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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

ORLANDO JOSEPH LOPEZ et al.,

Defendants and Appellants.

A136253

(Lake County Super. Ct.
Nos. CR927046A, CR927046B,
CR927102)

Two men shot firearms into a crowd at a backyard barbecue, resulting in the death of a child and injuries to five others. Appellants Orlando Lopez, Paul Braden, and Kevin Stone were charged as the assailants. Stone pleaded no contest to lesser charges and testified against Lopez and Braden at trial. Both were convicted of first degree murder, six counts of attempted murder, and other offenses.

On appeal, Lopez and Braden assert instructional error and related claims of ineffective assistance of counsel. Braden asserts additional claims, including a claim the trial court erred in consolidating his trial with Lopez's trial and claims related to evidence of an adoptive admission and uncharged acts. Lopez challenges the sufficiency of the evidence to support the judgment. All three appellants contend the trial court erred in failing to stay sentences on certain offenses under Penal Code section 654.¹ We conclude the convictions for first degree murder must be reversed under *People v. Chiu* (2014) 59

¹ All undesignated statutory references are to the Penal Code.

Cal.4th 155 (*Chiu*), which held that an aider and abettor may not be held liable for first degree premeditated murder under the natural and probable consequences doctrine. On remand the People may elect to retry that charge or to accept a reduction of the conviction to second degree murder. We direct that the sentences imposed on Lopez and Braden for two mayhem counts be stayed under section 654. The judgment is otherwise affirmed.²

PROCEDURAL BACKGROUND

On December 12, 2011, the Lake County District Attorney filed a consolidated information charging appellants Lopez and Braden with 15 counts relating to a shooting at a backyard barbecue on June 18. The charges included: first degree murder of Skyler Rapp (§ 187, subd. (a); count 1); six counts of assault with a firearm on Skyler Rapp, Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith, and Ross Sparks (§ 245, subd. (a)(2); counts 2, 4, 7, 10, 12, and 14); five counts of attempted murder of those same victims except Skyler Rapp (§§ 664, 187, subd. (a); counts 3, 6, 9, 11, and 13); two counts of mayhem against Desiree Kirby and Andrew Sparks (§ 203; counts 5 and 8); and discharging a firearm at an inhabited dwelling (§ 246; count 15). The information also alleged that Lopez and Braden had personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d); counts 1, 3, 5, 6, 8, 9, 11, 13, and 15); personally discharged a firearm (§ 12022.53, subd. (c); counts 1, 3, 5, 6, 8, 9, 11, and 13); personally used a firearm (§§ 12022.5, subd. (a), 12022.53, subd. (b); counts 1-14); and inflicted great bodily injury (§ 12022.7, subds. (a), (d); counts 2-4, 6, and 9-14). The information alleged that counts 1-4, 6-7, and 9-15 were serious and/or violent felonies. (§§ 1192.7, subd. (c) & 667.5, subd. (c).) The information further alleged that Braden had served a prior prison term (§ 667.5, subd. (b).)

Previously, on November 21, 2011, the Lake County District Attorney had filed an amended information charging appellant Stone with the same 15 counts alleged against Lopez and Braden, and also unlawful possession of a firearm (§ 12021, subd. (c)(1);

² Lopez also filed a petition for writ of habeas corpus. In that proceeding, we separately issue an order denying the petition, with a dissent.

count 16); conspiracy to commit robbery (§§ 182, subd. (a)(1), 211; count 17); and acting as an accessory to murder, attempted murder, assault with a firearm, mayhem, and shooting at an inhabited dwelling (§ 32; count 18). That same day Stone pleaded no contest to counts 16, 17, and 18, and the remaining charges were dismissed. As part of the negotiated disposition, Stone agreed to testify against Lopez and Braden at trial.

The trial court ordered a consolidated trial with separate juries for Lopez and Braden. On June 15, 2012, Lopez's jury found him guilty on all counts and found all the special allegations true. On June 20, Braden's jury found him guilty on all counts and found all the special allegations true. Braden admitted the prior prison term allegation.

In August 2012, the trial court sentenced Lopez to a total term of 26 years plus 285 years to life in prison, Braden to a total term of 27 years plus 285 years to life, and Stone to a total term of 10 years 4 months in prison.³ All three appealed.

FACTUAL BACKGROUND

The June 2011 Fight At Graduation

On June 10, 2011, Josh Gamble attended a graduation ceremony at Lower Lake High School with his friend Joseph Armijo. At the time, Gamble was 17 and Armijo was 15. A group of youths known as the "Avenue Boyz" approached Gamble and Armijo as

³ As to Lopez and Braden, the trial court imposed the upper term of eight years for the base term on count 5 (mayhem), plus a consecutive firearm enhancement of 25 years to life. For the subordinate term on count 8 (mayhem), the court imposed one year and four months (one-third the middle term), with a consecutive firearm enhancement of 25 years to life. For the subordinate term on count 15 (shooting at an inhabited dwelling), the court imposed one year and eight months (one-third the middle term), with a consecutive firearm enhancement of 25 years to life. For the subordinate term on count 1 (first-degree murder), the court imposed 25 years to life, with a consecutive firearm enhancement of 25 years to life. For each of the subordinate terms on counts 3, 6, 9, 11, and 13 (attempted premeditated murder), the court imposed seven years to life, with consecutive three-year great bodily injury enhancements and consecutive firearm enhancements of 25 years to life. The trial court also added a one year consecutive term to Braden's sentence on count 5 for the prior prison term enhancement. The sentences on counts 2, 4, 7, 10, 12, and 14 were stayed pursuant to section 654. As to Stone, the trial court imposed the upper term of nine years on count 17 (conspiracy), plus 8 months (one-third the middle term) on count 16 (possession of a firearm), and plus 8 months (one-third the middle term) on count 18 (being an accessory).

they sat in the bleachers. One member of the group, Dennis Fry, stepped on Gamble's shoe and said, "What's up, bitch." Fry and Gamble had had a conflict prior to that date. After the ceremony, Gamble and Armijo sat outside, either talking to other kids or waiting to fight Fry. The Avenue Boyz and Leonardo Lopez (the brother of appellant Lopez)⁴ approached. Fry and Gamble exchanged words, then Leonardo Lopez hit Gamble in the face without warning, with either his fist or a lead pipe. Gamble sustained an injury under his right eye. The two groups scuffled, then separated.

A few days later, Desiree Kirby was with Gamble's sister Amanda at a store. Kirby's boyfriend, Ross Sparks, is Josh and Amanda Gamble's cousin. Kirby and Amanda Gamble had heard about the graduation fight. They saw Leonardo Lopez and Fry at the store and there was a confrontation. They yelled at each other angrily. Fry said "it would happen again." The store staff made them all leave.

Events at Ashli Athas's House On June 18, 2011

Ashli Athas was Leonardo Lopez's girlfriend, and they had an infant. In June 2011, they lived with Athas's grandmother on 16th Avenue in Clearlake. In the afternoon or early evening on June 18, people started arriving at the house for a party. The guests included some of the Avenue Boyz and appellants Lopez and Braden. Braden was a tall man with a shaved head. "Nano" is Lopez's nickname.

At some point during the party, Athas heard Braden arguing on the phone with Crystal Pearls and Ross Sparks; Pearls is aunt to both Athas and Sparks. Braden said, "Let's meet up and handle this." Other witnesses saw Lopez and Braden yelling and arguing on the phone; they were passing the phone back and forth. Leonardo Lopez heard Braden threaten someone, "I'll kill you." One witness testified Lopez was angry, yelling, and "trying to schedule somewhere to go to fight." The witness asked Lopez who he was speaking to, and Lopez responded "bitch ass Ross Sparks." A group was discussing the possibility of meeting up with Ross Sparks for a fight, and Braden said, "we can meet them . . . and you guys can start fighting, I'll be hiding in the bushes and I

⁴ To avoid confusion between appellant Lopez and his brother, we will refer to Leonardo Lopez by his first and last names throughout this decision.

can pop out and start shooting them.” Lopez was present, but still on the phone at the time.

Braden said he could have a gun delivered, and about 10 to 15 minutes later Lopez and Braden left the party together. When they returned, Braden was carrying a black shotgun wrapped in a sweatshirt or sweater and a plastic bag containing shotgun shells. Braden said he wanted to saw off the butt of the shotgun, and Leonardo Lopez said he could use the garage. Braden went to a workbench in the garage and began sawing off the butt of the shotgun. Lopez was standing either next to Braden or close by at the entrance to the garage. One witness testified Lopez was holding the barrel of the gun.

Subsequently, Braden sat on the patio stairs popping shells in and out of the shotgun. He said, “I didn’t bring this gun to Clearlake for nothing, let’s go use it. I didn’t go get it for no reason.” Several times he also said, “I’m bored, let’s go shoot somebody.” At the time, Lopez was standing on the patio on his phone. Another witness heard Braden say, “What the fuck, I didn’t bring my gun for nothing, we need to go do this.” The same witness also heard Braden say that, “since no one would go meet them,” he wanted to “[w]alk down to Ross’s house and start shooting them.” At the time, Lopez was “sitting a ways away.”

At around 9:30 or 10:00 p.m., Athas’s grandmother told everyone to go home. Lopez and Braden left between 10:15 and 10:30 p.m.; Kevin Stone picked them up in a car. Athas testified that Braden carried the shotgun wrapped in a sweatshirt, but Lopez was not holding anything.

The June 18 Backyard Barbecue

In June 2011, Desiree Kirby lived in an apartment building on Lakeshore Drive in Clearlake with Ross Sparks and their two children, Skyler and Eden.⁵ Skyler was four years old. Their yard was separated from their neighbor Curtis Eeds’s yard by a six-foot-tall wooden fence. The fence had a hole where two boards were missing. There was also

⁵ Sparks was Skyler’s stepfather.

a notch at the top of the fence where a piece of board was missing; there was a washing machine in Eeds's yard behind that spot.

On June 17, 2011, Lopez had unexpectedly stopped by Eeds's place. Sparks was there, and he and Lopez talked about the graduation fight. Sparks told Lopez, "your brother's got one coming." Lopez said he would handle his brother and not to worry about it.

Sparks and Kirby held a barbecue on June 18, 2011, the same day as the party at Athas's place. The guests included Ross's brother Andrew Sparks, Josh Gamble, Amanda Gamble, Joseph Armijo, Ian Griffith, and Crystal Pearls, among others. That day, Ross Sparks received a number of threatening texts and phone calls. A text at 7:20 p.m. said, "Let's go toes at oak hill u ready." A second text from the same number said, "Its nano im fuck u up u fuckn punk fuck your life." Sparks responded: "Really nano this is Ross and if u want problems you know my family ain't one to fuck with this shit will get real crazy if u want." Sparks sent another message stating, "Shit will get handled." Another incoming message said, "Come c me rite n0w." Sparks replied, "If this is how its gonna be over some punk shit then I guess well all bump into one another." Further incoming messages said, "Im on my way u at hOme" and "Were ya at." Sparks replied, "At my house." An incoming response said, "K meet me at tha water park if a man."

At some point in the middle of the texting Ross Sparks called the number the texts had come from and recognized Lopez's voice on the other end. Lopez told Sparks he would "bash" Sparks and his family with the same lead pipe Leonardo Lopez had used to hit Josh Gamble. Lopez and Sparks exchanged a few texts and calls after that; Lopez was mad because Sparks would not come and meet him. Other people saw Sparks on the phone, angry, yelling, and saying that he was willing to fight. Josh Gamble heard him say, "You're going to come and do it, then do it." Kirby heard Sparks tell a caller he would "beat their ass." The last phone call with Lopez was around 7:42 p.m.

Crystal Pearls testified that at around 3 p.m. on June 18th Sparks called her and asked her to come over to his house because there was going to be an altercation to settle a dispute that had started at the high school. She saw Sparks on the phone arguing with

Lopez. At one point, Pearls had the phone, and she spoke to someone whose voice she did not recognize who told her, “I’m going to come there, we’re going to—I’ll kill you, I’ll kill your family. I don’t give a fuck who you are.” He also said he was going to come and “shoot up” her whole family. After Pearls hung up, a friend of hers called Lopez’s number, spoke to Lopez, and learned that Braden was the person Pearls had spoken to. Pearls left the barbecue before the shooting.

The June 18 Shooting

Around 10:30 to 10:45 p.m., the partygoers in Sparks and Kirby’s yard heard a big boom or gunshot from the wooden fence separating the yard from Eeds’s yard. Ross Sparks, who was facing the fence, testified the shot came from the hole in the fence and it sounded like a shotgun. He then saw muzzle flashes from a second shooter firing over a portion of the top of the fence where a notch is missing; he testified the shooter must have been kneeling on the washer at that location on the Eeds’s side of the fence. Other witnesses also described seeing muzzle flashes from those two locations.

Ross Sparks could only see by the light of the muzzle flash the silhouette of a person kneeling and aiming through the hole in the fence. As for the shooter at the top of the fence, he could only see the silhouette of a head; the shooter did not have long hair. It was “really dark” over there. Josh Gamble testified the shooter at the top of the fence was at least six feet tall and had short hair. Andrew Sparks also testified that shooter had short hair. The shooter at the hole in the fence was almost six feet tall and it looked like he had a shotgun. It was even darker at the hole in the fence than at the top of the fence where the second shooter was.

Josh Gamble testified that the firearm at the hole in the fence made a “boom” sound and the other made a “pap, pap, like a firecracker.” He had “no doubt” they sounded different. He thought the person at the hole had a shotgun; he couldn’t tell what type of firearm the person at the top of the fence had. Ross Sparks also testified the gunshots sounded different; one was a “big booming sound” and the other was a “lower sounding shot.” He opined it could have been two shotguns with different types of shot. Ian Griffith testified the first shot was loudest and the subsequent shots had “more pop.”

At one point in his testimony, Andrew Sparks testified the weapons sounded “real similar” and he thought both were shotguns. At another point in his testimony he testified the shots from the different locations sounded different; he opined it was because different types of rounds were used.

Ross Sparks testified he saw four or five shots fired from the hole in the fence and two or three fired from the top of the fence; because of the rate of fire, he thought the shooter at the hole had a semiautomatic weapon. The entire period of shooting lasted about five seconds. Andrew Sparks saw about three muzzle flashes from the top of the fence, and three or four from the hole in the fence; on cross-examination he stated that he heard six or seven shots but only saw three muzzle flashes. Joseph Armijo heard more than two shots, but fewer than ten. Ian Griffith heard 13 or 14 shots total. Amanda Gamble heard six or seven shots total, over the space of three minutes.

Skyler Rapp was killed in the shooting. Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith, and Amanda Gamble were all hit by the shots, and suffered injuries of varying severity.

Clearlake Police Department Sergeant Martin Snyder responded to the scene of the shooting for evidence collection. He observed holes in the residence consistent with damage from 9-shot and 15-shot buckshot. One shotgun could have fired both types of rounds. Sergeant Snyder recovered three shotgun shell casings. A criminalist could not identify the shells as having been fired from the same weapon but opined they had been “cycled” (loaded and ejected) through the same weapon.

Events After the Shooting

Some time after midnight on the night of the shooting, Stone’s girlfriend Leighann Painchaud received a text from him saying, “I love you, I’m sorry, but we can’t be together.” Painchaud communicated with Stone two or three weeks after the shooting. She met him in Santa Rosa at the end of June; Stone was scared and overwhelmed. Stone and Painchaud were arrested in Santa Rosa.

Braden called Leonardo Lopez’s cell phone the morning after the shooting, and Athas answered. Athas, who was related to Skyler Rapp, said to Braden, “You know that

was like my cousin that you killed.” Braden responded, “Oh my God, I’m sorry. Oh my God.” Athas then hung up.

Anthony Gaston, one of the Avenue Boyz, testified that around June 14 he had stashed a borrowed single-shot shotgun between boxes on the porch at Athas’s place. Lopez saw the shotgun when Gaston brought it over and saw where it was hidden. Gaston saw the shotgun on the afternoon of the June 18th party, but did not see it again after that. Gaston later heard from Leonardo Lopez that the weapon had been used and was no longer at Athas’s place. At trial, Leonardo Lopez denied Gaston’s testimony about the shotgun.

Kevin Stone’s Testimony

Appellant Stone testified against Lopez and Braden as part of Stone’s plea bargain. He said he was testifying because he did not want to be blamed for the shootings, because he wanted to help put Braden in prison, and to “save my own ass really.” Stone admitted that at the time of the shooting he had been addicted to methamphetamine for eight years, was using a very large amount every day, and sold the drug to support his habit. He had also traded drugs for guns.

On June 18, Stone’s girlfriend Painchaud borrowed a car from her cousin so they could go purchase some methamphetamine. Stone was also texting with Lopez that day. Lopez asked Stone in a text whether Stone was interested in “pulling a lick,” which meant getting something for free, including by a robbery. Lopez texted, “I got a lick and I got the straps and everything.” A “strap” meant a firearm. Stone told Lopez he would pick Lopez up.

Painchaud drove to Leonardo Lopez’s place. Lopez and Braden approached the car; Braden was holding a shotgun, and Lopez was carrying something “similar” that Stone thought was another shotgun.⁶ Braden was wearing gloves and a rag over the lower portion of his face. Painchaud drove the men back to her apartment and gave the car key to Stone. Stone retrieved a .22-caliber rifle from Painchaud’s apartment. Either

⁶ Painchaud testified she could not tell if Braden and Lopez were carrying anything.

Lopez or Braden told Stone to drive to Curtis Eeds's place. Braden told Stone he should drive more carefully because Braden was "wanted for murder." Stone asked a couple of times what the "lick" was, and Braden told him, "it's a good lick, don't trip." Stone had recently ripped Eeds off by giving him fake drugs in exchange for cash, and he thought they were going to do something similar again.

Stone parked and the men went into Eeds's yard. Lopez was in the lead, followed by Braden and then Stone. Stone could hear a party on the other side of a fence. Stone was not looking at Braden or Lopez when he heard the first shotgun blast. He looked up and saw Braden shooting his shotgun over the fence into the party. Stone watched Braden aim and shoot "about three times;" he heard five or six shots total. Stone saw Lopez standing still and looking at Braden; he did not see Lopez fire his weapon.⁷ He believed the other shots he heard came from Braden. Stone said he was "very certain" Lopez was not shooting.

Stone and Lopez ran back to the car; Stone said Lopez jumped in it at the same time he did and Braden followed moments later. Lopez was shaken up, while Braden was calm. Stone sped off and eventually crashed the car into some bushes. The men got out, discarding their weapons into foliage along the way.⁸

At trial, Lopez impeached Stone's testimony with testimony from Valentin Aguilar, who was in jail with Stone. Stone was "real sad" while talking about his case. Stone said Lopez wanted a ride, so Stone went to pick him up. Stone retrieved a gun and suggested they rob Eeds. Braden had a shotgun, but Lopez had no weapon. When they arrived at Eeds' place, Braden thought Eeds was in the neighboring yard. Stone put his gun over the fence and fired once into the ground and once into the air; he did not hit anyone. Braden fired several times towards the people on the other side of the fence. Stone told Aguilar he had lied about Lopez being armed because Lopez had said that

⁷ At trial Stone testified he was not sure where Lopez was standing while Braden was shooting. In an earlier interview he told the police he saw Lopez stepping through the fence, but at trial he told the jury that story was based on what he had heard at the preliminary hearing.

⁸ A .22-caliber rifle was recovered by the police, but no shotguns.

Stone had been armed. Aguilar had shared a cell with Lopez for a week, but he did not talk with Lopez about the case.

In the People's rebuttal, Stone denied telling Aguilar that he had fired his rifle, and he reaffirmed his testimony that Lopez had a shotgun on June 18.

Evidence Presented Only to Braden's Jury

Clearlake Police Department Detective Sergeant Thomas Clements contacted appellant Braden at Braden's father's house and interviewed him twice on June 20, 2011. Recordings of the interviews were played to Braden's jury. Braden said his father picked him up after the party at Athas's house on June 18; Lopez was not present at the party. He denied knowing Stone and denied being present at the shooting.

Sergeant Clements testified he spoke with Braden's father on September 21, 2011, and Braden's father said he would not have gone to pick up Braden because he took medication between 8:00 and 9:00 p.m. and would not have driven after that.

An informant, Daniel Loyd, testified he met Braden while the two of them were in jail. He did not receive any deal in exchange for his testimony. On September 29, 2011, Braden said he "blasted Rapp's little boy^[9] and the other motherfuckers that had it coming" Braden "was bragging about how he was going to get away with shooting a little boy." Braden told Loyd that Stone and Lopez had called and asked for help retaliating for "somebody [who] had been beaten down." Braden brought a shotgun, which he modified by sawing off the butt and some of the barrel. The three of them drove to a residence in a van and "started blasting over the fence." Braden said he gathered up the shells and stashed the firearms, although he was upset that one of his codefendants had thrown "a .22" out the window as they fled.

On a couple of occasions, Braden asked if Loyd wanted to buy marijuana and guns, or if Loyd knew someone who did. Braden said he sold a lot of guns to gang members. Braden also said he could escape jail with Loyd by beating a correctional officer, stealing her key, and getting to a car he would have waiting. Braden said he sent

⁹ Skyler's biological father was Jeremiah Rapp, who Loyd knew.

someone to scare one of the witnesses, probably Athas, and he talked about having some of the witnesses in the case killed.

Evidence Presented Only to Lopez's Jury

Sergeant Clements interviewed Lopez on June 28; a recording of the interview was played to Lopez's jury. Lopez said he had been at Athas's house with Braden. He saw Braden saw the butt off a black shotgun and wrap up the end with duct tape. Braden had been "talking shit" to Ross Sparks and talking about "shooting up the house." Braden also was telling people at Athas's place, "I wanna shoot somebody."

Lopez said that Stone picked him and Braden up; Stone's girlfriend was driving. They went to an apartment, and Stone retrieved a gun and returned without his girlfriend. Braden had his shotgun. Braden and Stone were talking about robbing someone but Lopez did not think they were serious. They arrived at Eeds's house and Braden walked up to the fence and started shooting.

DISCUSSION

I. *The Convictions For First Degree Murder Must Be Reversed*

Appellants Lopez and Braden were convicted under count one of the first degree murder of Skyler Rapp. Their juries also found true section 12022.53, subdivision (d) enhancements alleging that in committing the murder the appellants each personally discharged a firearm causing Skyler Rapp's death. Lopez and Braden contend their convictions for first degree murder must be reversed because the trial court's instructions allowed the jurors to convict based on a theory that the premeditated murder was a natural and probable consequence of each appellant's aiding and abetting of an assault with a firearm, contrary to the California Supreme Court's recent decision in *Chiu, supra*, 59 Cal.4th 155. We agree the convictions for first degree murder must be reversed.¹⁰

¹⁰ Lopez challenged the propriety of the natural and probable consequences instruction in a supplemental opening brief filed in October 2013. In addition, he joined in a supplemental brief filed by Braden in July 2014 that argued *Chiu* required reversal of the first degree murder convictions because of flaws in the same instruction. Despite this, at oral argument, Lopez appeared to concede that *Chiu* did not assist him because any error in giving the instruction was harmless. To the extent Lopez offered such a concession,

A. *Background*

The trial court instructed the juries on the elements of first degree murder (§ 189) in the language of CALCRIM No. 521, including proof that the defendant “acted willfully, deliberately, and with premeditation.” The court also instructed the juries pursuant to CALCRIM No. 400 that a person may be guilty of a crime as the direct perpetrator or as someone who aided and abetted the perpetrator. The court instructed the juries pursuant to CALCRIM No. 401 regarding the required proof for a finding someone is an aider and abettor, including that “[s]omeone aids and abets a crime if he knows of the perpetrator’s unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of the crime.”

Most importantly for purposes of the present appeal, the trial court proceeded to instruct the juries on the natural and probable consequences doctrine pursuant to CALCRIM No. 402. The court instructed the jurors that, if they find the defendant is guilty of assault with a firearm, they should proceed to consider whether he is guilty of the other charged offenses, including murder, attempted murder, and mayhem. The court explained that, “[u]nder certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time.” In particular, to find the defendant guilty of murder, attempted murder, or mayhem, the People must prove that he is guilty of assault with a firearm; a co-participant in the assault committed murder, attempted murder, or mayhem; and “[u]nder all of the circumstances, a reasonable person in the defendant’s position would have known that the commission of Murder, Attempted Murder, or Mayhem was a natural and probable consequence of the commission of the Assault With a Firearm.” Finally, the court explained, “The People alleged that the defendant originally intended to aid and abet the commission of Assault With a Firearm. The defendant is guilty of Murder, Attempted Murder or Mayhem if the

we reject it. (*People v. Sanders* (2012) 55 Cal.4th 731, 740; see also *Desny v. Wilder* (1956) 46 Cal.2d 715, 729 [“This court, of course, is not bound to accept concessions of parties as establishing the law applicable to a case.”].)

People have proved that the defendant aided and abetted in the Assault With a Firearm and that Murder, Attempted Murder or Mayhem was the natural and probable consequence of the Assault With a Firearm. However, you do not need to agree on which of these two crimes the defendant aided and abetted.”¹¹

In his closing arguments to both juries, the prosecutor argued that each defendant could be convicted of murder under any of three different theories: First, that he was the director perpetrator; second, that he aided and abetted in the murder committed by the other defendant; or third, that he aided and abetted in the assault with a firearm committed by the other defendant, and the murder of Skyler Rapp was a natural and probable consequence of the assault with a firearm. The prosecutor told the jurors they did not have to unanimously agree that the defendant was the direct perpetrator or an aider and abettor, as he would be guilty either way.

The juries convicted both Braden and Lopez as described above.

B. *The California Supreme Court’s Decision in Chiu*

On June 2, 2014, the California Supreme Court decided *Chiu, supra*, 59 Cal.4th 155, in which the Court held that “an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles.” (*Id.*, at pp. 158–159.)

Chiu explained at the outset, “There are two distinct forms of culpability for aiders and abettors. ‘First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider

¹¹ We reject Lopez and Braden’s contention there is a likelihood the jurors misunderstood the trial court’s natural and probable consequences instruction because the trial court mistakenly included the final sentence—“However, you do not need to agree on which of these two crimes the defendant aided and abetted.” That language was inapplicable in the present case, because the People alleged only that each defendant intended to aid and abet an assault with a firearm, for purposes of the natural and probable consequences doctrine. The trial court cautioned the jury that “[s]ome of these instructions may not apply,” and appellants have presented no basis to conclude the jurors were confused by the surplusage.

and abettor is guilty not only of the intended crime, but also “for any other offense that was a ‘natural and probable consequence’ of the crime aided and abetted.” ’ ” (*Chiu, supra*, 59 Cal.4th at p. 158.) 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.] Reasonable foreseeability ‘is a factual issue to be resolved by the jury.’ ” (*Chiu*, at p. 162.)

Turning to the application of the doctrine in the context of a premeditated murder, the court pointed out that the mental state of premeditation “is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death.” (*Chiu, supra*, 59 Cal.4th at p. 166.) The court continued, “[a]dditionally, whether a direct perpetrator commits a nontarget offense of murder with or without premeditation and deliberation has no effect on the resultant harm. The victim has been killed regardless of the perpetrator’s premeditative mental state. Although we have stated that an aider and abettor’s ‘punishment need not be finely calibrated to the criminal’s mens rea’ [citation], the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the . . . public policy concern of deterrence.” (*Id.* at p. 166.) Instead, “punishment for second degree murder is commensurate with a defendant’s culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine.” (*Ibid.*)

Chiu emphasized that “[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles.” (*Chiu, supra*, 59 Cal.4th at p. 166.) The Court reasoned that, “[u]nder those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of

committing, encouraging, or facilitating its commission. [Citation.] Because the mental state component—consisting of intent and knowledge—extends to the entire crime, it preserves the distinction between assisting the predicate crime of second degree murder and assisting the greater offense of first degree premeditated murder. [Citations.] An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder.” (*Id.* at p. 167.)

Chiu then turned to the question of how to determine whether the error in instructing the jury on the natural and probable consequences theory of premeditated murder was harmless. The decision explained, “When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.] Defendant’s first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.” (*Chiu, supra*, 59 Cal.4th at p. 167.) There, the Court could not conclude the jury relied on the permissible theory, because an exchange between the court and the jury during deliberations suggested the jury was relying on the impermissible natural and probable consequences theory. (*Id.* at pp. 167–168.) *Chiu* held the proper remedy was to reverse the first degree murder conviction, and to allow the People either to accept a reduction of the conviction to second degree murder or to retry the case to seek a first degree murder conviction under a direct aiding and abetting theory. (*Id.* at p. 168.)

C. *Application of Chiu to the Present Case*

In the present case, we must reverse the first degree murder convictions as to both Lopez and Braden unless we can conclude beyond a reasonable doubt that each jury based its verdict on a finding that the defendant before it was the direct perpetrator of the murder or a direct aider and abettor of the murder.

The People argue it can be said beyond a reasonable doubt that the juries based their verdicts on a legally valid theory.¹² The People reason that, because the juries found Lopez and Braden had each personally and intentionally discharged a firearm and proximately caused Skyler Rapp's death, "it is clear that the jury found both Lopez and Braden guilty of the first degree murder of Skyler as direct perpetrators, not as aiders and abettors or under the natural and probable consequences doctrine."

The People's reasoning fails. Unquestionably, each appellant's jury believed he was one of the two shooters the night of June 18. In addition to the true finding regarding the section 12022.53, subdivision (d) enhancement attached to the murder charge, the juries also convicted Lopez and Braden of attempted murder, assault with a firearm, and mayhem, with additional section 12022.53, subdivision (d) enhancements. However, that does not mean that each jury necessarily found the defendant before it was the direct perpetrator of the murder. As we explain below in Part IX, a finding that a defendant's discharge of a firearm is a proximate cause of a death or injury does not require evidence that the " 'defendant personally fired the bullets which struck the victim.' " (*People v. Bland* (2002) 28 Cal.4th 313, 335 (*Bland*)). Instead, " 'A proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred.' " (*Id.* at p. 335; see also *id.* at p. 336.)

In the present case, the trial court's definition of proximate cause did not include the "chain of events" phrase in the *Bland* definition, but the court did instruct the jury that, for the purposes of the firearm enhancement, "An act causes great bodily injury or death if the injury or death is the direct, natural, and probable consequence of the act and the injury or death would not have happened without the act." Thus, the true findings regarding the section 12022.53, subdivision (d) enhancement attached to the murder charge could reflect a conclusion that Skyler Rapp's death was a natural and probable

¹² The People do not argue in their briefing that the jury instructions in *Chiu* are materially different from the jury instructions in the present case.

consequence of each appellant’s conduct of shooting into Sparks’ backyard. In that case, the findings on the enhancement would reflect the precise chain of reasoning that *Chiu* held was insufficient to support imposition of liability for premeditated murder on an aider and abettor. Indeed, the absence of direct evidence regarding who shot Skyler Rapp makes it likely the juries convicted Lopez and Braden on an aiding an abetting theory rather than as direct perpetrators. Although there was certainly sufficient evidence to convict both defendants on a *direct* aiding and abetting theory, the record provides no basis from which we may conclude beyond a reasonable doubt that the jury did not rely on the impermissible natural and probable consequences theory.¹³

This risk that Lopez and Braden were convicted of first degree murder under the natural and probable consequences doctrine was magnified in the present case because the prosecutor told each jury that the defendant before it could be convicted of murder even if his intent was only to “assault somebody with a firearm.” That is not a sufficient basis to sustain a conviction of first degree murder. (*Chiu, supra*, 59 Cal.4th at p. 167 [“An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder.”].)

The convictions of Lopez and Braden for first degree murder must be reversed under *Chiu*. On remand the People may elect to accept a reduction of the convictions to second degree murder or to retry the greater offense under a direct aiding and abetting theory.¹⁴ (*Chiu, supra*, 59 Cal.4th at p. 168.)

¹³ The convictions for attempted murder reflect the juries’ determinations that Lopez and Braden intended to kill. (See Part II, post.) However, those convictions do not establish that either appellant premeditated the murder of Rapp or anyone else. Respondent does not argue to the contrary.

¹⁴ Lopez and Braden also argue in passing, in Lopez’s words, that their juries “received no explanation of the specific mens rea required to find [them] guilty of . . . attempted murder, or mayhem, on a direct aiding theory.” But the trial court instructed the juries on the intent required to commit attempted murder and mayhem, and instructed that, “Someone aids and abets a crime if he knows of the perpetrator’s unlawful purpose and

II. *No Error Due to the Trial Court's "Kill Zone" Instruction*

Appellants Lopez and Braden contend the trial court's instruction on the "kill zone" theory of attempted murder, in combination with the prosecutor's closing arguments, led their juries to understand they could convict the appellants of attempted murder without finding the appellants formed the specific intent to kill the named victims. Although a portion of the instruction was unclear, we disagree there is a reasonable likelihood the jury applied the instruction in the way appellants suggest.¹⁵

A. *The "Kill Zone" Theory of Attempted Murder*

"Attempted murder requires proof of a direct but ineffectual act done towards killing another human being and the specific intent to unlawfully kill another human being. [Citation.] Unlike the mental state for murder, which does not require an intent to kill but only a conscious disregard for life (implied malice), '[a]ttempted murder requires the specific intent to kill' [Citation.] The doctrine of 'transferred intent,' transferring the intent to kill an intended target to an unintended victim, applies to murder but not to attempted murder." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1242 (*Campos*)). As the California Supreme Court explained in *Bland, supra*, 28 Cal.4th at p. 328, "[t]o be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else. The defendant's mental state must be examined as to each alleged attempted murder victim. Someone who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Id.* at p. 328.)

Nevertheless, "the fact [a] person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within [a] 'kill

he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." Appellants fail to explain how, and cite no authority that, those instructions were inadequate to inform the jurors the " 'an aider and abettor's mental state must be at least that required of the direct perpetrator.' " (*People v. Nunez* (2013) 57 Cal.4th 1, 43.)

¹⁵ Because appellants' claims on this issue are without merit, we need not consider the People's contention that appellants' objections were forfeited below and whether any such forfeiture would constitute ineffective assistance of counsel.

zone.’ ‘The intent is concurrent . . . when the nature and scope of the attack, while directed at a primary victim, are such that we can conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim’s vicinity. . . . Where the means employed to commit the crime against a primary victim create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended that harm to all who are in the anticipated zone.’ ” (*Bland, supra*, 28 Cal.4th at pp. 329–330.) In *Bland*, the evidence showed the defendant intended to create a kill zone where he “fired a flurry of bullets” at a car driven by the primary target that also contained passengers. (*Id.* at pp. 330–331.) The court explained, “Even if the jury found that defendant primarily wanted to kill [the driver] rather than [his] passengers, it could reasonably also have found a *concurrent* intent to kill those passengers” by creating a “kill zone.” (*Ibid.*) *Bland* noted that the kill zone analysis “is not a legal doctrine requiring special jury instructions, as is the doctrine of transferred intent. Rather, it is simply a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.” (*Id.* at p. 331, fn. 6.) The “defendant’s mental state must be examined as to each alleged attempted murder victim.” (*Id.* at pp. 327–328.)

In *People v. Perez* (2010) 50 Cal.4th 222, the California Supreme Court declined to apply the kill zone theory in circumstances where a single shot was fired into a crowd. Instead, the Court held the evidence supported only a single conviction of attempted murder where the defendant fired one shot at a group of eight people. (*Id.* at pp. 224–225.) The Court reasoned that the “defendant fired the single shot at the group intending to kill *someone*, but without targeting any particular individual, and without using a means of force calculated to kill everyone in the group.” (*Id.* at p. 225.) Absent evidence the defendant intended to kill multiple specific individuals or intended to kill everyone in the group but was thwarted from continuing to fire, eight convictions could not be sustained. (*Id.* at p. 231.)

In *People v. McCloud* (2012) 211 Cal.App.4th 788, two defendants fired 10 shots from a handgun at a party at which 400 people were present, resulting in two deaths and

one injury. (*Id.* at pp. 790–791.) The defendants were convicted of two counts of second degree murder, and one defendant was convicted of 46 counts of attempted murder. (*Id.* at p. 791.) The Court of Appeal held the trial court erred by instructing the jury on the kill zone theory of attempted murder, because there was no evidence the defendants intended to kill with ten bullets the 46 people who were in the area of the primary target. (*Id.* at pp. 791, 799–800.) The court interpreted *Bland* to mean that “In a kill zone case, the defendant does not merely subject everyone in the kill zone to lethal risk. Rather, the defendant *specifically intends* that *everyone* in the kill zone die. If some of those individuals manage to survive the attack, then the defendant—having specifically intended to kill every single one of them and having committed a direct but ineffectual act toward accomplishing that result—can be convicted of their attempted murder.” (*Id.* at p. 798.) Attempted murder convictions on a kill zone theory cannot be based on conduct that only “subject[s] everyone in the kill zone to lethal risk.” (*Id.* at p. 798.) In *McCloud*, the evidence was sufficient only to sustain eight attempted murder convictions, based on the eight bullets fired that did not result in deaths. (*Id.* at pp. 791, 807.)

In *People v. Canizales*, review granted November 19, 2014, S221958, the California Supreme Court is further considering how to apply the kill zone theory. The issue in that case is simply, “Was the jury properly instructed on the ‘kill zone’ theory of attempted murder?”

B. *The Trial Court’s Instruction Failed to Clearly Explain the Kill Zone Theory But Did Not Negate the Intent Element*

The trial court instructed both juries on attempted murder with CALCRIM No. 600 without objection from Braden or Lopez. At the outset, the instruction referenced the five counts of attempted murder and informed each jury the People were required to prove the defendant “took at least one direct but ineffective step toward killing another person” and “intended to kill that person.”

Regarding the kill zone theory, the instruction told the juries, “A person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or ‘kill zone.’ In order to convict the defendant of the attempted

murder of Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith or Ross Sparks the People must prove that the defendant not only intended to kill either Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith or Ross Sparks but also intended to kill Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith or Ross Sparks or intended to kill everyone within the kill zone. If you have a reasonable doubt whether the defendant intended to kill Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith or Ross Sparks or intended to kill Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith or Ross Sparks by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted murder of Desiree Kirby, Andrew Sparks, Joseph Armijo, Ian Griffith or Ross Sparks.”

Appellant Braden contends CALCRIM No. 600 as given in the present case “did not require [the jury] to separately examine [Braden’s] mental state with respect to each named victim of alleged attempted murder and instead suggested intent to kill could be ‘transferred.’ ” He argues the trial court’s instruction led the jury to believe it could convict him of the “five charged attempted murders if it found he **either** intended to kill Kirby **or** Sparks **or** Armijo **or** Griffith **or** Andrew Sparks, **or** intended to kill everyone in the kill zone.” Lopez also contends the jury was led to understand they could convict on the attempted murder charges without particularized findings of intent to kill each of the victims.

We agree the portion of the instruction Braden focuses on failed to clearly explain the kill zone theory of attempted murder. The second sentence in the kill zone paragraph of CALCRIM No. 600 is designed to explain that, in order to convict the defendant of the attempted murder of the alleged victim on a theory of concurrent intent, the People must prove that the defendant intended to kill a primary target *and* also intended either to kill the alleged victim or to kill everyone in the kill zone. The pattern instruction is written to allow for two possibilities—that the alleged victim was specifically targeted by the defendant, or was targeted merely because the victim was in the kill zone. Unfortunately, when the trial court inserted the names of the five alleged victims, the sentence became nonsensical because it failed to distinguish between the primary target and the named

alleged victim. In particular, the modified sentence failed to make clear that in the first and third listings of names the named individuals were being referenced in their capacity as the named victims in the five attempted murder counts, and that in the second listing of names the individuals were being referenced as possible primary targets. That is, the sentence was intended to inform the jury that in order to convict a defendant of attempted murder of any of the alleged victims on a theory of concurrent intent, the People were required to prove the defendant intended to kill one of them as a primary target and, also, either specifically intended to kill the alleged named victim or intended to kill everyone in the kill zone.

Although we think the sentence at issue was more nonsensical than misleading, it arguably is amenable to the construction Braden suggests. In particular, the sentence can be read to inform the jury that, in order to convict a defendant of the attempted murder of one of the named victims, the People must prove that the defendant intended to kill any one of the named victims and also *either* any other one of the named victims *or* everyone in the kill zone. The instruction can be read to suggest a conviction may be based on a defendant's intent to kill two other named victims, who need not be the victim named in the count. Although the language at issue does not unambiguously misinform the jurors that a conviction may be based merely on the presence of the victim in the kill zone and a defendant's intent to kill *anyone* in the kill zone, neither does it clearly communicate that, where the named victim is not specifically targeted, the People must show the defendant intended to kill *everyone* in the kill zone.

The other portions of the kill zone instruction did not entirely clarify the issue, but they did tend to undermine Braden's interpretation. Most importantly, the first sentence of the paragraph on the kill zone theory properly and plainly told the jury "[a] person may intend to kill a specific victim or victims and at the same time intend to kill everyone in a particular zone of harm or 'kill zone.'" The final sentence of the kill zone paragraph informed the jury, "If you have a reasonable doubt whether the defendant intended to kill [one of the named victims,] or intended to kill [one of the named victims] by killing everyone in the kill zone, then you must find the defendant not guilty of the attempted

murder of [one of the named victims].” The sentence is flawed in that it fails to make it clear the second reference to the named victims is in their capacity as possible primary targets, but the sentence does focus on particularized findings of intent to kill and contains a reference to a finding of intent to kill everyone in the kill zone.

On balance, although CALCRIM No. 600 as given in the present case is more nonsensical than misleading, it is sufficiently confusing and complicated that it may properly be characterized as ambiguous.

C. *The Prosecutor’s Ambiguous Closing Arguments Did Not Create a Reasonable Likelihood the Juries Were Misled*

“ ‘If a jury instruction is ambiguous, we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction.’ [Citations.] ‘ ‘ ‘[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.’ ’ ’ ’ [Citations.] The reviewing court also must consider the arguments of counsel in assessing the probable impact of the instruction on the jury.” (*People v. Young* (2005) 34 Cal.4th 1149, 1202.) As noted above, although CALCRIM No. 600 as given to both juries in the present case properly identifies the intent element and contains at least one accurate description of the kill zone theory of attempted murder, the portion of the instruction describing the People’s burden of proof under that theory was ambiguous. An examination of the prosecutor’s closing arguments reveals a similar combination of clear statements on the intent requirement mixed with some more ambiguous language.

It is important to note the trial court was not *required* to give the kill zone instruction—the instruction merely sets forth “a reasonable inference the jury may draw in a given case: a primary intent to kill a specific target does not rule out a concurrent intent to kill others.” (*Bland, supra*, 28 Cal.4th at p. 331, fn. 6; see also *McCloud, supra*, 211 Cal.App.4th at p. 802 [“It should be noted that the Supreme Court has repeatedly explained that jury instructions on the kill zone theory are never required.”].) Thus, the trial court’s failure to clearly explain the kill zone theory did not constitute a failure to “instruct on general principles of law that are commonly or closely and openly connected

to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) Rather, the trial court's unclear kill zone instruction is only reversible error if there is a reasonable likelihood it led the juries to believe they could convict Lopez and Braden of attempted murder on the basis of transferred intent.

The prosecutor argued to Braden's jury, "In order to convict a defendant of attempted murder of a specific victim, the People must prove[] that the defendant intended to kill either a specific victim or intended to kill everyone in the kill zone. [¶] So what that means as it relates to this case is if someone shoots into a crowd intending to kill one, two, three, all of them, he is—he is guilty of attempting to murder regardless of who is killed or who doesn't get killed. So all you need is intent to kill one or more in a crowd, you shoot into a crowd, then you're guilty of attempted murder." The prosecutor further argued, "Doesn't matter who they wanted to kill, doesn't matter if they wanted to kill Ross Sparks or Desiree or any of the other ones or if they wanted to kill Skyler Rapp. I'm not saying that was the intent, don't get me wrong. We don't know who they wanted to kill, but they wanted to kill. [¶] When you shoot into a crowd of people, you shoot into the kill zone and if you kill someone that's murder. If you attempt to kill someone and they don't, then that's an attempted murder."¹⁶

The prosecutor argued to Lopez's jury, "Now, the next part of the instruction really pertains to this case quite a bit. This is if a person may intend to kill a specific victim or victims and at the same time intended to kill everyone in a particular zone of harm, which is called the kill zone. [¶] In this case in particular, what we are alleging is that [Lopez] and Paul Braden shot into a crowd with the intent to kill. You don't have to have the intent to kill one particular person. Say, for instance, he didn't have to intend to kill Ross Sparks, didn't have to intend to kill Desiree Kirby or one particular person, he intended to kill and you shoot into a kill zone and someone dies then you're guilty of the murder." The prosecutor also argued, "We're claiming that the attempted murder was

¹⁶ Braden's counsel did not object to the prosecutor's argument on this issue and he did not address the kill zone theory during closing argument.

intentional, deliberate and premeditated and it was done maybe not to kill anyone specific, maybe not to kill Ross Sparks, maybe not to kill Desiree or anybody there or maybe not to kill Skyler Rapp, but it was done to kill. And they shot into the kill zone, into a crowd; and because they attempted to kill somebody, anybody in that crowd, they're guilty of attempted murder for everybody that had got hit [sic].” Finally, the prosecutor argued, “All that one person or more [shooting into a crowd] had to do is want to kill somebody in that crowd, that crowd is the kill zone; and in this case you have one probably two people shooting into that kill zone.”¹⁷

Thus, in its first comments on the topic to both juries, the prosecutor properly characterized its burden—that the People must prove intent to kill a specific victim or to kill everyone in the kill zone. His subsequent comments were more ambiguous. The prosecutor acknowledged uncertainty about the identity of the primary target, and one interpretation of the prosecutor’s comments is that if a defendant intended to kill at least one person in the crowd, then the defendant is guilty of the attempted murder of whoever was hit. However, another interpretation of the prosecutor’s subsequent comments is that if a defendant shot into the crowd intending to kill anyone he could hit, he is guilty of attempted murder of those that were hit. (See *People v. Stone* (2009) 46 Cal.4th 131, 138 [“In context, a jury hearing about the intent to kill *anyone* within the kill zone would probably interpret it as meaning the intent to kill *any* person who happens to be in the kill zone, i.e., *everyone* in the kill zone.”] (*Stone*); *Bland, supra*, 28 Cal.4th at pp. 322–323 [“When one intends to kill and does so, the killing is hardly an accident, even if the specific victim or victims are unintended.”]; *Campos, supra*, 156 Cal.App.4th at p. 1243 [“A defendant who shoots into a crowd of people with the desire to kill anyone he happens to hit, but not everyone, surely has the specific intent to kill whomever he hits,

¹⁷ Lopez did not object to the prosecutor’s argument on this issue. His lawyer stated during closing argument, “The prosecution talks about kill zones. In other words, if a whole bunch of people are clumped together and two people are shooting in there the prosecution does not have to prove . . . which one of them actually hit this guy there and that guy there. That’s true, that is the law.”

as each person in the group is at risk of death due to the shooter’s indifference as to who is his victim.”].)¹⁸

In summary, both the instructions and the prosecutor’s closing arguments contained clear statements describing the kill zone theory as requiring proof of specific intent to kill the named victim or proof of intent to kill everyone in the zone of harm. The instructions and arguments also contained ambiguous passages that arguably could be read to allow for transference of intent. Because the accurate statements of law were clear and the inaccurate statements only present by inference from ambiguous passages, we conclude there is no reasonable likelihood the jury misapplied the instruction and convicted absent proof of intent to kill the named victims.

D. *Lopez’s Remaining Contentions Regarding Kill Zone Instructions*

Lopez contends the trial court erred in referring to a “zone of harm,” but we reject the suggestion that use of the phrase is equivalent to the use of the phrase “zone of risk” criticized in *McCloud*. (*McCloud, supra*, 211 Cal.App.4th at p. 802 [“By referring repeatedly to a ‘zone of risk,’ the instruction suggests to the jury that a defendant can create a kill zone merely by subjecting individuals other than the primary target to a risk of fatal injury.”].)

Lopez contends the trial court erred in instructing his jury on the kill zone portion of CALCRIM No. 600, because the evidence supported only an inference that he possessed a single-action shotgun, and there was “no evidence appellant could physically have fired enough shots during the relevant period to kill five people.” There were some

¹⁸ As Lopez and Braden point out, the traditional kill zone theory actually contemplates that there is a primary target and an intent to kill everyone around the target to ensure the death of the target. In the present case, the parties do not cite evidence there was a primary target. However, assuming the trial court should have modified the kill zone instruction to clarify that point, any error is harmless because appellants do not contend it would have been improper to instruct the jury it could convict of attempted murder based on a theory that appellants intended to kill anyone and everyone in the zone of harm, even in the absence of a primary target—which appeared to be the argument the prosecutor made to the juries. (See *Stone, supra*, 46 Cal.4th at p. 138; *Bland, supra*, 28 Cal.4th at pp. 322–323; *Campos, supra*, 156 Cal.App.4th at p. 1243.)

differences in the testimony regarding the duration of the shootings. Joseph Armijo testified it lasted for about 10 seconds. Ian Griffith said he saw two muzzle flashes over the space of 5 seconds but heard 13–14 shots total. Ross Sparks testified he saw 6 to 8 shots from the two locations over the space of 5 seconds, and then subsequently heard a final shot.¹⁹ The jury could infer from that testimony that Lopez had enough time to fire multiple shots; he cites no authority that the prosecution was required to present expert testimony on shotgun reload times in order to support such an inference. Because a single shotgun shot can hit multiple targets, we need not decide whether the jury could have inferred from the evidence that Lopez had time to fire five shots.

Finally, Lopez contends it was error to give the kill zone instruction because “there is no evidence in this record [he] formed the specific intent to kill *anyone*, let alone that he formed the specific intent to kill all of the five victims named in the attempted murder counts.” We reject that contention, as explained in our discussion of Lopez’s sufficiency of the evidence claim (Part X, *post*).²⁰

III. *The Failure to Instruct on Corroboration of Accomplice Testimony Was Harmless*

Section 1111 provides: “A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense

¹⁹ One of the eyewitnesses, Amanda Gamble, gave a very different account—she testified there was 40 seconds between the first and second shot and she heard seven shots over the space of three minutes.

²⁰ Because there is no reasonable likelihood the jurors misapplied the kill zone instruction, and because we reject Lopez’s other contentions, the failure of Lopez’s counsel to object to the instruction and the prosecutor’s argument did not constitute ineffective assistance of counsel. (See *Strickland v. Washington* (1984) 466 U.S. 668, 687 (*Strickland*); see also *People v. Ledesma* (1987) 43 Cal.3d 171, 215–217 (*Ledesma*)). Assuming trial counsel’s failures constituted deficient performance, there is no “reasonable probability” the result would have been different had counsel objected to the instruction and argument. (*Ledesma*, at p. 218.)

charged against the defendant on trial in the cause in which the testimony of the accomplice is given.” “Section 1111 codifies common law concerns about the reliability of accomplice testimony. [Citation.] ‘[S]uch testimony has been legislatively determined never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated.’ ” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303 (*Gonzales*)). The underlying rationale is that “an accomplice has a natural incentive to minimize his own guilt before the jury and to enlarge that of his cohorts.” (*People v. Brown* (2003) 31 Cal.4th 518, 555.) The parties agree Stone was an accomplice of Lopez and Braden and the trial court erred in failing to properly instruct the jury regarding corroboration. (*People v. Tobias* (2001) 25 Cal.4th 327, 331 [“ ‘[w]hen there is sufficient evidence that a witness is an accomplice, the trial court is required on its own motion to instruct the jury on the principles governing the law of accomplices,’ including the need for corroboration”].)

A. *The Missing Instructions*

The parties agree the trial court should have instructed the jury pursuant to CALCRIM Nos. 334 or 335²¹ that it could not convict Lopez and Braden based on Stone’s testimony alone and that it could use Stone’s testimony to convict only if (1) Stone’s testimony “is supported by other evidence that you believe,” (2) the supporting evidence is “independent” of Stone’s testimony, and (3) “[t]hat supporting evidence tends to connect the defendant to the commission of the crime[s].” The instruction would have further informed the jury that, “Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime[s], and it does not need to support every fact [mentioned by Stone in his testimony]. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime.” (CALCRIM Nos. 334, 335.) Finally, the instruction would have directed the jury that “Any [testimony] of an

²¹ CALCRIM numbers 334 and 335 are identical, except number 334 also directs the jury to determine whether the individual at issue is an accomplice.

accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that [testimony] the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.” (*Ibid.*)

The trial court also erred in failing to modify CALCRIM No. 301, which was given without modification: “The testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.” However, the trial court should have added a proviso reminding the jury that Stone’s testimony required supporting evidence.²² (*People v. Chavez* (1985) 39 Cal.3d 823, 831–832.)

B. *Harmless Error Analysis*

“ ‘A trial court’s failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record.’ [Citation.] ‘Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.’ [Citation.] The evidence is ‘sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.’ [Citation.]” (*Gonzales, supra*, 52 Cal.4th at p. 303; see also *People v. McDermott* (2002) 28 Cal.4th 946, 985 (*McDermott*).) Where there is sufficient corroboration in the record, we need *not* consider whether it is reasonably probable the result would have been more favorable had the jury been properly instructed. (*Gonzales*, at pp. 304–305; see *People v. Watson* (1956) 46 Cal.2d 818, 836.) We need only engage in that analysis where sufficient corroboration is *absent*. (*Gonzales*, at p. 304.)²³

²² The jury should have been instructed, “*Except for the testimony of Kevin Stone, which requires supporting evidence, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.*”

²³ As appellant Lopez points out, in *People v. Williams* (2010) 49 Cal.4th 405, 456, the California Supreme Court stated, “Error in failing to instruct the jury on consideration of accomplice testimony at the guilt phase of a trial constitutes state-law error, and a

In the present case, there was ample corroboration of Stone’s testimony that appellant Braden shot a shotgun over the fence into Sparks’ backyard. Among other things, Braden threatened Crystal Pearls and her family the day of the shooting; Braden obtained, modified, and expressed a desire to use a shotgun the day of the shooting; Braden, holding his shotgun, was in a car with Lopez and Stone the night of the shooting; Braden failed to deny participating in the shooting when confronted by Athas the next day (see Part VII, *post*); and Braden admitted participating in the shooting to a jailhouse informant (see Part IV, *post*). The omission of proper accomplice instructions as to Braden was harmless error.

There was also ample corroboration as to appellant Lopez. We recognize that at trial the only witness who testified to seeing Lopez with a shotgun was the accomplice Stone. However, the record is replete with independent evidence connecting Lopez to the crime. It is undisputed that Lopez spent the day and evening of the shooting with Braden, and that Lopez was at the scene of the shooting. The day of the shooting, Lopez was involved in a heated dispute with Sparks and had threatened Sparks and his family with physical harm. Lopez went with Braden to obtain a shotgun, and was nearby when

reviewing court must evaluate whether it is reasonably probable that such error affected the verdict.” Nevertheless, we follow the court’s more recent and detailed analysis in *Gonzales*, which makes clear such analysis is unnecessary where there is sufficient corroboration in the record. In any event, because there was ample corroboration, it is not reasonably probable the result would have been different had the jury been properly instructed regarding the corroboration requirement. For the same reason, it is not reasonably probable the result would have been different had the jury been properly instructed in CALCRIM No. 301 that Stone’s testimony required supporting evidence.

Appellant Braden contends the failure to give the corroboration instruction omitted an element of the charged offenses, thereby violating his federal constitutional right to due process, and therefore the “harmless beyond a reasonable doubt” standard for federal constitutional error applies. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*).) We reject the contention. The California Supreme Court held in *People v. Frye* (1998) 18 Cal.4th 894, 968, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421 & fn. 22, that “the corroboration requirement established in section 1111 has no bearing on the prosecution’s proof of any element of the charged crime.” We also reject Lopez’s contention that the instructional errors resulted in denial of his federal constitutional due process right to fundamental fairness.

Braden modified his shotgun. The jury could infer that Lopez heard Braden's comments at Athas's party expressing a desire to shoot someone. Lopez had access to a shotgun and traveled to the area of Sparks's home in the company of Braden, despite Braden's violent comments.

Thus, although Stone was the only witness to testify to seeing Lopez with a shotgun, there was ample evidence connecting him to the crime generally, as well as circumstantial evidence he was armed. (See *People v. Pedroza* (2014) 231 Cal.App.4th 635, 653 [corroborating evidence need not "directly implicate[] the defendant" but it must "tend[] to connect him to the crimes"].) Lopez presents no authority that any more specific corroboration of Stone's testimony was required. (See, e.g., *McDermott, supra*, 28 Cal.4th at pp. 985-986 [sufficient corroboration of the defendant's involvement in murder plot where independent evidence showed the defendant had a motive to kill the victim, was present during the murder, and was an associate of one of the testifying accomplices]; *People v. Vu* (2006) 143 Cal.App.4th 1009, 1013 ["independent evidence sufficiently corroborated accomplice testimony by establishing motive and opportunity, placing [the defendant] with the conspirators on the night of the murder, and showing he gave the police a false alibi after the crime"].)²⁴

IV. *The Failure to Instruct on Corroboration of Informant Testimony Against Braden Was Harmless*

Appellant Braden contends the trial court erred by failing to sua sponte instruct his jury that the testimony of an in-custody informant must be corroborated. The error was harmless.

²⁴ Because the failure to give proper accomplice corroboration instructions was harmless, Lopez has failed to show on direct appeal that his counsel's failure to request the instructions and take other steps suggested by Lopez related to the corroboration requirement constituted ineffective assistance of counsel. (See *Strickland, supra*, 466 U.S. at p. 687; see also *Ledesma, supra*, 43 Cal.3d at pp. 215-218.) Assuming trial counsel's failures constituted deficient performance, there is no "reasonable probability" the result would have been different had the jury been properly instructed on the accomplice corroboration requirement. (*Ledesma*, at p. 218.)

At the time of trial, Daniel Loyd, who testified regarding various statements made to him by Braden in jail, was in custody on a pending murder charge. The trial court instructed Braden’s jury that Loyd was an in-custody informant and, in the language of CALCRIM No. 336, “The testimony of an in-custody informant should be viewed with caution and close scrutiny. In evaluating such testimony, you should consider the extent to which it may have been influenced by the receipt of, or expectation of, any benefits from the party calling that witness. This does not mean that you may arbitrarily disregard such testimony, but you should give it the weight to which you find it to be entitled in the light of all the evidence in the case.”

The trial court’s instruction did not inform the jury that the testimony of an in-custody informant must be corroborated. That requirement is contained in section 1111.5, subdivision (a), which went into effect on January 1, 2012—before the January 19 commencement of trial in the present case. (See *People v. Davis* (2013) 217 Cal.App.4th 1484, 1488–1489 (*Davis*); see also *People v. Huggins* (2015) 235 Cal.App.4th 715, 718–719.) That section reads in pertinent part: “A jury or judge may not convict a defendant, find a special circumstance true, or use a fact in aggravation based on the uncorroborated testimony of an in-custody informant. The testimony of an in-custody informant shall be corroborated by other evidence that connects the defendant with the commission of the offense, the special circumstance, or the evidence offered in aggravation to which the in-custody informant testifies. Corroboration is not sufficient if it merely shows the commission of the offense or the special circumstance or the circumstance in aggravation.” (§ 1111.5. subd. (a).) The trial court erred in failing to sua sponte instruct the jury on the in-custody informant requirement. (*Davis*, at p. 1489.)²⁵

In *Davis*, *supra*, 217 Cal.App.4th at p. 1489, the Court of Appeal concluded the trial court’s error should be assessed for prejudice under the test for state law error (*Watson*, *supra*, 46 Cal.2d at p. 836), rather than the under the sufficiency of the corroborating evidence test that applies to failure to instruct on accomplice corroboration.

²⁵ The corroboration requirement was added to CALCRIM No. 336 in August 2012, after the June 2012 instructions to Braden’s jury. (*Davis*, *supra*, 217 Cal.App.4th at p. 1489.)

(See Part III.B., *ante*.) Following *Davis*,²⁶ we “reverse the judgment only if we are able to say it is reasonably probable the jury would have reached a result more favorable to defendant if the trial court had instructed that before the jury could convict defendant based solely on the testimony of [Loyd], an in-custody informant, there must be evidence that corroborates that testimony, i.e., that connects [Braden] to the commission of the crime.” (*Id.* at p. 1490.)

As explained with reference to the trial court’s failure to instruct the jury regarding the requirement of corroboration in the accomplice context (see Part III.B., *ante*), there is a plethora of evidence connecting Braden to the commission of the crime. (See *Davis*, *supra*, 217 Cal.App.4th at p. 1491 [physical evidence and evidence suggesting a motive sufficient to connect the defendant to murder].) It is not reasonably probable the jury would have reached a result more favorable to Braden had the trial court instructed his jury regarding the in-custody informant corroboration requirement.

V. *The Trial Court’s Consolidation Order Was Not An Abuse of Discretion and Did Not Deprive Braden of His Right to Due Process*

Section 1098 provides in relevant part, “When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials.” In the present case, the prosecutor moved in November 2011 to consolidate the trials of all three defendants. Lopez opposed consolidation on the ground that the prosecutor’s intent to introduce Braden’s pretrial statements raised concerns under *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*) and *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*), which relate to the prejudice arising from admission at a joint trial of a prior statement of one defendant that inculcates

²⁶ Because respondent in the present case does not argue otherwise and the result would be the same under either test, we follow *Davis*, but express no opinion on the *Davis* court’s conclusion that a different prejudice analysis from that used in the accomplice context is appropriate. We also reject Braden’s contention that the appropriate prejudice analysis is that applicable to federal constitutional error under *Chapman*, *supra*, 386 U.S. at p. 24. (See *People v. Frye*, *supra*, 18 Cal.4th at p. 968 [accomplice corroboration instruction “has no bearing on the prosecution’s proof of any element of the charged crime”].)

a codefendant. Braden joined Lopez’s opposition. The trial court acknowledged the *Aranda-Bruton* issue, but noted that the defendants “face virtually identical charges and allegations. Even if the strategy of one defendant is to present evidence placing responsibility on another defendant, all of the damaging evidence admissible in a joint trial would likely also be admissible in a separate trial as to any defendant.” The court ruled that Lopez and Braden would be tried jointly with separate juries; at the time of the ruling, Stone had decided to enter a guilty plea.

On appeal, Braden contends that consolidation of his trial with that of Lopez was prejudicial error. We review the trial court’s consolidation order “for abuse of discretion based upon the facts as they appeared when the court ruled on the motion.” (*People v. Burney* (2009) 47 Cal.4th 203, 237 (*Burney*)). “ ‘If the court’s joinder ruling was proper at the time it was made, a reviewing court may reverse a judgment only on a showing that joinder “ ‘resulted in “gross unfairness” amounting to a denial of due process.’ ” ’ ” (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 150 (*Letner*)).

Braden first argues consolidation should have been denied due to the likelihood he would be prejudiced by association with Lopez because the evidence at the preliminary hearing showed “the case against [Braden] was far weaker than that against Lopez.” “A prejudicial association justifying severance will involve circumstances in which the evidence regarding one defendant might make it likely the jury would convict that defendant of the charges and, further, more likely find a codefendant guilty based upon the relationship between the two rather than upon the evidence separately implicating the codefendant.” (*Letner, supra*, 50 Cal.4th at p. 152.) We reject Braden’s claim because the preliminary hearing disclosed substantial evidence separately implicating Braden. It is true the evidence at that stage indicated Lopez had a clearer motive for the shooting, and there was an eyewitness—Sparks’s neighbor—who saw Lopez at Sparks’s fence firing a shotgun. Nevertheless, the neighbor also saw Braden at the fence.²⁷ Moreover,

²⁷ The neighbor’s account was related by a police officer, who testified to her statements at the preliminary hearing. (See Cal. Const., Article I, Section 30(b); § 872, subd. (b); *Whitman v. Superior Court* (1991) 54 Cal.3d 1063, 1070.) The neighbor failed to pick

there was testimony at the preliminary hearing that on the afternoon of the shooting Braden threatened to beat Pearls during a phone call, retrieved a shotgun which he modified by sawing off part of the barrel, and stated he wanted to shoot somebody. Finally, Braden failed to deny participating in the shooting in a phone call the next day. Braden's claim based on prejudicial association fails.²⁸

Braden also argues his trial should have been severed because his defense that he was not present conflicted with Lopez's defense that he was present but did not shoot into Sparks's backyard. Severance is only warranted for conflicting defenses "when the conflict between the defendants *alone* will demonstrate to the jury that they are guilty. If, instead, 'there exists sufficient independent evidence against the moving defendant, it is not the conflict alone that demonstrates his or her guilt, and antagonistic defenses do not compel severance.'" (*Letner*, 50 Cal.4th at p. 150.) In the present case, substantial independent evidence implicated Braden in the shootings.

Finally, Braden appears to contend that joinder resulted in gross unfairness denying his right to due process (*Letner*, *supra*, 50 Cal.4th at p. 150) because Clearlake Police Sergeant Tim Celli testified at trial that Lopez admitted being present at the scene of the shooting and indicated that Braden was in the car as well. As explained below (Part VI, *post*), that evidence was stricken and the jury was instructed to disregard it. In any event, that testimony did not result in gross unfairness because other witnesses, including Stone and his girlfriend, placed Braden in the car and/or at the scene of the shooting. Neither has Braden shown gross unfairness resulted from any other aspect of the joint trial.²⁹

Lopez or Braden out of photo lineups, and she did not testify at trial. At trial the evidence against Lopez was weaker than that against Braden, because there was less direct evidence of his possession of a weapon, and because Braden made more violent threats. (See Part X, *post*.)

²⁸ Any contention that Lopez was prejudiced by association with Braden fails because, based on the evidence at the preliminary hearing, the case against Lopez was not weaker than the case against Braden.

²⁹ Because Braden has not shown error, we need not address the People's contention that Braden's claim of error due to consolidation was forfeited.

VI. *The Trial Court Did Not Err in Denying Braden’s Motion for Mistrial*

As noted previously, the trial court ordered separate juries for Braden and Lopez to address the risk of prejudice arising from admission at the joint trial of a prior statement of one defendant inculcating the other. (See *Aranda, supra*, 63 Cal.2d 518; *Bruton, supra*, 391 U.S. 123.) Nevertheless, at trial on April 26, 2012, in front of *both* juries, Clearlake Police Sergeant Tim Celli testified, in response to questions from the prosecutor, regarding a prior statement made by Lopez that incriminated Braden. On appeal, Braden contends the trial court erred in denying his mistrial motion relating to the testimony. We disagree.

A. *Background*

In the relevant portion of his testimony, Sergeant Celli testified he detained Lopez days after the shooting and advised Lopez of his *Miranda* rights.³⁰ Although Lopez initially denied involvement in the shooting, he eventually admitted he was present but claimed he did not shoot anybody. Celli continued, “Lopez essentially told me that he was in the passenger—a passenger in the vehicle, Paul Braden was seated behind him, directly behind him, Kevin Stone was the driver of the vehicle” At that point in the testimony, Braden’s counsel objected on the basis of *Aranda*, and the trial court sustained the objection. After a recess, Braden’s counsel indicated his intent to file a written motion regarding the testimony, and the trial court released the jury until May 2, 2012. On April 30, Braden filed a motion for mistrial based on the *Aranda-Bruton* violation and prosecutorial misconduct. The prosecutor argued the error in admitting the evidence of Lopez’s statement was harmless in light of other evidence—some not yet presented—that Braden was with Lopez and Stone in the car the night of the shooting. The court deferred ruling on the mistrial motion and ordered the jury to return on May 9, in part because “someone [on the jury] has lost a family member and there’s a funeral tomorrow.”

On May 9, 2012, the trial court read the following admonition to Braden’s jury: “During the most recent time that you were present for testimony on April 26, 2012,

³⁰ *Miranda v. Arizona* (1966) 384 U.S. 436.

questions were asked of Officer Tim Celli of the Clearlake Police Department. Objections were made and were sustained. The Court has determined that the questions were improper and orders the testimony stricken from the record. You are to disregard the testimony you heard from Officer Celli. [¶] You are not to speculate as to why that testimony was stricken or what other answers he may have given had he continued to testify. When the Court orders testimony stricken from the record, you may not consider it in any way. You are to treat it as though you had never heard it.” After the close of evidence, the court denied the mistrial motion and again admonished the Braden jury, as follows: “At one point in this trial you heard testimony from Sergeant Tim Celli of the Clearlake Police Department about a statement or statements made by defendant Orlando Lopez. Those statements were stricken from the record and you were instructed to disregard them. [¶] I again instruct you to disregard any testimony from Sergeant Celli as to statements made by Orlando Lopez. You are to treat any such statements as if you had never heard them.”

B. *Analysis*

Braden contends the trial court erred in denying his mistrial motion because the trial court’s admonishments were inadequate to cure the prejudice in Braden’s jury hearing Lopez’s prior statement that Braden was in a car with Lopez and Stone the night of the shooting. “ “ “A mistrial should be granted if the court is apprised of prejudice that it judges incurable by admonition or instruction. [Citation.] Whether a particular incident is incurably prejudicial is by its nature a speculative matter, and the trial court is vested with considerable discretion in ruling on mistrial motions.’ ” [Citation.] Accordingly, ‘[w]e review a trial court’s denial of a motion for mistrial for abuse of discretion.’ ” (*People v. Lightsey* (2012) 54 Cal.4th 668, 718 (*Lightsey*)).

In arguing that the trial court’s admonishments were inadequate, Braden emphasizes that Lopez’s prior statement was the first evidence that directly connected Braden with the shooting. He also points out that the trial court did not give the admonition until May 9, 2012—two weeks after the objectionable testimony. (See *People v. Pigage* (2003) 112 Cal.App.4th 1359, 1375 [“a *timely* admonition from the

court generally cures any harm”] (emphasis added).) Finally, he argues the testimony was especially prejudicial because the statement directly implicated him in the shooting. The United States Supreme Court has indicated that admonishments are less effective at curing the prejudice from expressly incriminating prior statements by codefendants because they are “more vivid than inferential incrimination, and hence more difficult to thrust out of mind.” (*Richardson v. Marsh* (2003) 481 U.S. 200, 208.)

The trial court did not abuse its discretion. Braden’s jury only heard that Lopez denied shooting the victims and he was in a car with Braden and Stone at some point, presumably the evening of the shooting. There was already testimony from two witnesses that Lopez and Braden were picked up by Stone the night of the shooting, and, as the prosecutor promised, Stone’s girlfriend testified later in the trial that she and Stone picked up Lopez and Braden the night of the shooting.³¹ Although the court did not admonish the jury not to consider Sergeant Celli’s testimony for two weeks—delay which resulted from Braden’s motion for mistrial and the death of a juror’s family member—there was no additional testimony between Braden’s original objection and the admonishment. Under the circumstances, the jury would have understood there was a problem with Celli’s testimony and there is no reason to believe the delay in providing an admonishment rendered it ineffective. Braden does not suggest the language of the admonishment was inadequate, and the trial court again admonished the jury at the end of the trial. (See *People v. Avila* (2006) 38 Cal.4th 491, 575 [“assuming [the codefendant’s] extrajudicial statement about defendant incriminated defendant, it did not prejudice defendant because the court admonished the jury not to consider it for any purpose against defendant, and we presume the jury followed the instruction”].) There is no basis

³¹ Because the information in Lopez’s brief prior statement was largely duplicative of other evidence at trial, even if it had not been stricken from evidence its admission would have been harmless beyond a reasonable doubt. (*Burney, supra*, 47 Cal.4th at p. 232 [“‘if the properly admitted evidence is overwhelming and the incriminating extrajudicial statement is merely cumulative of other direct evidence, the error will be deemed harmless’ ”].)

to reject the trial court's finding that the objectionable testimony was not "incurably prejudicial." (*Lightsey, supra*, 54 Cal.4th at p. 718.)

VII. *No Error or Ineffective Assistance As to Instruction Regarding Braden's Alleged Adoptive Admission*

As noted in the factual background, Leonardo Lopez's girlfriend, Ashli Athas, testified that on the day after the shooting she answered Leonardo Lopez's cell phone and spoke to Braden. She told Braden, "You know that was like my cousin that you killed" or "Did you know that that was my little cousin you shot." Braden responded, "Oh my God, I'm sorry. Oh my God." or "Oh my God. I'm so sorry. I'm so sorry." Athas hung up immediately thereafter.

Evidence Code section 1221 permits the introduction of a party's adoptive admissions: "Evidence of a statement offered against a party is not made inadmissible by the hearsay rule if the statement is one of which the party, with knowledge of the content thereof, has by words or other conduct manifested his adoption or his belief in its truth."

On appeal, Braden contends there was ambiguity as to whether his response could be taken as an admission of guilt, because on cross-examination Athas testified she did not "accuse" Braden. Braden argues it is unclear whether he was "apologizing for being involved in the shooting, or whether he merely was expressing sympathy for Athas's loss." He claims the jury should have been instructed with CALCRIM No. 357, which would have directed the jury to determine whether Braden's statement was indeed an adoptive admission. Among other things, the instruction would have directed the jury to find whether the statement accused Braden of or connected him with the crime; whether Braden understood the statement; whether Braden "would, under all the circumstances, naturally have denied the statement if he thought it was not true;" and whether Braden could have but failed to deny the statement. (*Ibid.*) The instruction informs the jury that, if it finds the listed requirements satisfied, it "may conclude that the defendant admitted the statement was true." (*Ibid.*) On the other hand, if the jury were to find a listed requirement unmet, the instruction directs the jury to "not consider either the statement or the defendant's response for any purpose." (*Ibid.*)

In the present case, Braden concedes he did not request that the trial court instruct the jury with CALCRIM No. 357. It is well-established a trial court is not required to give CALCRIM No. 357 or an equivalent instruction sua sponte. As explained in *People v. Carter* (2003) 30 Cal.4th 1166, 1198 (*Carter*), with regard to the equivalent CALJIC instruction, “[A]doptive admissions require certain foundational facts. Trial courts may certainly instruct on the matter if they think it best to do so. But, as the Evidence Code makes clear, courts are required to so instruct only at a defendant’s request. When the court admits evidence subject to the existence of preliminary facts, it ‘[m]ay, and on request shall, instruct the jury to determine whether the preliminary fact exists and to disregard the proffered evidence unless the jury finds that the preliminary fact does exist.’” [Citation.] ‘On its own terms, this provision makes it discretionary for the trial court to give an instruction regarding a preliminary fact unless the party makes a request.’” (See also *People v. Charles* (2015) 61 Cal.4th 308, 331.)

Braden argues that, because the alleged adoptive admission was critical to the prosecution’s case, the trial court was obligated to instruct the jury regarding such admissions under *People v. Atwood* (1963) 223 Cal.App.2d 316, 334, which held the trial court erred in failing to provide such an instruction sua sponte. However, the Supreme Court explained in *People v. Najera* (2008) 43 Cal.4th 1132, 1139, fn. 3, that *Atwood* turned on “ ‘the particular evidentiary circumstances of the case,’ which included error in giving instructions . . . on oral admissions that ‘would have a tendency to mislead the jury.’” *Najera* reaffirmed *Carter* and stated that *Atwood* imposes no “categorical duty on trial courts to instruct on these issues.” (*Najera*, at p. 1139, fn. 3.) Because Braden points to no unusual circumstances analogous to those in *Atwood*, the general rule announced in *Carter* applies.

Braden argues in the alternative that, if the court was not obligated to instruct on adoptive admissions sua sponte, then his trial counsel’s failure to request that the jury be instructed with CALCRIM No. 357 was ineffective assistance of counsel. To establish a violation of his state and federal constitutional right to counsel, Braden must demonstrate his counsel’s performance was “deficient” and “the deficient performance prejudiced the

defense.” (*Strickland, supra*, 466 U.S. at p. 687; see also *Ledesma, supra*, 43 Cal.3d at pp. 215–217.) “If the record does not shed light on why counsel acted or failed to act in the challenged manner, we must reject the claim on appeal unless counsel was asked for and failed to provide a satisfactory explanation, or there simply can be no satisfactory explanation.” (*People v. Scott* (1997) 15 Cal.4th 1188, 1212.)

Braden argues his counsel’s performance was deficient because “there could be no reasonable tactical purpose for failing to request instruction on critical evidence that directly contradicted [Braden’s] defense: his seeming adoption of an accusation that he killed Skyler [Rapp].” He also emphasizes his counsel “was well aware of the damning nature of Athas’s testimony,” because counsel argued to the jury that she was biased against Braden because of her relationship with Leonardo Lopez. Braden reasons in his argument on appeal, “[a]s counsel made these efforts to persuade the jury to ignore Athas’s testimony, it makes no sense for counsel not to have asked for [the adoptive admission] instruction” because it would have precluded the jury’s consideration of the testimony at issue if the jury found Braden’s statements were merely an expression of sympathy.

Braden disregards the possibility that, if the jury found Braden’s statements were indeed an adoptive admission, CALCRIM No. 357 would have instructed the jury that if it found, among other requirements, that Braden would “naturally have denied the statement if he thought it was not true,” then the jury could “conclude that the defendant admitted the statement was true.” Thus, the instruction was a double-edged sword: If the jury accepted Braden’s interpretation of the testimony, the instruction would lead the jury to disregard it; but if the jury accepted the prosecution’s interpretation, the instruction would lead the jury to view Braden’s statement as an admission of guilt. In such circumstances, Braden’s trial counsel may have made a “reasonable tactical decision[.]” (*People v. Lucas* (1995) 12 Cal.4th 415, 437 (*Lucas*)) not to request the instruction.

The California Supreme Court recognized in *Carter, supra*, 30 Cal.4th at p. 1198, that trial counsel might reasonably opt not to seek an instruction such as CALCRIM No. 357, explaining, “In a given case, it may be far from clear whether the defendant would

wish the court to give [the CALJIC equivalent to CALCRIM No. 357]. The instruction is largely a matter of common sense—silence in the face of an accusation is meaningful, and hence may be considered, only when the defendant has heard and understood the accusation and had an opportunity to reply. Giving the instruction might cause the jury to place undue significance on bits of testimony that the defendant would prefer it not examine so closely.” Braden’s claim of ineffective assistance of counsel fails.

VIII. *No Error or Ineffective Assistance As to Instruction Regarding Braden’s Uncharged Acts*

Under Evidence Code section 1101, subdivision (a), evidence of a person’s character is generally inadmissible “to prove his or her conduct on a specified occasion.” On the other hand, the statute does not prohibit “the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, . . .) other than his or her disposition to commit such an act.” Braden contends that the trial court erred in failing to sua sponte instruct the jury on the limited purposes for which evidence of his uncharged acts was admitted at trial, or alternatively that his counsel was ineffective in failing to request such an instruction. We reject his claims.

A. *Background*

At trial, Daniel Loyd, the jailhouse informant, testified to various uncharged bad acts by Braden. Loyd testified that Braden twice asked if Loyd would buy, or knew someone who would buy, 15 pounds of marijuana. Braden also offered to sell Loyd guns, claiming he could get Loyd any gun he wanted and that he currently had 4 shotguns, an AK-47 assault rifle, and a nine-millimeter pistol. Braden said he sold firearms to gang members and had firearms “all the time.” Braden related selling a pistol to a friend in Rohnert Park who committed a murder with the weapon. Braden claimed he sent people to scare Athas and “talked about having some of the witnesses in his case killed.” Finally, Braden discussed a plan to escape from jail, which involved overpowering a guard and escaping in a waiting car with guns.

Also at trial, Stone testified that, while driving from his girlfriend Painchaud's apartment to Eeds's house before the shooting, Braden said to drive carefully because, "I'm wanted for murder right now."

B. *Analysis*

On appeal, Braden does not contend the trial court erred in admitting the testimony referenced above, or that trial counsel was ineffective in failing to object to the testimony. Instead, Braden contends the jury should have been instructed pursuant to CALCRIM No. 375 regarding "the use it could make of the 'uncharged offenses' testimony" in the case. That instruction, which requires substantial customization by the trial court, would have referenced the evidence of other offenses or acts; informed the jury it could consider the evidence only if the People proved commission of the other offenses or acts by a preponderance of the evidence; instructed the jury it could consider any proven offenses or acts for specific purposes, such as identity, intent, motive, or knowledge; and cautioned the jury not to consider the evidence for any other purpose or to conclude the defendant is disposed to commit crime. (CALCRIM No. 375.)

Generally, the trial court has no *sua sponte* duty to give a limiting instruction on past conduct, such as CALCRIM No. 375. (*People v. Collie* (1981) 30 Cal.3d 43, 63–64; see also *Carter, supra*, 30 Cal.4th at p. 1198.) As *Collie* explained, "Neither precedent nor policy favors a rule that would saddle the trial court with the duty either to interrupt the testimony *sua sponte* to admonish the jury whenever a witness implicates the defendant in another offense, or to review the entire record at trial's end in search of such testimony." (*Collie*, at p. 64.) Nevertheless, "[t]here may be an occasional extraordinary case in which unprotested evidence of past offenses is a dominant part of the evidence against the accused, and is both highly prejudicial and minimally relevant to any legitimate purpose. In such a setting, the evidence might be so obviously important to the case that *sua sponte* instruction would be needed to protect the defendant from his counsel's inadvertence." (*Ibid.*)

Braden argues the present case is one of those extraordinary cases where the trial court was obligated to provide a limiting instruction *sua sponte* because Stone and Loyd

were the prosecution's "key witnesses." However, assuming they were, that does not mean that the evidence of past offenses was itself "a dominant part of the evidence against" Braden. (*Collie, supra*, 30 Cal.3d at p. 64.) Stone was an important witness because he testified he witnessed Braden firing into Sparks's backyard, not because he testified to Braden's stray and ambiguous remark about being wanted for murder. Similarly, Loyd was an important witness because he testified Braden admitted committing the charged offenses, including killing Skyler Rapp, not because he testified to Braden's other comments about guns, drugs, and a prison escape. Furthermore, none of the testimony about Braden's other offenses and acts was "highly prejudicial" (*ibid.*) relative to the grievous conduct at issue in the charged offenses. Finally, Braden effectively concedes the evidence was more than "minimally relevant" (*ibid.*), acknowledging his admissions about past conduct "involved uncharged bad acts about possessing and furnishing guns, assisting in a murder, and committing violence, [and] arguably bore on [Braden's] intent, motive, *modus operandi* and other factors." This was not an "extraordinary case" (*ibid.*) in which the trial court is required to sua sponte instruct the jury on the limited uses of evidence of other acts and offenses.

Braden argues in the alternative that, if the court was not obligated to give a limiting instruction sua sponte, then trial counsel's failure to request that the jury be instructed with CALCRIM No. 375 was ineffective assistance. As explained previously, to establish a violation of his state and federal constitutional right to counsel, Braden must demonstrate his counsel's performance was "deficient" and "the deficient performance prejudiced the defense." (*Strickland, supra*, 466 U.S. at p. 687; see also *Ledesma, supra*, 43 Cal.3d at pp. 215–217.) Braden has not demonstrated deficient performance, because trial counsel could have made a "reasonable tactical decision[]" (*Lucas, supra*, 12 Cal.4th at p. 437) not to request the instruction. For example, the instruction would have reminded the jurors of all of the uncharged acts mentioned during the trial and suggested how the acts might be relevant to the issues before the jury. (See *People v. Hernandez* (2004) 33 Cal.4th 1040, 1053 ["an instruction on use of this testimony properly might explain how it could be used as well as how it could not be

used”].) Trial counsel might reasonably have decided it would be better not to provide the jury such a summary and guidance. Braden’s claim of ineffective assistance of counsel fails.³²

IX. *Braden’s Firearm Use Enhancements Are Supported by Sufficient Evidence*

Braden contends there is insufficient evidence to support his jury’s true findings on nine firearm use enhancements attached to counts 1, 3, 5, 6, 8, 9, 11, 13, and 15.

“In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60.)

At issue are section 12022.53, subdivision (d) enhancements that provide for the imposition of additional consecutive sentences of 25 years to life where the accused, in the commission of specified felonies including murder, attempted murder, assault with a deadly weapon, and shooting at an inhabited dwelling, “intentionally and personally discharged a firearm and proximately caused great bodily injury . . . or death, to any person other than an accomplice.”³³ Braden argues the jury had insufficient evidence to

³² Braden also contends the cumulative effect of five alleged errors resulted in prejudice. (See *People v. Hill* (1998) 17 Cal.4th 800, 844 [“a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error”].) We have concluded the trial court did not err in denying Braden’s motion for mistrial related to officer testimony about a statement made by Lopez (Part VI, *ante*), or in failing to give sua sponte instructions on adoptive admissions (Part VII, *ante*) or uncharged acts evidence (Part VIII). The remaining two errors—the failure to give instructions on the corroboration requirements for accomplice and jailhouse informant testimony—did not result in cumulative prejudice in light of the ample corroborative evidence in the record.

³³ Section 12022.53, subdivision (d) provides in full: “Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), Section 246, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section

conclude his personal use of a firearm was the proximate cause of the death or great bodily injury alleged in the nine counts, because there was no direct evidence he hit any of the six named victims with the shots from his shotgun.

As the People point out, in *Bland*, *supra*, 28 Cal.4th 313, the California Supreme Court rejected the Court of Appeal’s conclusion that the section 12022.53, subdivision (d) “ ‘enhancement cannot be found true unless defendant personally fired the bullets which struck the victim.’ ” (*Bland*, at p. 335.) The Court explained that “[p]roximately causing and personally inflicting harm are two different things.” (*Id.* at p. 336.) The Court approved the definition of proximate cause in the CALJIC instruction given in the case: “ ‘A proximate cause of great bodily injury or death is an act or omission that sets in motion a chain of events that produces as a direct, natural and probable consequence of the act or omission the great bodily injury or death and without which the great bodily injury or death would not have occurred.’ ” (*Id.* at p. 335; see also *id.* at p. 336.)

In the present case, the trial court provided a different definition of proximate cause, as per CALCRIM No. 3150: “An act causes great bodily injury or death if the injury or death is the direct, natural, and probable consequence of the act and the injury or death would not have happened without the act. 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.” The jury was not instructed in the “chain of events” language approved in *Bland*, and the trial court did not read optional language from CALCRIM No. 3150 explaining that there may be more than one cause of injury or death.

Braden does not contend any of the trial court’s instructions on proximate cause were erroneous, and he does not dispute there was sufficient evidence to support the findings on the enhancements under *Bland*’s “chain of events” reasoning. That is sufficient to defeat his claim on appeal, because the evidence was not *legally insufficient*

12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.”

to support the true findings on the enhancements. Braden, however, seeks to benefit from the trial court's failure to give the "chain of events" or multiple causation instructions, and argues there was no evidence the injuries and death were "the direct, natural, and probable consequence" of his actions, which is the definition the jury actually received. But Braden has not shown the definition of proximate cause in CALCRIM No. 3150 is *legally* different from the definition approved in *Bland, supra*, 28 Cal.4th at pp. 335–336. Although the language of the latter would have made it easier for the prosecution to argue proximate causation, the language of the former is broad enough to encompass "chain of events" causation and a finding of proximate cause regardless of whether there is evidence Braden fired the shots that hit the named victims. That is, the definition of proximate cause given in the present case may have strategically disadvantaged the prosecution on the issue to a minor degree, but it did not change the legal meaning of the element in the jury charge. Accordingly, Braden's claim fails.³⁴

X. *Lopez's Convictions Are Supported by Substantial Evidence*

Lopez contends the evidence was insufficient to support his convictions on all the counts. We reject the claim.

"In reviewing a criminal conviction challenged as lacking evidentiary support, 'the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" [Citation.] The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence [citation] An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

³⁴ If the trial court erred in its instructions on proximate cause, the error was to Braden's benefit, because the definition approved in *Bland* used *broader* language than that in CALCRIM No. 3150. (See *Bland, supra*, 28 Cal.4th at p. 338 ["The correct definition of proximate causation is broader, not narrower, than jurors might assume."].)

A. *The Victim Eyewitness Testimony Did Not Compel The Jury To Conclude Stone Was The Second Shooter*

Lopez relies heavily upon a theory that Stone, rather than Lopez, was the second shooter, asserting there was “nearly proof beyond a reasonable doubt that the second shooter was Stone, and not [Lopez].” He emphasizes victim eyewitness testimony describing the shooters and the sound of the gunshots, but a close examination of the evidence admitted at trial shows it was inconclusive.³⁵

Lopez cites the testimony of three eyewitnesses who offered partial descriptions of the two shooters. As explained previously, on the Eeds side of the fence separating his backyard from Sparks’s backyard, there was a washing machine underneath a notch at the top of the fence where a small portion of the fence was missing. There was also a hole in the fence where two boards were missing. Josh Gamble testified regarding his observations of the shooter at the notch at the top of the fence, who he could only see in silhouette. The shooter had short hair, about one inch long. The shooter was at least six feet tall and scrawny, with long arms. Gamble was unable to describe the shooter at the hole in the fence; at one point he testified he could not estimate the shooter’s height because Gamble was sitting down and at another point he estimated the shooter at the hole was about 5’11”. Andrew Sparks, who was intoxicated, testified the man shooting through the notch at the top of the fence was not shaved bald but had very short hair, similar to a military cut. He could not describe the shooter at the hole in the fence. Ross Sparks testified the shooter at the notch in the fence had short hair.

Based on the testimony of those three witnesses, Lopez argues the evidence showed he could not have been one of the shooters. We agree the testimony of those witnesses provided a basis for Lopez’s counsel to argue that the shooter at the notch was Stone and the shooter at the hole was Braden. Braden was shaved bald at the time of the

³⁵ Lopez also argues Stone was the second shooter because Stone was a habitual methamphetamine user who possessed guns and fled after the shooting. However, none of those circumstances constitute strongly circumstantial evidence that Stone was a shooter, rather than a person who had the more limited involvement to which he admitted at trial.

shooting, so arguably he could not have been the shooter at the notch. Stone testified he was six feet tall and at the time of the shooting he used clippers to cut his hair short, while a booking photo of Lopez near the time of the shooting showed he had longer hair. Thus, Stone better matched the description of the shooter at the notch.

Nevertheless, the testimony of Josh Gamble, Ross Sparks, and Andrew Sparks did not obligate the jury to find that Stone, rather than Lopez, was the second shooter. There were some inconsistencies in the testimony that presumably reflected the poor visibility and chaotic circumstances. While Andrew Sparks testified the shooter at the notch was clean-shaven, Stone testified he had a “sizeable” mustache at the time; the booking photo shows Lopez had a goatee and a thin mustache. While Gamble testified the shooter at the notch was 6 feet tall, Ross Sparks testified the shooter must have been kneeling on the washing machine. The jury may have concluded there was no basis for Gamble to accurately estimate the shooter’s height. More generally, it is possible the jury decided not to put much weight on the very sparse descriptions offered by the victims, considering the dark conditions around the fence.

Lopez also argues the eyewitness testimony about the sound of the gunshots showed that the second shooter was Stone firing with his .22 rifle. However, the trial testimony did not conclusively establish that one of the shooters had a .22 rifle. Ross Sparks testified he heard two different types of shots—a “big booming sound” and a “lower sounding shot.” At the preliminary hearing, Sparks testified he thought the lower sounding shot was from a “lower size” rifle or pistol. However, at trial he testified he believed the sound was that of a “smaller shotgun shell.” He explained it could have been “birdshot from another shotgun, that’s a lower sounding pitch and volume.” Josh Gamble testified the shot he heard from the notch sounded like a “firecracker” and the shot he heard from the hole in the fence sounded like a louder “boom.” He thought the assailant at the hole had a shotgun, but he did not see what the type of firearm the assailant at the notch had. At one point in his testimony, Andrew Sparks testified the weapons sounded “real similar” and he thought both were shotguns. At another point in his testimony he testified the shots from the different locations sounded different; he

opined it was because different types of rounds were used. Another witness testified regarding the shots, “There was one louder and there was one with more pop.” Thus, although the weight of the evidence suggests the firearms sounded different, the jury was offered an explanation that was consistent with both weapons being shotguns. No other evidence, such as expert testimony, contradicted that explanation.

In sum, although the victim eyewitness testimony provided some basis to argue Stone was the second shooter, it did not *compel* the jury to reach that conclusion.³⁶

B. *The Judgment is Otherwise Supported By Substantial Evidence*

There was ample evidence to support the jury’s verdict convicting Lopez on all the counts.

First, it is undisputed that Lopez spent the day and evening of the shooting with Braden, and that Lopez was at the scene of the shooting. Lopez went with Braden to obtain a shotgun, and was nearby when Braden modified his shotgun. The jury could infer that Lopez heard Braden’s comments at Athas’s party expressing a desire to shoot someone. Among other things, Lopez told the police that Braden had been talking about “shooting up the house” and telling people at Athas’s place, “I wanna shoot somebody.” Stone testified Lopez contacted him to recruit him for a “lick,” although there is no evidence any robbery or other “lick” was ever anticipated by Lopez and Braden.

Second, there is no dispute that Lopez was involved in a heated dispute with Sparks the day of the shooting and that numerous angry phone calls and texts had been exchanged between the two. In one of the calls, Lopez threatened Sparks and his family with physical harm. Lopez argues the evidence shows only that he wanted to set up a fistfight. We agree there is no evidence in the record of a motive sufficient to explain why the horrific shooting in the present case occurred. But it is not uncommon for

³⁶ As described in the factual background, the theory that Stone was the second shooter was also supported by the testimony from the jailhouse informant Valentin Aguilar. Aguilar testified Stone told him that Lopez had no weapon and that Stone fired over the fence but did not hit anyone. Although helpful to Lopez, the jury was not obligated to credit that testimony. (*People v. Zamudio* (2008) 43 Cal.4th 327, 357 [“it is the exclusive province of the trial judge or jury to determine the credibility of a witness’ ”].)

crimes to lack adequate explanation. The evidence of hostility between Lopez and Sparks at least demonstrates a possible motive for the shooting, which is more than was evidenced regarding Braden or Stone.

Finally, although not overwhelming, there was direct and circumstantial evidence that Lopez was in possession of a shotgun the night of the shooting. Anthony Gaston testified he hid a shotgun at Athas's place several days before the shooting, and Lopez saw the shotgun when Gaston brought it over and knew where it was hidden. The shotgun was still there the day of the shooting, but Leonardo Lopez subsequently told him the gun had been used and was gone. Stone testified that Lopez told him in a text that he had a gun, and Stone later saw Lopez with a shotgun in the car, at the scene of the shootings, and after the car crash.³⁷ Lopez emphasizes Stone's testimony that only Braden, and not Lopez, was the shooter. Stone testified that he was "very certain" Lopez was not shooting and that Lopez ran back to the car at the same time as him. Although that testimony was certainly helpful to Lopez, the jury might have believed that Stone was lying on that point to protect Lopez, who was a "really good" friend.

From the above evidence, the jury reasonably could have inferred that Lopez was one of the two persons who shot into Sparks's backyard barbecue on June 18, 2011.³⁸ Lopez's challenge to the sufficiency of the evidence fails.³⁹

³⁷ Lopez relies heavily upon the trial court's failure to give proper instructions on corroboration, which is relevant to Stone's testimony. However, because there was sufficient corroboration, that error was harmless and we can properly consider Stone's testimony as part of the quantum of evidence supporting the judgment. (See Part III, *ante*.)

We recognize, of course, that none of the testifying witnesses who were at Athas's party testified that Lopez had a gun and that Stone's girlfriend testified she did not see Lopez with a gun (she also testified she did not see Braden with a gun). However, the existence of evidence from which the jurors could infer Lopez did *not* have a shotgun does not negate the evidence from which the jurors could find he *did* have one.

³⁸ Lopez briefly references some evidence from which an inference could be made that there was only one shooter. However, several victims testified there were two shooters.

³⁹ Lopez contends there was insufficient evidence to support the section 12022.53, subdivision (d) personal use enhancements attached to various counts. As we explained previously in rejecting the same argument by Braden (Part IX, *ante*), those enhancements

XI. *Lopez and Braden's Section 654 Claims*

Section 654, subdivision (a), provides in pertinent part: “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.” Section 654 “prohibits punishment for two crimes arising from a single indivisible course of conduct. [Citation.] If all of the crimes were merely incidental to, or were the means of accomplishing or facilitating one objective, a defendant may be punished only once. [Citation.] If, however, a defendant had several independent criminal objectives, he may be punished for each crime committed in pursuit of each objective, even though the crimes shared common acts or were parts of an otherwise indivisible course of conduct. [Citation.] The defendant’s intent and objective are factual questions for the trial court, and we will uphold its ruling on these matters if it is supported by substantial evidence.” (*People v. Perry* (2007) 154 Cal.App.4th 1521, 1525 (*Perry*); see also *People v. Chung* (2015) 237 Cal.App.4th 462, 468 [noting that recent California Supreme Court decisions regarding section 654 did not overrule the “ ‘intent and objective’ test”].)

The trial court imposed sentences of 35 years to life for the attempted murders of Desiree Kirby and Andrew Sparks, including sentencing enhancements under section 12022.53, subdivision (d) and section 12022.7, subdivision (a). The court also imposed consecutive sentences, including consecutive section 12022.53, subdivision (d) enhancements, on each appellant for counts 5 and 8, which alleged mayhem against those same two victims. The trial court stayed under section 654 the sentences on the assault with a firearm counts involving the same victims. Lopez and Braden contend the

did not require evidence that Lopez’s shots actually hit Skyler Rapp or the other victims. Lopez also contends there was insufficient evidence to support findings he acted with premeditation and deliberation, as relevant to counts 1, 3, 6, 9, 11, and 13. We disagree. The jury could infer from the evidence described herein that Lopez and Braden planned the shooting before leaving Athas’s party. (See *Burney, supra*, 47 Cal.4th at p. 235.) Similarly, based on the evidence of planning and the circumstances of the shooting, the jury could infer Lopez had specific intent to kill, as required to support the attempted murder charges. (See *People v. Ramos* (2004) 121 Cal.App.4th 1194, 1208.)

sentence on the mayhem counts also should have been stayed pursuant to section 654 because, in Braden’s words, “[w]here (as here), convictions of mayhem and assault are based on one attack on one victim, sentence for the lesser offense must be stayed” Respondent agrees the sentences for mayhem, and the attendant enhancements, should have been stayed under section 654. (See *People v. Bui* (2011) 192 Cal.App.4th 1002, 1015 [“We agree with defendant that under section 654, he may not be punished for both the attempted murder and mayhem counts. . . . There was no evidence defendant had independent objectives for the two crimes that would justify multiple punishment.”] (*Bui*)). We will direct that the sentences on counts 5 and 8 be stayed.

Lopez and Braden were convicted on count 15 of shooting at an inhabited dwelling (§ 246) and their juries found true the allegation pursuant to section 12022.53, subdivision (d), that they personally and intentionally discharged a firearm and proximately caused great bodily injury or death to a person other than an accomplice. Appellants contend the gun use enhancement should have been stayed under section 654, because, in Braden’s words, it “is based on the same act that led to the murder of Skyler [Rapp] and infliction of great bodily injury and mayhem on the other five named victims; but that act already was punished by the same enhancement on other counts.” Appellants’ argument is foreclosed by *People v. Palacios* (2007) 41 Cal.4th 720, 729, in which the Supreme Court held, “the broad and unambiguous scope of ‘[n]otwithstanding any other provision of law’ overrides the application, if any, of section 654 to the imposition of punishment prescribed in section 12022.53, subdivisions (b), (c) and (d).” (See also *Bui, supra*, 192 Cal.App.4th at p. 1014.)⁴⁰

⁴⁰ Braden also contends section 246 is not one of the enumerated felonies to which section 12022.53 applies. He is mistaken. Section 12022.53, subdivision (d), provides: “Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), *Section 246*, or subdivision (c) or (d) of Section 26100, personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life.” (Italics added.) The trial court properly imposed sentence on the enhancement.

XII. *Stone's Section 654 Claim*

Appellant Stone, in his only argument on appeal, contends the trial court violated section 654 when it sentenced him to an eight month consecutive term on the count 17 accessory charge. The claim fails.

The trial court sentenced Stone to the upper term of nine years in prison for conspiracy to commit robbery (§§ 182, subd. (a), 211, & 213). For unlawful possession of a firearm (§ 12021, subd. (a)), the court sentenced Stone to a consecutive sentence of eight months in prison, one-third of the midterm for that offense. For being an accessory after the fact to the shooting (§ 32), the court sentenced Stone to a consecutive sentence of eight months in prison, one-third of the midterm for that offense.

As noted previously, section 654 prohibits punishment for two crimes arising from a single indivisible course of conduct, where the crimes were the means of accomplishing one objective; if a defendant harbored independent criminal objectives, he may be punished for each crime, even though they shared common acts. (*Perry, supra*, 154 Cal.App.4th at p. 1525.) We review the trial court's ruling for substantial evidence. (*Ibid.*)

Stone argues section 654 applies because he “was convicted of but one act, that of driving Braden and Lopez away from the crime scene.” Stone is incorrect. The factual basis for Stone's plea to conspiracy was his agreement to drive Lopez and Braden to commit an armed robbery at Eeds's house. Stone unlawfully possessed the .22-caliber rifle prior to his agreement to rob Eeds. Finally, by driving Braden and Lopez away from the scene of the shooting, Stone acted as an accessory to murder, attempted murder, assault, mayhem, and shooting at an inhabited dwelling. Accordingly, the three sentences

We also reject Lopez's passing contention the trial court was required to stay the entire sentence on count 15 under section 654. Appellants' conduct in shooting at Sparks's house put additional persons at risk and is properly subject to separate punishment. (See *People v. Masters* (1987) 195 Cal.App.3d 1124, 1128 [“As long as each violent crime involves at least one different victim, section 654's prohibition against multiple punishment is not applicable.”].)

were imposed for three crimes involving independent acts and objectives. Section 654 is inapplicable.⁴¹

DISPOSITION

The first degree murder convictions of appellants Lopez and Braden are reversed, although the People may accept a reduction of the conviction to second degree murder. If, after the filing of the remittitur in the trial court, the People do not bring defendants to retrial solely on the premeditation and deliberation element within the time set forth in Section 1382, subdivision (a)(2)—60 days unless waived by the defendants—the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder and shall resentence appellants Lopez and Braden accordingly. The trial court shall also stay the sentences imposed on Lopez and Braden on counts 5 and 8. The trial court’s judgment is otherwise affirmed.

⁴¹ Stone’s reliance on *People v. Jones* (2012) 54 Cal.4th 350, is misplaced. There, the Court emphasized that “Section 654 prohibits multiple punishment for a single physical act that violates different provisions of law.” (*Jones*, at p. 358.) The Court held the defendant could be punished under one criminal statute for the “single act” of carrying a loaded and concealed firearm. (*Id.* at p. 352.) However, this is not a “single act” case. Moreover, all the elements for the conspiracy offense were satisfied when Stone drove Braden and Lopez to Eeds’s house, which was an act in furtherance of the robbery conspiracy. (*People v. Johnson* (2013) 57 Cal.4th 250, 257.) The evidence supports the trial court’s apparent conclusion that the defendants’ flight after the shooting was unrelated to the original robbery plot.

SIMONS, Acting P.J.

We concur.

NEEDHAM, J.

BRUINIERS, J.

(A136253)