissan Altima parked in front of the house. It had sustained damage to the rear tailgate, parts of which were found in front of Pichardo's house. Sparling's palm print was found on the rear driver's side door.

Baldwin Park Police Officer Richard Ogas interviewed Quintana at Queen of the Valley Hospital on January 30, 2011, where Quintana was being treated for a stab wound to his hand. Quintana stated that he and Gardner were at a bar in West Covina, where they were jumped by assailants in the parking lot. Quintana told Officer Ogas that they had walked to the hospital for treatment. Quintana did not say anything about being at Pichardo's house.

Detective Breceda interviewed Gardner at Queen of the Valley Hospital on January 31, 2011. Gardner had received emergency surgery for a stab wound to his upper torso. He also suffered multiple fractured ribs. He told Detective Breceda that he and Quintana were walking near Big Dalton Avenue, about half a mile from Howellhurst Drive, when they were jumped by a group of people. After the attack, he walked to the hospital, which was about two miles away. Gardner said he had never been to Pichardo's house and was not injured there.

The police never recovered the knife used to stab Pichardo.

On March 11, 2011, Robles identified Quintana and Gardner from photographic lineups. Regarding Quintana, she wrote: "saw punching motion to stomach." Regarding Gardner,

she wrote: "saw him standing by [Pichardo's] head to the right, swinging."

Prior to trial, Scott received two telephone calls from blocked numbers. During the first call, a man told her not to testify and then hung up. During the second call, the caller said Scott was a "snitch." As a result of these calls, Scott was concerned about her family's safety.

3. *DNA Evidence*

DNA profiles obtained from a bloodstain on Pichardo's sweatshirt matched his DNA profile. They did not match the DNA profiles of Quintana, Gardner or Aguilar.

DNA profiles obtained from bloodstains on Quintana's shoes and jeans matched his DNA profile. They did not match the profiles of Pichardo, Gardner or Aguilar.

DNA profiles from several bloodstains on Gardner's shoes and jeans matched Quintana's DNA profile but not those of any of the others. DNA profiles from one bloodstain on Gardner's left shoe and one on his jeans matched his DNA profile but not those of any of the others. The DNA profile from a small bloodstain on the back of Gardner's jeans showed more than one contributor, with Pichardo being the major contributor.

4. *Gang Evidence*

Baldwin Park Police Detective Esteban Mendez testified as an expert on the Eastside Bolen Park and Northside Bolen Park gangs. He testified in general regarding gang membership, gang territories, the importance of respect in gang culture, commission of crimes by gang members, and gang rivalries.

Detective Mendez testified that the Eastside Bolen Park and Northside Bolen Park gangs were rivals. Pichardo's house was in Eastside Bolen Park gang territory.

Detective Mendez identified Quintana and Gardner as good friends and members of the Eastside Bolen Park gang. Both had gang tattoos on their bodies. The detective identified Sparling as a member of the Northside Bolen Park gang, with a gang tattoo on the top of his head.

Most of Detective Mendez's contacts with Gardner occurred prior to 2008. He noted that Gardner had not previously been arrested in connection with a violent crime, and Gardner was in protective custody after testifying for the prosecution in an unrelated gang murder case.

In response to a hypothetical question based on the facts of this case, Detective Mendez opined that the stabbing of Pichardo was done for the benefit of, at the direction of, or in association with a criminal street gang. By aiding a fellow gang member in a fight and escalating the fight by using a weapon, a gang member would enhance both his reputation within the gang and the gang's reputation for violence. Such conduct aids the gang in creating an atmosphere of fear and intimidation, which, in turn, discourages witnesses and victims of gang crimes to cooperate with the police. The fact that the victim was not a gang member did not change the detective's opinion. He explained that interference or disrespect by a non-rival gang member required a response, usually a violent one. Even if the victim was "collateral damage," it still enhanced the gang's reputation for violence.

B. *Defense*

1. *Quintana*

Quintana did not testify but offered the testimony of Baldwin Park Police Officer Jeffrey Honeycutt, who had arrived at Pichardo's house within an hour or two of the incident and interviewed Gonzalez at that time. According to Gonzalez in that interview, the three men walked up the driveway, began yelling, and attacked Pichardo and another man whom Gonzalez did not know. Pichardo ran into the backyard. Gonzalez ran into the backyard and saw the same three men hitting Pichardo, whom they had cornered against a wall. Gonzalez joined in the fight to try to help his friend. He struck one of the men in the face. The man he struck was six feet tall, with a mustache and a shaved head.[6] The other two attackers were about five feet, five inches tall with shaved heads. While this was going on, other people in the backyard were throwing bottles to try to stop the attackers.

Gonzalez told Officer Honeycutt the three attackers eventually ran down the driveway to the street. Gonzalez saw them leave in a white Nissan Altima. After the fight stopped, Gonzalez saw that Pichardo was bleeding from his chest.

Rose Marie Sauceda worked with Quintana at a toy store warehouse, where Quintana worked from September 2010 to April 2011. She described Quintana as a respectable employee on whom coworkers could depend.

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[6] At trial, Gonzalez denied telling Officer Honeycutt that the man he struck was six feet tall and had a mustache; he testified that he could not see the man's face. He also testified that he was very upset at the time he talked to Officer Honeycutt, and he could not recall who the attackers were or what they looked like.

2. *Gardner*

Gardner testified in his own defense. He admitted he was a member of the Eastside Bolen Park gang but claimed he did not engage in any criminal activity as a gang member and never carried a weapon. He admitted having one misdemeanor conviction for assault or battery and one for tagging.

Gardner was friends with Sparling when they were younger, but that changed when he joined the Eastside Bolen Park gang and Sparling joined the Northside Bolen Park gang. Gardner had known Quintana since elementary school and Aguilar since junior high school.

Gardner left the gang life in 2010 and moved his family to Fontana to get away from the gang. However, he moved back to Baldwin Park about a year later to help his wife's mother, who was having financial problems.

On the night of January 29, 2011, Gardner and Quintana were at Aguilar's house, drinking beer. Aguilar spoke to someone on the telephone and then asked Gardner if he wanted to go see Scott. Gardner agreed even though he knew Scott was dating Sparling, a Northside Bolen Park gang member, as Sparling's gang membership did not matter to him, and he did not know Sparling would be at Pichardo's house. Aguilar did not say anything about wanting to fight Sparling. Gardner drove to Pichardo's house in his wife's white Nissan Altima. Quintana and Aguilar drove there in an SUV belonging to Quintana's grandfather.

When they arrived at Pichardo's house, there were people gathered in the driveway and on the front lawn. Aguilar tripped over a box of beer on the ground, and someone caught him. Gardner saw an arm swing at Sparling, but he could not see

whose it was. Gardner knew it was not Aguilar who swung at Sparling, because Aguilar was directly in front of Gardner. Gardner made eye contact with Sparling. A few seconds later, there was a loud noise, and Sparling and some other people ran toward the back of the house.[7]

Gardner followed the group to the backyard. As he entered the yard, a much bigger man punched him in the nose, and he fought back. Gardner testified he and the other man hit each other in the face for ten seconds. Other people joined the fight, and he was hit on the back of his head and the side of his face. Gardner did not see Pichardo or anyone else he recognized in the backyard. Eventually, Gardner was able to break away from the fight, and he ran to his car. He did not know he was injured until he sat down in the car and felt a burning sensation beneath his ribs. When he reached down, he felt wetness and realized he was bleeding.

Sparling ran to the car and tried to open the door, but it was locked. Sparling began to punch the car window, and other people started to hit the car. Gardner quickly drove away. He did not see Scott, Aguilar or Quintana in front of the house. He drove back to Aguilar's house, where another friend then drove him to the hospital. He remained hospitalized for four or five days.

One month after the incidents leading to the death of Pichardo, Gardner testified against gang members in an unrelated murder trial where the victim was his wife's brother. As a result of his testimony, the gang placed a "green light" on

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[7] Gardner denied that the three of them yelled "Eastside Bolen" and rushed Sparling.

him, meaning he could be killed. Gardner was concerned that he and his family might be attacked by gang members.

Gardner acknowledged giving a false statement to the police at the hospital but said he did so because he did not want anyone else to get in trouble. At that time, he knew Quintana had been injured in the fight but did not know about Pichardo's injuries.

Gardner's wife testified that early in 2009, Gardner changed his life. He stopped spending time with gang members, although he remained friends with Quintana. After Gardner testified at the trial of the people who killed her brother, the family had to move due to concern for their safety.

DISCUSSION

A. *Double Jeopardy and Collateral Estoppel*

1. *Defendants' Motion*

This was the second trial of the defendants. At the prior trial, a jury found both defendants not guilty of assault by means of force likely to produce great bodily injury as to Sparling but the jury was unable to reach a verdict as to Pichardo's murder.[8] The prosecution's theory in the first trial was that the death of Pichardo was the "natural and probable consequence[]" of a simple assault on Sparling.

At the retrial, the prosecution pursued only second degree murder charges against defendants. Prior to the jury being

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[8] At the previous trial Aguilar was convicted of assault by means of force likely to produce great bodily injury on Sparling but acquitted of the murder of Pichardo.

empaneled, defendants moved to preclude the prosecution's reliance on the "natural and probable consequences" doctrine[9] in light of their acquittal of the aggravated assault on Sparling. They claimed the prosecution should be collaterally estopped from relying on the simple assault on Sparling as the target offense on which application of the natural and probable consequences doctrine was based. In the alternative, they requested that the jury be informed of the acquittal.

The trial court stated it did not "believe the People are collaterally estopped from relitigating perhaps a theory of liability that is perhaps inconsistent with the verdicts of the outcome of the first trial." The court was also "very reluctant to allow perhaps evidence of . . . the outcome of the first trial as evidence in our case. I think that would be very confusing for the jury, almost misleading." The court also excluded evidence of Aguilar's acquittals. It concluded the finding that defendants were not guilty of an assault on Sparling did not preclude the People "from pursuing the same underlying theory of liability for

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[9] Under the natural and probable consequences doctrine, an aider and abettor "'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. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine '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.]" (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

purposes of homicide liability." The not guilty finding just precluded the People from pursuing the charge on which defendants were acquitted.

2. *Double Jeopardy*

A double jeopardy claim must be raised at trial, or it is forfeited on appeal. (*People v. Holloway* (2004) 33 Cal.4th 96, 155, fn. 18; *People v. Williams* (1999) 21 Cal.4th 335, 343-344; *People v. Sullivan* (2013) 217 Cal.App.4th 242, 246.) Defendants did not raise a double jeopardy claim at trial, nor plead it as an affirmative defense. They cite no authority to support their assertion that merely mentioning the prior acquittal of assault on Sparling in connection with their collateral estoppel argument was sufficient to raise a double jeopardy claim. We conclude the claim has been forfeited on appeal.

3. *Collateral Estoppel*

The doctrine of collateral estoppel "'bar[s] relitigation of an issue decided at a previous proceeding "if (1) the issue necessarily decided at the previous [proceeding] is identical to the one which is sought to be relitigated; (2) the previous [proceeding] resulted in a final judgment on the merits; and (3) the party against whom collateral estoppel is asserted was a party or in privity with a party at the prior [proceeding]." [¶] It is implicit in this three-prong test that only issues actually litigated in the initial action may be precluded from the second proceeding under the collateral estoppel doctrine. [Citation.] An issue is actually litigated "[w]hen [it] is *properly raised*, by the pleadings or otherwise, and is submitted for determination, and is *determined* . . . ."' [Citations.]" (*People v. Carter* (2005) 36 Cal.4th 1215, 1240.) The

purposes of the doctrine are "'(1) to promote judicial economy by minimizing repetitive litigation; (2) to prevent inconsistent judgments which undermine the integrity of the judicial system; and (3) to provide repose by preventing a person from being harassed by vexatious litigation.'" (*Ibid*.)

The People in essence concede that collateral estoppel barred retrial of the murder charges under the natural and probable consequences doctrine based on the assault on Sparling. Their position is that collateral estoppel does not apply because they tried defendants in the second trial on the theory that Pichardo's murder was a natural and probable consequence of an assault on Pichardo himself.

In a discussion on jury instructions, the following colloquy took place:

"[The court:] People, do you want to put on the record your theory of liability for the murder charged in count 1?

"[The prosecutor]: Yes, your honor. The People are proceeding under the theory that the simple assault, the target crime, is as to Rene Pichardo.

"The court: The concern as expressed by the defense at some point in the trial that they felt the target crime, if any, was Diego Sparling because certainly based on the People's evidence that that was the reason . . . the alleged perpetrators, including Mr. Aguilar, traveled to the Pichardo residence was to confront perhaps Diego Sparling, certainly not Mr. Pichardo. So how do you rectify that or explain that away?

[The prosecutor]: Because the testimony, I believe, that was presented was that Mr. Pichardo came to the aid of Diego Sparling and he then became the focus of the defendants' attack. And as Detective Mendez testified, anyone who helps out a rival

gang member . . . or simply a good Samaritan, has to be dealt with in the same manner and fashion.

"The court: All right. Again, I think that is a plausible argument given the evidence in the case. Certainly another plausible argument would be the simple assault upon Diego Sparling, then perhaps a natural and probable consequence that anyone who interferes with that attack would also become a target as well. That is consistent with the expert's testimony. The People have elected to take Diego Sparling out of the equation, just focus on the person that came to the rescue of Diego Sparling as being then the intended assault target at that point in time. . . ."

Counsel for Quintana did not wish to be heard on the matter, stating, "I think the People have a right to pursue their theory, however ridiculous it is." Counsel for Gardner argued that the People should not be allowed to change their theory of the case after the previous mistrial and claim that the target crime was the assault on Pichardo, rather than the assault on Sparling. He additionally argued that the jury instruction "should identify and define the target offense. And I think that in this factual situation just identifying the target offense as an assault is insufficient." Neither the prosecutor nor counsel for Quintana objected to modifying the jury instruction in this manner.

The trial court stated: "Okay. I'm going to overrule like I previously overruled your collateral estoppel argument with respect to the People changing their underlying theory of liability from the first trial to the second trial. I think they can pursue the same theory of liability but pursue it in a different avenue under the same doctrine of this accomplice liability instruction.

We will modify [CALCRIM No.] 403[,] however, consistent with what the parties have settled upon and that will be element No. 1 . . . . It will read the defendant is guilty of simple assault upon Rene Pichardo. . . ."

The trial court instructed the jury pursuant to CALCRIM No. 403 as modified: "Before you may decide whether a defendant is guilty of murder, you must decide whether he is guilty of simple assault. [¶] To prove that the defendant is guilty of murder, the People must prove that:

"1. The defendant is guilty of simple assault upon Rene Pichardo;

"2. During the commission of simple assault a co-participant in that simple assault committed the crime of murder; [¶] AND [¶]

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the simple assault. . . ."

Defendants claim that despite the prosecutor's decision to identify the assault on Pichardo as the target crime, "that is definitely not the argument the prosecutor made to the jury. He argued that [defendants'] target offense was the assault on [Sparling] because he was a rival gang member, and [Pichardo] was injured as a natural and probable consequence of assaulting [Sparling]." Defendants cite portions of the prosecutor's opening statement and closing argument as supporting their claim.

In his opening statement, the prosecutor told the jury that defendants arrived at Pichardo's house with Aguilar, walked up to Sparling, one of them yelled "Eastside Bolen," and then "[t]hey started beating up [Sparling], hitting him several times while in

the front yard. At some point [Pichardo] joined in to try to help [Sparling] and the fight progressed. It went down [the] driveway . . . and it went into the backyard." The prosecutor continued describing what happened, stating that "[w]hile the fight progressed, all three of them in the backyard were attacking [Pichardo]." At some point Aguilar left and was fighting with Sparling, while the other fight with Pichardo continued.

The prosecutor also told the jury about the testimony they could expect to hear from the gang expert, including "that if someone disrespects you, that you have to take action. The evidence will show that's exactly what the defendants did. They attacked Rene Pichardo, who was simply helping out someone who was at his house that evening. . . . He paid the ultimate price for it. The evidence will . . . show that these two men directly participated in the reason that he was killed."

Based on this statement, defendants argue on appeal that "in [t]rial [t]wo, just as in [t]rial [o]ne, the prosecution's theory was (a) [defendants] assaulted [Sparling] and (b) assaulting [Sparling] caused Rene Pichardo to be killed." Broadly speaking, this is correct. However, in trial one the jury was instructed that it could find defendants guilty of murder if the murder was a natural and probable consequence of the assault on Sparling. In trial two, the jury was instructed that it could find them guilty if they assaulted Pichardo when he came to Sparling's aid, and the murder was a natural and probable consequence of their assault on Pichardo. More importantly, nothing in the prosecutor's opening statement told the jury it could find defendants guilty of murdering Pichardo if the murder was a natural and probable consequence of their initial assault on Sparling. The opening

statement did not contradict the trial court's explanation of the applicable law in CALCRIM No. 403.

Defendants contend the prosecution's closing argument also impermissibly focused on an assault on Sparling. They highlight the prosecution's statement that the jury should consider "what the defendants did in this case, acting together as gang members, attacking a rival gang member and then attacking Rene Pichardo." Later in the same closing, the prosecutor stated: "As to [Sparling] being the aggressor, there is no evidence at all that he was the one who started this fight. . . . [Gonzalez's] testimony is that all three of them, including defendants and Andrew Aguilar, are the ones that rushed, yelled out East[s]ide Bolen . . . and attacked [Sparling]." Defendants assert the prosecutor doubled down on these improper references to the assault on Sparling by stating in final rebuttal closing: "[Sparling] was the person the defendants started hitting first. Before that attack, [Eastside] Bolen Park was yelled out. [Pichardo] comes in to help and then he's attacked. Ladies and gentlemen, you can consider all of that because under the theory of natural and probable and considering the evidence as a whole, you are able to look at everything that was done beforehand[,] what the defendants knew, what type of lifestyle they had, what they knew about the gang, how the gang treats rivals, how the gang deals with their neighborhood and fear and respect."

Defendants neglect to mention that immediately prior to these statements, the prosecutor stated, "We have witnesses who saw defendant Quintana hitting [Pichardo] repeatedly. Remove [Sparling] out of the case because the target crime is the assault on [Pichardo]. So there shouldn't be any conversation of [Sparling] at all." Considering this introductory statement, it is

unlikely the jury would have concluded, in contradiction with the trial court's instruction pursuant to CALCRIM No. 403, that they could convict defendants of the murder of Pichardo if they found that murder to be a natural and probable consequence of the initial assault on Sparling. Rather, the argument conveyed to the jury that it consider the initial assault in determining whether the murder was for the benefit of a criminal street gang.

Moreover, any confusion that may have been caused by the prosecution's closing argument's necessary reference to Sparling's involvement in the events leading up to the altercation with Pichardo was corrected by the jury instruction which expressly stated that the prosecution had to prove Pichardo was the victim of the target offense. On this record, there was no collateral estoppel violation in allowing the prosecution to pursue charges for murder against the two defendants based on an alternative aiding and abetting theory from that pursued in the initial trial.

B. *Penal Code Section 654*

At oral argument, counsel for Quintana requested permission to file a supplemental brief addressing the question whether the second prosecution was barred by Penal Code section 654, subdivision (a) (section 654), which 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."

Quintana acknowledges that he did not specifically object that the second prosecution for the murder of Pichardo was

barred by section 654, but he claims his objection "reiterated the substance of that provision as well as one of its rationales." He cites no authority to suggest that his objection on collateral estoppel grounds was sufficient to preserve a section 654 issue for appeal, and the law is to the contrary. (*People v. Jones* (1998) 17 Cal.4th 279, 313).

In any event, the claim is without merit. Section 654 "bars multiple prosecutions for the same act or omission where the defendant has already been tried and acquitted, or convicted and sentenced. [Citations.] This preclusion is primarily 'a procedural safeguard against harassment.' [Citation.]" (*People v. Davis* (2005) 36 Cal.4th 510, 557; see also *Kellett v. Superior Court* (1966) 63 Cal.2d 822, 825.) The section "does not bar all successive prosecutions, only those that follow an acquittal or a conviction and sentence. [Citations.]" (*In re R.L.* (2009) 170 Cal.App.4th 1339, 1344; see *Kellett*, *supra*, at p. 827.)

Thus, section 654's "proscription against multiple prosecution does not apply where there is but one prosecution; that is, a single criminal action. It prohibits only a subsequent prosecution for the same act or omission which means the filing and pressing of a new criminal action." (*Burris v. Superior Court* (1974) 43 Cal.App.3d 530, 539, citing *People v. Seiterle* (1963) 59 Cal.2d 703, 712 and *People v. Tideman* (1962) 57 Cal.2d 574, 584-587; accord, *People v. Berutko* (1969) 71 Cal.2d 84, 95.)

Quintana cites *People v. Witcraft* (2011) 201 Cal.App.4th 659 for the principle that section 654 requires "that when 'the prosecution is or should be aware of more than one offense in which the same act or course of conduct plays a significant part, all such offenses must be prosecuted in a single proceeding unless joinder is prohibited or severance is permitted for good cause.

Failure to unite all such offenses will result in a bar to subsequent prosecution of any offense omitted if the initial proceedings culminate in either acquittal or conviction and sentence.' [Citation.]" (*Id*. at p. 666, quoting *Kellett v. Superior Court*, *supra*, 63 Cal.2d at p. 827.) Therefore, "'if the evidence needed to prove one offense necessarily supplies proof of the other . . . the two offenses must be prosecuted together, in the interests of preventing needless harassment and waste of public funds.' [Citations.]" (*Id.* at p. 667.)

Quintana argues that because the basis of the prosecution's theory was that the murder of Pichardo was a natural and probable consequence of the assault on Pichardo, "the prosecution's failure to litigate the assault against Pichardo in the first trial precluded its being litigated in the second trial." The prosecution, however, did not charge defendants with a separate assault on Pichardo in either trial; it retried the murder charge on which no verdict had been returned. The jury's consideration of the assault on Pichardo as the target offense did not run afoul of section 654. (Cf. *People v. Jones*, *supra*, 17 Cal.4th at p. 313 [jury's consideration of uncharged criminal activity as an aggravating factor at penalty phase did not violate double jeopardy, as the defendant "was not tried *for* the prior offense at all"].)

Here, defendants were retried for Pichardo's murder after the jury was unable to reach a verdict as to that charge. The prosecution did not file a new criminal action after an acquittal, and section 654 did not bar the retrial. (*Kellett v. Superior Court*, *supra*, 63 Cal.2d at p. 827; *Burris v. Superior Court*, *supra*, 43 Cal.App.3d at p. 539.)

Defendants were not retried for the assault on Sparling, of which they were acquitted. Section 654 therefore did not apply. (*People v. Jones*, *supra*, 17 Cal.4th at p. 313.)

C. *Exclusion of Evidence of the Previous Acquittal of Aggravated Assault on Sparling*

Defendants contend the trial court erred in excluding evidence of their previous acquittal of aggravated assault on Sparling, "an essential fact required for the prosecution to present its theory of natural and probable consequences, i.e.[,] that [Pichardo's] murder was a natural and probable consequence of an assault on [Sparling]." Defendants claim the evidence was relevant and its exclusion violated their right to present a defense.

Defendants' contention rests on a faulty premise: that the prosecution's theory of the case was that defendants were guilty of the murder of Pichardo as a natural and probable consequence of the assault on Sparling. As discussed above, the prosecution's theory of the case—and the theory on which the jury was instructed—was that defendants were guilty of the murder of Pichardo as a natural and probable consequence of the assault on Pichardo.

Evidence of defendants' acquittal of aggravated assault on Sparling was not relevant to any of the issues here: whether defendants assaulted Pichardo and whether his murder was a natural and probable consequence of that assault. Evidence of the acquittal had no "tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) That a previous jury found

defendants not guilty of an aggravated assault on Sparling did not tend to prove that defendants did not assault Pichardo.

Additionally, it must be recalled that defendants were acquitted of the charge of assault on Sparling by means of force likely to produce great bodily injury; the first jury was not asked to consider whether they were guilty of simple assault. Presenting evidence of the jury verdict from the first trial would necessarily have required explaining to the jury the different elements of simple assault as compared to aggravated assault. These additional instructions likely would have been distracting or confusing to the jury.

A criminal defendant's constitutional right to present evidence extends to "'all relevant evidence of *significant* probative value in his favor.'" (*People v. Homick* (2012) 55 Cal.4th 816, 865.) Because the evidence of the prior acquittal was not relevant and may have been confusing, the trial court did not abuse its discretion in excluding it, and defendants were not deprived of their right to present a defense by its exclusion. (*People v. Thornton* (2007) 41 Cal.4th 391, 444-445; *People v. Roberts* (1992) 2 Cal.4th 271, 300-301 ["the due process clause does not entirely strip a trial court of its power to exclude evidence on grounds of irrelevance or potential confusion"].)

D. *Instruction as to the Natural and Probable Consequences Doctrine*

Defendants contend the trial court here erred in using the phrase "could have happened" to explain the natural and probable consequences doctrine, thereby equating "foreseeable" with "possible." We conclude that the trial court's explanation was inaccurate, and we cannot conclude that the error was

harmless beyond a reasonable doubt, requiring reversal of the guilty verdicts.

1. *Proceedings Below*

As previously stated, the trial court instructed the jury pursuant to CALCRIM No. 403 that before it decided whether the defendant was guilty of murder, it had to decide if he was guilty of simple assault upon Pichardo. The prosecution was required to prove, in addition to the simple assault, that "[d]uring the commission of simple assault a co-participant in that simple assault committed the crime of murder; [¶] AND [¶] Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the simple assault."

The instruction further stated: "A *natural and probable consequence* is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the simple assault, then the commission of murder was not a natural and probable consequence of simple assault."

One of the jurors, Juror No. 11, had previously told the court that he had to leave for a business trip on March 22. On the morning of Thursday, March 21, in the midst of closing arguments, Juror No. 11 sent the court a letter concerning his need to leave for the business trip the following day and the likelihood the trial would not be completed before then. In a hearing to consider the juror's concerns, the trial court

acknowledged "that this case did go beyond our original estimate and certainly mine. And this certainly places you in jeopardy of having this conflict. What I am willing to do if the parties are willing is to stipulate that we can excuse you and replace you with our final alternate." Counsel were not willing to stipulate, and Juror No. 11 agreed to participate in deliberations the following day.

Deliberations commenced mid-afternoon on March 21. Late on Friday afternoon, March 22, the jury sent a note to the court stating that they were "at an impasse. [¶] For Angel Quintana 9 guilty 3 not guilty[,] [¶] [f]or Corey Gardner 7 guilty 5 not guilty." The court brought the jury in and asked questions to the foreperson "regarding whether or not there is a reasonable probability that this jury could reach a unanimous decision on one or perhaps both of the defendants."

After noting that the jury had been deliberating for only one day and had not submitted any questions or requested any read back of testimony, the court told counsel that "this case is much too important just to . . . fold at the first impasse that is communicated to the court. . . . I also am taking into consideration, even if we replace [Juror] No. 11 with our remaining alternate, given the numerical breakdown and the impasse, it's not going to be of much significance even if there is a vote obviously rendered by a new alternate juror given the position of the other jurors. So I don't think that endangers Mr. Quintana or Gardner in any way in terms of the court reconstituting the jury against their interest. I don't think that's a major issue, given what I've heard. But, again, one day of deliberations is simply insufficient for any jury to throw in the towel and just say we cannot reach a verdict. So that is what I'm

going to do and obviously it's over the objections of both defense counsel."

The court decided not to declare a mistrial and to require the jurors to continue deliberating with a replacement juror after the weekend. On Monday, March 25, within an hour of the replacement juror being substituted for Juror No. 11, the jury sent the court several questions and a request for a read back of certain testimony. The questions were: "(1) If both defendants are guilty of aiding & abetting, can we find both defendants guilty of 2nd degree murder without knowing who dealt the fatal blows?

"(2) Further explain Natural & Probably [*sic*] Cause—implied malice with intent to do fatal harm.

"(3) Please elaborate on [CALCRIM No.] 224 'Circumstantial Evidence' as a whole & the specifi[c]ally on the paragraph that[] starts on 224 line 7."

As to question number two, the trial court told counsel that "what I plan on doing, is when they're referring to a specific instruction, I'll reread the instruction, and then take a moment to try to clarify what it means and do my best. [¶] But what I will not do is incorporate any of the evidence in my explanation. Just simply an explanation of the law, without any mention of the facts before the jury. They have to decide those facts and simply apply it to the law as I'm going to explain it." Counsel for Gardner, who was representing both defendants for purposes of the response to the jury's question, agreed with the court's plan.

The court brought the jury back in and told them, "I think the best way to approach this communication is to reread the law, which I know you've read probably more than once, and then I'll do my best to perhaps clarify what these instructions mean." The

court stated it was "going to go through the [CALCRIM] 400 series, aiding and abetting generally, aiding and abetting the intended crime, and the natural and probable consequence theory, which is a hybrid of aiding and abetting, but it still pertains to people who help the actual perpetrator in committing a crime."

After rereading CALCRIM No. 400 on the general principles involved in aiding and abetting, the trial court elaborated: "Now, under some circumstances—and this kind of leads you into natural and probable consequences—if [the] evidence established that the aiding and abetting of one crime which is the target crime, that is what I'm helping the perpetrator commit, that person can only be found guilty of another crime which was a non-target crime if that crime was foreseeable, it *could have happened* under the circumstances, given all you know about the case. It was foreseeable as something not intended by the aider and abettor, but *could have happened* because the aider and abettor at least intended that target crime; that something else *could have happened*, given all the circumstances of the case. Again, that's natural and probable consequence[s]." (Italics added.)

The trial court then discussed CALCRIM No. 401, about aiding and abetting intended crimes. In connection with a hypothetical scenario involving an intended liquor store robbery in which money was also taken from a customer, the trial court commented, "The question is, can I still be convicted of aiding and abetting the robbery of the customer which I did not plan on doing at all? I did not agree to that. I just wanted the loot in the cash register, and that's why I took the perpetrator there.

"Under the natural and probable consequences theory, a jury would have to decide whether or not it was foreseeable that the actual gunman who went into the liquor store *might* take the opportunity to perhaps take other property from someone else other than the liquor store owner just to get even more booty, so to speak, more valuables, more fruit of that type of crime, if you find [that] it was a natural and probable consequence that committing a liquor store robbery *might* evolve to something even more.

"It's foreseeable that could happen, it's objectively reasonable that it *could* happen. Then I, being the getaway driver, could be convicted of not only what I helped out in doing, the liquor store robbery, but also the unintended crime, which was the other robbery of a customer, even though I did not agree to that, . . . that was not part of my intent.

"If it was *possible*, foreseeable. If it was a natural and probable consequence, one that a reasonable person would know is likely to happen if nothing unusual intervenes.

"In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence."

The court continued by contrasting its hypothetical with one in which the robber who entered the store proceeded to set fire to the inventory. The court questioned: "could I, being the wheel man of the liquor store robbery, be convicted of an arson, of putting a match to the inventory in the back of the store? Well, is that likely to happen? If you find that it's not a natural and probable consequence, then I could, as the getaway driver, . . . be guilty of the robbery itself, but not of that unintended crime, because it's not a natural and probable consequence of my

conduct." The court further explained "that's just another hypothetical kind of example to help you distinguish what might be foreseeable in one situation and what may not be foreseeable in another situation, given the same set of facts."

The court then read CALCRIM No. 403, explaining the terms used in the instruction. It ended with "the final element, under all the circumstances, a reasonable person, objective, a reasonable person in the defendant's position would have known that the commission of murder was a natural and probable consequence of the commission of simple assault. By doing the simple assault, under all the circumstances of the case, a person in the defendant's position, knowing everything that he knows, is it foreseeable that the simple assault *could* escalate to the ultimate crime of murder under all the circumstances of the case.

"And again, you have to understand what simple assault is. Did a perpetrator or someone who aided and abetted the perpetrator commit the simple assault, and did the simple assault get out of hand, did it escalate to the crime of murder, and was it foreseeable that that *could have happened*. And again, you have to decide what the facts are of that particular case." (Italics added.)

After the questions were answered by the court, and a witness's testimony was read back, the jury continued deliberating. The jury reached its verdicts about 3:30 p.m. that afternoon.

2. *Applicable Law and Analysis*

The trial court "is under a general obligation to 'clear up any instructional confusion expressed by the jury,' but '[w]here . . . the original instructions are themselves full and complete, the

court has discretion . . . to determine what additional explanations are sufficient to satisfy the jury's request for information.' [Citations.]" (*People v. Dykes* (2009) 46 Cal.4th 731, 802.) However, where the trial court does give additional explanations, those explanations must be legally correct. (See *People v. Giardino* (2000) 82 Cal.App.4th 454, 467.) In elaborating on instructions, "'[C]omments diverging from the standard are often risky.'" (*Ibid*., quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Under the natural and probable consequences doctrine, an aider and abettor is liable for any offense which is a *reasonably foreseeable* consequence of the target offense. (*People v. Smith* (2014) 60 Cal.4th 603, 613-614.) "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.]" (*People v. Chiu* (2014) 59 Cal.4th 155, 161-162.) Reasonable foreseeability requires something more than that the nontarget offense "could have happened." It requires a finding that the result was one that "a reasonable person would know is likely to happen if nothing unusual intervenes." (CALCRIM No. 403; *People v. Prettyman* (2006) 14 Cal.4th 248, 260 [doctrine is "based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion'"])

The trial court's repeated instruction that a natural and probable consequence was one that "could have happened, given all the circumstances of the case" omitted the requirement that the consequence must have been reasonably foreseeable, and likely to have happened, and not merely possible. It thus was erroneous.

Error in instructing the jury as to the elements of the natural and probable consequences doctrine is reviewed under the *Chapman*[10] harmless beyond a reasonable doubt standard. (See *People v. Prettyman*, *supra*, 14 Cal.4th at pp. 271-272; *People v. Riva* (2003) 112 Cal.App.4th 981, 997-998 & fn. 58.) Here, we cannot conclude that the error was harmless beyond a reasonable doubt.

This was clearly a close case. The jury was deadlocked 9 to 3 and 7 to 5 on Friday afternoon, after more than a day of deliberations. One juror was replaced on Monday morning, but, as the trial court observed, that would not be enough to break the deadlock given the jurors' respective positions as of Friday afternoon. One hour after the alternate juror was empaneled, the jury requested a read back of certain testimony and further instruction, at which time the trial court provided the erroneous instruction on natural and probable consequences. The jury was able to reach its verdicts that afternoon. That the jury was deadlocked as to both defendants, received the additional instructions, and was able to reach its verdicts shortly thereafter suggests that those verdicts were based on the erroneous instructions. (See *People v. Brown* (2016) 247 Cal.App.4th 211,

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10 *Chapman v. California* (1967) 386 U.S. 18, 24 [87 S.Ct. 824, 17 L.Ed.2d 705].

226.) Moreover, the evidence was extremely conflicted in this case, with no eyewitness to the stabbing or retrieval of the murder weapon, disputed testimony as to whether Pichardo at some point had the upper hand in the struggle, and uncontroverted evidence that both defendants were stabbed by an unknown person. Therefore, instructing the jury in this case that a natural and probable consequence was one that *could have happened* was not harmless beyond a reasonable doubt. (*Id*. at p. 227.)[11]

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11 As the People point out, neither defendant objected to the trial court's response to the jury's question. Nevertheless, if the instruction affected defendants' substantial rights, we may review the claim of instructional error even though defendants did not object to the instruction in the trial court. (Pen. Code, § 1259; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1142, 1192; *People v. Valenzuela* (2011) 199 Cal.App.4th 1214, 1233.) Here, the instruction clearly affected defendants' substantial rights.

DISPOSITION

The judgments are reversed.

KEENY, J.*

We concur:

PERLUSS, P. J.

ZELON, 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.