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COURT OF APPEAL, FOURH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBIN CEE ROBINS et al.,

Defendants and Appellants.

D058619

(Super. Ct. No. FBA800768)

APPEAL from a judgment of the Superior Court of San Bernardino County, Cheryl C. Kersey, Judge. Affirmed in part; reversed in part; and remanded for further proceedings.

I.

INTRODUCTION

A jury found Robin Cee Robins and Joshua Dalke guilty of attempted murder (Pen. Code, §§ 664, 187, subd. (a))¹ (count 1), conspiracy to commit murder (§§ 182, subd. (a), 187, subd. (a)) (count 2), and assault with a deadly weapon (§ 245, subd. (a)(1)) (count 3). The jury also found that the attempted murder was committed willfully,

¹ Unless otherwise specified, all subsequent statutory references are to the Penal Code.

deliberately and with premeditation (§ 664, subd. (a)). The jury further found that Dalke personally inflicted great bodily injury in the commission of counts 1 and 3 (§ 12022.7, subd. (a)). Following the jury trial, the court found that Dalke had suffered a prior strike conviction (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

The trial court sentenced Robins to 25 years to life on count 2 (conspiracy to commit murder). The court imposed a sentence of life with the possibility of parole on count 1 (premeditated attempted murder), to be served concurrently with the term imposed on count 2. The court stayed the sentence on count 3 (assault with a deadly weapon) pursuant to section 654. The court sentenced Dalke to 50 years to life on count 2 (conspiracy to commit murder), consisting of the base term of 25 years to life, doubled in light of the strike prior. The court imposed a sentence of life with the possibility of parole on count 1 (premeditated attempted murder) plus an additional three years for the great bodily injury enhancement (§ 12022.7, subd. (b)), to be served concurrently with the term imposed on count 2. The court stayed the sentence on count 3 (assault with a deadly weapon) pursuant to section 654.

Appellants contend that the trial court committed reversible error in instructing the jury on the offense of conspiracy to commit murder (count 2).² Specifically, appellants contend that the trial court erroneously instructed the jury that appellants could be found guilty of conspiracy to commit murder upon proof of a conspiracy to commit either murder, attempted murder, *or* assault with a deadly weapon. Appellants note that the trial court's instruction pertaining to the charge of conspiracy to commit murder was

² Robins raised this instructional claim in his brief and Dalke joined in the claim.

erroneous in several other aspects, as well, including that the court failed to provide any instructions on the elements of the target offense of murder, as is required.

The People acknowledge that the trial court's instruction on conspiracy to commit murder contained "errors and internal inconsistencies," but contend that it is not reasonably likely that the jury misunderstood the court's instruction, in light of the court's other jury instructions and the prosecutor's closing arguments. The People also contend that any instructional error was harmless. We conclude that the errors in the trial court's instruction on conspiracy to commit murder require reversal. The court's instruction was fundamentally flawed, hopelessly contradictory, and entirely inadequate. In view of the magnitude of the errors in the trial court's instruction, and their combined effect, we cannot conclude that the errors were harmless beyond a reasonable doubt.

In a related claim, appellants contend that the jury's verdicts on count 2 are ambiguous as to whether the jury found appellants guilty of conspiracy to commit murder, conspiracy to commit attempted murder, or conspiracy to commit assault with a deadly weapon.³ In view of the alleged ambiguity, appellants maintain that this court should modify the judgment on count 2 to reflect a conviction for conspiracy to commit assault with a deadly weapon. We reject this claim. While we conclude that the trial court committed reversible error in instructing the jury as to count 2 and that reversal of count 2 is required in light of the instructional error, the jury's verdicts on this count indicate that the jury convicted appellants of conspiracy to commit murder. Appellants are thus not entitled to a modification of the judgment to state that they are convicted of

³ Dalke raised the verdict form claim in his brief and Robins joined in this claim.

conspiracy to commit assault with a deadly weapon. Rather, the People may retry appellants on a charge of conspiracy to commit murder.

Dalke also contends that there is insufficient evidence in the record that his prior conviction for attempted assault in the second degree under New York law (New York Penal Law §§ 110.00, 120.05, subd. (2)) constituted a strike under California law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)). We agree that there is insufficient evidence that Dalke has suffered a prior strike under California law.

We reverse the judgment as to count 2 as to both appellants, reverse the trial court's finding that Dalke suffered a prior strike conviction, vacate appellants' sentences and remand the matter to the trial court for further proceedings.⁴

II.

FACTUAL BACKGROUND

A. The prosecution's evidence

1. Dalke and Robins meet the victim

Dalke and his girlfriend, Antoinette Albini, lived together in Pahrump, Nevada. In November of 2008, they traveled to Bakersfield, California. While in Bakersfield, Dalke and Albini met Robins. Albini and Dalke asked Robins to help them find a ride back to Pahrump.

⁴ In light of our reversal of the judgment as to both appellants on count 2 and the corresponding vacatur of appellants' sentences, we need not consider various sentencing claims that appellants raise on appeal.

On the evening of November 18, 2008, victim Randy Sundgren met Robins. Sundgren agreed to give Albini, Dalke, and Robins a ride to Las Vegas in Sundgren's girlfriend's car.⁵ Robins contacted Albini and Dalke, and told them that he had found them a ride back to Pahrump.

2. The charged offenses

In the early morning hours of November 19, Albini, Dalke, Robins, and Sundgren began their trip. Robins drove, Sundgren sat in the front passenger seat, Dalke sat in the rear seat behind Robins, and Albini sat in the back seat behind Sundgren. Robins drove to a gas station where the four injected methamphetamine.

The group continued traveling until they stopped for gas in Baker, California at approximately 7:30 or 8:00 in the morning. Sundgren got out of the car to go use the bathroom. While Sundgren was in the bathroom, Albini heard Robins tell Dalke that Sundgren was a child molester. Albini also heard Robins tell Dalke that Robins wanted to have Sundgren killed. According to Albini, Dalke responded that it (the killing) could happen.

When Sundgren returned to the car, Robins again got in the driver's seat and Sundgren sat in the front passenger seat. Dalke and Albini switched positions in the back seat, so that Dalke was seated behind Sundgren. Robins began driving. As the group approached the edge of the town of Baker, Albini leaned over the seat and asked, "Are we going to do it?" Sundgren was unsure of what Albini meant by her question. About three miles outside of Baker, Robins said, "Country [Dalke's nickname], here's that knife

⁵ Las Vegas is approximately 60 miles from Pahrump.

you was asking about." Robins pulled a locked blade knife that was approximately six to 12 inches long from his pocket and handed it to Dalke.

About 10 miles outside of Baker, Dalke said, "End of the trail for you, cowboy," grabbed Sundgren's forehead, and slit Sundgren's throat with the knife that Robins had given to Dalke. Albini leaned away from Dalke and grinned.

After Dalke slit Sundgren's throat, Robins slowed down. During an ensuing struggle, Dalke stabbed Sundgren in the chest, abdomen and side, and punched him in the face and chest. Sundgren asked Robins to stop Dalke's attack. Robins responded that he "couldn't," and showed Sundgren his bloody hand. Dalke told Sundgren that he would let him live if Sundgren got out of the car. Sundgren opened the passenger door and jumped out. Robins pushed Sundgren just before Sundgren jumped out of the car.

3. Sundgren receives medical treatment

After escaping from the car, Sundgren began walking back to Baker. A passing motorist picked up Sundgren and summoned an ambulance. Sundgren was transported to a medical center where he was treated for knife wounds. Sundgren was hospitalized for three days.

4. Appellants' flight and arrest

After Sundgren left the car, Dalke threw the knife out of the window. Robins drove the group to Albini's trailer, in Pahrump. According to Albini, on the way to

Pahrump, Robins said that he had wanted Sundgren dead for the last 20 years.⁶ Later that evening or early the next morning, police arrested Albini, Robins and Dalke.

5. The investigation

During an initial police interview, Albini stated that Robins told Dalke that he wished someone would slit Sundgren's throat because Sundgren was a child molester. Albini told the investigators that Robins had stabbed Sundgren.

Several months later, Albini told the prosecutor and a detective that it was Dalke who had stabbed Sundgren and slashed his throat. Albini also told the prosecutor and a detective that Robins told "[Albini and Dalke] that [Sundgren] was a child molester and needed to have his throat slit." Albini subsequently entered into a plea agreement pursuant to which she agreed to plead guilty to assault with a deadly weapon as a strike in exchange for testifying truthfully at appellants' trial.

A Nye County detective interviewed Dalke on November 20. During the interview, Dalke claimed that he had been in Pahrump the prior day and evening, and that he had not been in Bakersfield for two weeks.

B. The defense

Dalke testified on his own behalf. He denied that he and Robins had a conversation at the gas station in Baker in which they discussed killing Sundgren. Dalke said that Albini had admitted that she "would lie for a deal," and maintained that Albini had not told the truth when she testified that Robins stated that he had wanted Sundgren dead for 20 years. Dalke acknowledged that Robins told him at the gas station that

⁶ Sundgren testified that he did not recall having ever previously met Robins.

Sundgren was a child molester. However, Dalke claimed that there were no plans to hurt or kill Sundgren.

According to Dalke, after the group left the gas station, Sundgren began to behave in a suspicious manner and tried to reach for a knife that was in the center console ashtray. Robins handed the knife to Dalke. Dalke claimed that shortly thereafter, Sundgren grabbed the steering wheel while a truck was coming toward them. Dalke said that he slit Sundgren's throat with the knife in order to make Sundgren let go of the steering wheel. Dalke denied that he intended to kill Sundgren.⁷

C. Rebuttal evidence

On January 9, 2009, San Bernardino Deputy Sheriff Ryan Smith went to Pahrump to take custody of Dalke and to assist other deputies in transporting Dalke to the Barstow jail. Approximately five minutes into the drive, Dalke asked Deputy Smith if Sundgren was dead. Deputy Smith told Dalke that Sundgren was not dead. Dalke then told Deputy Smith that he had "cut [Sundgren] to mark him" after Sundgren told Dalke that he had molested his girlfriend's child. Dalke claimed that he had not intended to kill Sundgren, and that he had not cut Sundgren deep enough to kill him. According to Deputy Smith, during the hour-long drive, Dalke never told Smith that he had acted in self-defense when he cut Sundgren with the knife.

⁷ Robins did not testify and presented no witnesses or evidence.

III.

DISCUSSION

A. The jury found appellants guilty of conspiracy to commit murder based on a set of fundamentally flawed instructions that improperly permitted the jury to find appellants guilty without finding that they had committed any of the necessary elements of the charged offense

Appellants contend that the trial court erred in instructing the jury on count 2, and that the jury's verdicts are ambiguous as to which crime the jury found appellants conspired to commit.

1. Factual and procedural background

a. The charging document

The third amended information charged appellants with conspiracy to commit murder, in relevant part as follows:

"On or about November 18, 2008 . . . the crime of conspiracy to commit a crime, in violation of Penal Code section 182(a)(1), a felony, was committed by Robin Cee Robins and Joshua Dalke, who did unlawfully conspire together and with another person and persons whose identity is unknown to commit the crime of murder, in violation of Section 187 of the Penal Code. . . , a felony; that pursuant to and for the purpose of carrying out the objects and purposes of the aforesaid conspiracy, the said defendant(s)[] committed the following overt acts . . . in the County of San Bernardino: 1. On or about November 18, 2008[,] a co-conspirator gave a knife to Defendant Joshua Dalke. [¶] 2. On or about November 18, 2008, a co-conspirator drove the victim to a remote area."

Just prior to instructing the jury at the close of the case, the trial court read the third amended information to the jury.

b. *The jury instructions*

The trial court instructed the jury pursuant to a modified version of the standard instruction on conspiracy (CALCRIM No. 415) as follows:

"I have explained that a defendant may be guilty of a crime if he either commits the crime or aids and abets the crime.^[8] He may also [be] guilty if he is a member of a conspiracy.

"The defendants are charged in Count 2 with conspiracy to commit murder.

"To prove the defendant is guilty of this crime, the People must prove that:

"The defendant intended to agree and did agree with one or more of the other defendants^[9] or Ms. Albini to commit murder, attempted murder or assault with a deadly weapon.

"At the time of the agreement, the defendant and one or more of the alleged members of the conspiracy intended that one or more of them would commit murder, attempted murder, or assault with a deadly weapon.

"One of the defendants or Ms. Albini committed at least one of the alleged overt acts to accomplish murder, attempted murder, or assault with a deadly weapon.

"On or about November 18[], 2008 a co-conspirator gave a knife to Defendant Joshua Dalke.

"On or about November 18[], 2008 a co-conspirator drove the victim to a remote area.

⁸ The trial court provided the jury with standard instructions on aiding and abetting (CALCRIM Nos. 400, 401), which permitted the jury to find each appellant guilty of attempted murder (count 1) and assault with a deadly weapon (count 3) either as a direct perpetrator or as an aider and abettor.

⁹ Notwithstanding the court's reference to "one or more of the other defendants," it is undisputed that Robins and Dalke were the only defendants at trial.

"At least one of these overt acts was committed in California.

"To decide whether a defendant committed these overt acts, consider all of the evidence presented about the acts.

"To decide whether a defendant and one or more of the other alleged members of the conspiracy intended to commit murder, attempted murder, or assault with a deadly weapon, please refer to the separate instructions that I will give you on those crimes.

"The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit one or more of those crimes. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crimes.

"An overt act is an act by one or more of the members of the conspiracy that is done to help accomplish the agreed upon crime. The overt act must happen after the defendant has agreed to commit the crime. The overt act must be more than the act of agreeing or planning to commit the crime, but it does not have to be a criminal act itself.

"You must all agree that at least one alleged overt act was committed in California by at least one alleged member of the conspiracy, but you do not have to all agree on which specific overt act or acts were committed or who committed the overt act or acts.

"You must make a separate decision as to whether each defendant was a member of the alleged conspiracy.

"The People allege that the defendants conspired to commit the following crimes: [m]urder, attempted murder or assault with a deadly weapon. You may not find the defendant guilty of conspiracy unless all of you agree that the People have proved the defendant conspired to commit at least one of these crimes, and you all agree which crime he conspired to commit.

"A member of a conspiracy does not have to personally know the identity or roles of all the other members.

"Someone who merely accompanies or associates with members of a conspiracy but who does not intend to commit the crime is not a member of the conspiracy.

"Evidence that a person did an act or made a statement that helped accomplish the goal of the conspiracy is not enough, by itself, to prove that the defendant was a member of the conspiracy."

The trial court also instructed the jury pursuant to a standard instruction on liability for a coconspirator's acts (CALCRIM No. 417). In this instruction, the court informed the jury that a "member of a conspiracy is . . . criminally responsible for any act of any member of the conspiracy if that act is done to further the conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy." The court also instructed the jury pursuant to a modified version of CALCRIM No. 417 in relevant part as follows:

"To prove that the defendant is guilty of the crimes charged in Count 2, the People must prove that:

"1. A defendant conspired to commit one of the following crimes: murder;

"2. A member of the conspiracy committed attempted murder and/or assault with a deadly weapon to further the conspiracy;

"AND

"3. Attempted murder and assault with a deadly weapon was a[sic] natural and probable consequence[s] of the common plan or design of the crime that the defendant conspired to commit."

In its instruction to the jury on the joint operation of act and wrongful intent, the trial court described count 2 as "conspiracy to commit murder."

The trial court also provided the jury with standard instructions on premeditated attempted murder (CALCRIM Nos. 600, 601) (count 1) and assault with a deadly weapon (CALCRIM Nos. 860, 915) (count 3).

c. The jury's verdicts

The jury rendered verdicts on count 2 that state:

"We, the jury in the above-entitled action, find the defendant, Joshua Dalke, guilty of the offense of Conspiracy to Commit a Crime, as charged in Count 2 of the Information.

"We the jury in the above-entitled action, find the defendant Robin Cee Robins, guilty of the offense of Conspiracy to Commit a Crime, in violation of Penal Code Section 182[, subdivision] (a)(1) as charged in Count 2 of the Information."

d. Appellants' motion for a new trial

Robins filed a new trial motion in which he contended that the trial court had erred in instructing the jury on count 2.¹⁰ Robins noted that the trial court had instructed the jury pursuant to a modified version of the standard instruction on conspiracy (CALCRIM No. 415), rather than the standard instruction on conspiracy to commit murder (CALCRIM No. 563), which differs from CALCRIM No. 415 and must be given when a defendant is charged with conspiracy to commit murder. Robins contended that under the court's instructions, the jury was improperly told that it could find him guilty of conspiracy to commit murder based on either a conspiracy to commit murder, a conspiracy to commit attempted murder, *or* a conspiracy to commit an assault with a deadly weapon. Robins argued further, "Since the jury only reached a verdict as to

¹⁰ Dalke joined in Robins's motion for new trial at the hearing on the motion.

Defendant Robins committing the crime of Conspiracy, but did not reach a verdict on which of the three proffered crimes he conspired to commit, the verdict as to Count 2 must be set aside."

The People filed an opposition in which they conceded that the trial court should have instructed the jury pursuant to CALCRIM No. 563 concerning conspiracy to commit murder. The People also conceded that conspiracy to commit *attempted* murder is not a crime. However, the People argued that in light of the evidence presented at trial, the trial court's instructions on coconspirator liability (CALCRIM No. 417), the prosecutor's arguments, and the jury's verdicts, "the instructions . . . were clear and the jury made appropriate findings."

The trial court held a hearing on the motion for new trial. Near the conclusion of the hearing, the court issued a tentative ruling to grant the motion for new trial as to count 2. The court invited the parties to submit supplemental briefing on the issue of whether the verdict forms adequately indicated that the jury found appellants guilty of conspiracy to commit murder. The People filed a supplemental brief in which they argued that the jury's verdicts finding appellants guilty of premeditated attempted murder demonstrated that the jury had found appellants guilty of conspiracy to commit murder.

After the People filed their supplemental brief, the court held another hearing on the motion for new trial. The court denied the motion, ruling:

"I have reviewed some research regarding the conspiracy count, and I think that what it is is that there was never any discussion of any other type of conspiracy except to commit murder. And with that in mind, it seems that the jurors, although the incorrect instruction was given to them on that charge as pointed out by [Robins's counsel] in his points and authorities, I have compared that instruction with the

one that was given. And for the record, it was—[the] Court gave [CALCRIM No. 415] and should have given, specifically, instruction [CALCRIM No. 563], which was conspiracy to commit murder.

"Since the instructions themselves are virtually identical and the jury was instructed on what a conspiracy was, and in this case, [the] conspiracy really was the agreement, the agreement that the jurors found apparently was persuasive in the testimony [*sic*] that occurred at the gas station and in the car. So the motion for new trial is denied."

2. *The substantive law of conspiracy to commit murder*

Section 182 provides in relevant part:

"(a) If two or more persons conspire:

"(1) To commit any crime. [¶] . . . [¶]

"They are punishable as follows: [¶] . . . [¶]

"When they conspire to commit any other felony, they shall be punishable in the same manner and to the same extent as is provided for the punishment of that felony. If the felony is one for which different punishments are prescribed for different degrees, the jury or court which finds the defendant guilty thereof shall determine the degree of the felony the defendant conspired to commit. If the degree is not so determined, the punishment for conspiracy to commit the felony shall be that prescribed for the lesser degree, except in the case of conspiracy to commit murder, in which case the punishment shall be that prescribed for murder in the first degree."

" 'A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act "by one or more of the parties to such agreement" in furtherance of the conspiracy.' [Citations.]" (*People v. Jurado* (2006) 38 Cal.4th 72, 120.) " 'To sustain a conviction for conspiracy to commit a particular offense, the prosecution must show not

only that the conspirators intended to agree but also that they intended to commit the elements of that offense.' [Citations.]" (*People v. Swain* (1996) 12 Cal.4th 593, 600, italics omitted.)

Section 187 defines the crime of murder as the "unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) "Where two or more persons conspire to commit murder—i.e., intend to agree or conspire, further intend to commit the target offense of murder, and perform one or more overt acts in furtherance of the planned murder—each has acted with a state of mind 'functionally indistinguishable from the mental state of premeditating the target offense of murder.' [Citation.] The mental state required for conviction of conspiracy to commit murder necessarily establishes premeditation and deliberation of the target offense of murder—hence all murder conspiracies are conspiracies to commit first degree murder, so to speak. More accurately stated, conspiracy to commit murder is a unitary offense punishable in every instance in the same manner as is first degree murder under the provisions of Penal Code section 182. [Citation.]" (*People v. Cortez* (1998) 18 Cal.4th 1223, 1232 (*Cortez*), italics omitted, fn. omitted.)

CALCRIM No. 563, the standard instruction on conspiracy to commit murder, states in relevant part:

"(The defendant[s]/Defendant[s] _____ <insert name[s]>)
(is/are) charged [in Count _____] with conspiracy to commit murder
[in violation of Penal Code section 182].

"To prove that (the/a) defendant is guilty of this crime, the People
must prove that:

"1. The defendant intended to agree and did agree with [one or more of] (the other defendant[s]/ [or] _____ <insert name[s] or description[s] of coparticipant[s]>) to intentionally and unlawfully kill;

"2. At the time of the agreement, the defendant and [one or more of] the other alleged member[s] of the conspiracy intended that one or more of them would intentionally and unlawfully kill;

"3. (The/One of the) defendant[s][,] [or _____ <insert name[s] or description[s] of coparticipant[s]>][,] [or (both/all) of them] committed [at least one of] the following overt act[s] alleged to accomplish the killing: _____ <insert the alleged overt acts>;

"AND

"4. [At least one of these/This] overt act[s] was committed in California.

"To decide whether (the/a) defendant committed (this/these) overt act[s], consider all of the evidence presented about the overt act[s].

"To decide whether (the/a) defendant and [one or more of] the other alleged member[s] of the conspiracy intended to commit murder, please refer to Instructions _____, which define that crime.

"The People must prove that the members of the alleged conspiracy had an agreement and intent to commit murder. The People do not have to prove that any of the members of the alleged conspiracy actually met or came to a detailed or formal agreement to commit that crime. An agreement may be inferred from conduct if you conclude that members of the alleged conspiracy acted with a common purpose to commit the crime."

3. The trial court committed reversible error in instructing the jury that it could find appellants guilty of conspiracy to commit murder upon proof of either conspiracy to commit murder, a conspiracy to commit an attempted murder, or a conspiracy to commit an assault with a deadly weapon

a. Relevant principles of law governing claims of instructional error

Appellate courts determine de novo whether a jury instruction correctly states the law. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of

instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.)

" ' "In determining whether error has been committed in giving or not giving jury instructions, we must consider the instructions as a whole . . . [and] assume that the jurors are intelligent persons and capable of understanding and correlating all jury instructions which are given." [Citation.]' [Citation.]" (*Ibid.*) " 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' [Citation.]" (*Ibid.*) "A trial court must instruct the jury, even without a request, on all general principles of law that are ' "closely and openly connected to the facts and that are necessary for the jury's understanding of the case. [Citation.]' [Citation.]" (*People v. Burney* (2009) 47 Cal.4th 203, 246.)

b. *Application*

i. *The trial court erred in instructing the jury on conspiracy to commit murder*

The trial court committed several fundamental errors in instructing the jury on count 2. To begin with, not only did the trial court fail to provide the jury with the standard instruction on conspiracy to commit murder (CALCRIM No. 563), the court improperly instructed the jury pursuant to a modified version of CALCRIM No. 415, which informed the jury, incorrectly, that it could find appellants guilty of conspiracy to commit *murder* if it found that appellants conspired to commit crimes *other than*

murder.¹¹ Specifically, as noted above, the trial court instructed the jury that it could find appellants guilty of conspiracy to commit murder if it found that:

"The defendant intended to agree and did agree with one or more of the other defendants or Ms. Albini to commit murder, *attempted murder, or assault with a deadly weapon*.

"At the time of the agreement, the defendant and one or more of the other alleged members of the conspiracy intended that one or more of them would commit murder, *attempted murder, or assault with a deadly weapon*.

"One of the defendants or Ms. Albini committed at least one of the alleged overt acts to accomplish murder, *attempted murder, or assault with a deadly weapon*.

"[¶]. . . [¶]

"At least one of these overt acts was committed in California."
(Italics added.)

It is undisputed that a finding of guilt for conspiracy to commit *murder* cannot be premised on a finding of conspiracy to commit *attempted murder* or *assault with a deadly weapon*.¹² Yet, the trial court instructed the jury that it could find appellants guilty of conspiracy to commit murder if it found appellants conspired to commit murder, *attempted murder* or *assault with a deadly weapon*. The effect of the trial court's instructional errors was to permit the jury to find appellants guilty of conspiracy to

¹¹ The Bench Notes to CALCRIM No. 415 state, "If the defendant is charged with conspiracy to commit murder, do not give this instruction. Give CALCRIM No. 563, *Conspiracy to Commit Murder*."

¹² It is also undisputed that there is no such crime as conspiracy to commit *attempted murder*. (See, e.g., *In re E.R.* (2010) 189 Cal.App.4th 466, 470, fn.6.)

commit murder without finding that appellants committed *any* of the necessary elements of that offense.

The trial court's instruction on conspiracy to commit murder was additionally flawed in that the instruction stated, "The People allege that the defendants conspired to commit the following crimes: murder, attempted murder, or assault with a deadly weapon." This instruction was both internally inconsistent, since the same instruction informed the jury that the People had charged appellants with conspiracy to commit *murder*, only, and inaccurate, since the People had *not* alleged that appellants conspired to commit either attempted murder (a nonexistent crime) or assault with a deadly weapon. This aspect of the court's instruction further improperly suggested to the jury that it could find appellants guilty of conspiracy to commit murder based on a finding that appellants had conspired to commit either attempted murder or assault with a deadly weapon.

The court's instruction on conspiracy to commit murder also stated, "To decide whether a defendant and one or more of the other alleged members of the conspiracy intended to commit murder, attempted murder, or assault with a deadly weapon, please refer to the separate instructions that I will give you on those crimes." This aspect of the instruction reinforced the fundamental error mentioned above (i.e., that the jury could find appellants guilty of conspiracy to commit murder based on a finding that appellants had conspired to commit murder, attempted murder or assault with a deadly weapon). Further, the court failed to provide the jury with any "separate instruction[]" on the crime of murder. The failure to provide an instruction on the target offense of murder also constituted error. (*Cortez, supra*, 18 Cal.4th at p. 1239 ["Instructions on the basic

elements of murder were . . . necessary to guide the jury in its determination of whether defendant harbored the requisite dual specific intent for conviction of conspiracy to commit murder"].)

The People contend that despite the admitted "errors and internal inconsistencies," in the court's instruction on conspiracy to commit murder, the "object of the conspiracy" was made clear to the jury by other instructions, including CALCRIM No. 417. Even assuming that the court's instructions adequately informed the jury as to the *object* of the conspiracy, i.e., murder, the jury was fundamentally misinstructed on the elements that the People had to establish in order to prove that appellants conspired to commit that offense, and none of the other jury instructions addressed these elements.

The People suggest that another instruction that the court gave—an instruction that was intended to inform the jury that it could find the defendants guilty of *attempted murder* (count 1) and *assault with a deadly weapon* (count 3) based on coconspirator liability under the natural and probable consequences doctrine (CALCRIM No. 417)—cured the court's error in failing to provide a proper instruction on the underlying offense of conspiracy to commit murder. We reject this contention.

Ironically, it is only because of yet another error, this time in the manner by which the court modified CALCRIM No. 417, that the People can even make this argument. The court instructed the jury pursuant to the modified version of CALCRIM No. 417 in relevant part as follows:

"To prove that the defendant is guilty of the crimes charged in *Count 2*, the People must prove that:

"1. A defendant conspired to commit one of the following crimes: [m]urder;

"2. A member of the conspiracy committed attempted murder and/or assault with a deadly weapon to further the conspiracy;

"AND

"3. Attempted murder and assault with a deadly weapon was a natural and probable consequence of the common plan or design of the crime that the defendant conspired to commit." (Italics added.)

The reference to *count 2* in the court's modified CALCRIM No. 417 instruction was incorrect, since the purpose of the instruction was to inform the jury of a manner by which they could find appellants guilty of *count 1* (attempted murder) and/or *count 3* (assault with a deadly weapon), *not count 2*. As read to the jury, the instruction was also nonsensical since it informed the jury that in order to find a defendant guilty of conspiracy to commit murder (count 2), the jury had to find that the defendant conspired to commit murder and that a member of the conspiracy committed the natural and probable offenses of attempted murder and/or assault with a deadly weapon to further the conspiracy. The court's instruction was also internally inconsistent since it referred to the *crimes* charged in count 2, and only one crime was charged in count 2—conspiracy to commit murder. In sum, the trial court's erroneous instruction on coconspirator liability pursuant to the natural and probable consequences theory (CALCRIM No. 417) did not remedy the numerous instructional errors contained in the court's instruction on conspiracy to commit murder.

We also reject the People's contention that the prosecutor's closing argument cured any error in the court's instruction on conspiracy to commit murder. Although we acknowledge that the *prosecutor* did indicate that appellants were charged with conspiracy to commit murder and the *prosecutor* did discuss the elements of conspiracy to commit murder as well as CALCRIM No. 563 during his closing argument,¹³ the prosecutor's comments in this regard were in direct conflict with the jury instructions discussed above that the *court* gave. We presume that the jury followed the court's instructions, rather than the prosecutor's argument. (See *People v. Osband* (1996) 13 Cal.4th 622, 717 ["When argument runs counter to instructions given a jury, we will ordinarily conclude that the jury followed the latter and disregarded the former, for '[w]e presume that jurors treat the court's instructions as a statement of the law by a judge, and the prosecutor's comments as words spoken by an advocate in an attempt to persuade.' [Citation.]"].) This conclusion is particularly warranted in this case since the trial court specifically instructed the jury, "You must follow the law as I explain it to you. . . . If you believe that the attorneys' comments on the law conflict with my instructions, you must follow my instructions."

We also reject the People's contention that *People v. Farnam* (2002) 28 Cal.4th 107, demonstrates that the prosecutor's argument in this case remedied the trial court's instructional error. In *Farnam*, the Supreme Court concluded that the jury instructions at

¹³ The prosecutor stated, "Here's what a conspiracy is, essentially. This is CALCRIM No. 563. That the defendants intended to agree and did agree with another to intentionally and unlawfully kill. At the time of the agreement, the defendant and the other intended that one or more of them would kill. That's a typo. The defendant or co-conspirator committed at least one alleged overt act to accomplish the killing."

issue in that case were "correct[]," "adequate[]" and "reasonably clear" (*id.* at p. 151), and that the prosecutor's closing argument clarified any "potential ambiguity" in the instructions. (*Ibid.*) *Farnam* is wholly distinguishable from the present case, since the trial court's instructions in this case were incorrect, incomplete, and inconsistent rather than "correct[]," "adequate[]," and "reasonably clear." (*Ibid.*) Under these circumstances, we will not apply *Farnam* in this case to conclude that the jury disregarded the trial court's fundamentally inaccurate instructions as to each element of the charged offense and instead applied a jury instruction (CALCRIM No. 563) that the prosecutor discussed in closing argument, but that the court never gave.

ii. *The trial court's error in instructing the jury on the elements of count 2 requires reversal of that count*

Instructional errors are ordinarily reviewed under the harmless beyond a reasonable doubt standard of prejudice described in *Chapman v. California* (1967) 386 U.S. 18, 43 (*Chapman*.) (See *People v. Huggins* (2006) 38 Cal.4th 175, 211-212 [" '[I]nstructional errors—whether misdescriptions, omissions, or presumptions—as a general matter fall within the broad category of trial errors subject to *Chapman* review on direct appeal' "].) However, the Supreme Court has suggested that certain "legally erroneous" instructions (*People v. Hughes* (2002) 27 Cal.4th 287, 351, citing *People v. Green* (1980) 27 Cal.3d 1 (*Green*)) that permit a jury to convict a defendant pursuant to a legally invalid theory may be subject to an even more stringent standard of prejudice pursuant to which reversal is required unless there is "a basis in the record to find that the verdict was actually based on a valid ground." (*People v. Hughes, supra*, 27 Cal.4th at pp. 350-351, quoting *People v. Guiton* (1993) 4 Cal.4th at p. 1129.) In this case, we need

not determine whether *Green* or *Chapman* applies because we hold that the error was prejudicial under either standard. (See, e.g., *People v. Lara* (1996) 44 Cal.App.4th 102, 111 [noting both *Green* and *Chapman* standards of prejudice and holding that reversal was required under either standard].)

At the outset, it is clear that reversal is required if the *Green* standard of prejudice applies, because there is nothing in the record that demonstrates that the jury rested its verdict on a legally adequate theory. Specifically, we reject the People's argument that the jury's verdicts finding appellants guilty of attempted premeditated murder (count 1) demonstrate that the jury's verdicts on the offense of conspiracy to commit murder rested on a legally valid theory. Clearly, the jury could have found that Dalke and Robins committed an attempted premeditated murder without finding that they *conspired* to commit murder. As to Dalke, the jury could have found him guilty of attempted murder based on Sundgren's testimony that Dalke slashed his throat with a knife, without also finding that Dalke *conspired* to murder Sundgren. The jury also could have found that Robins *aided and abetted* Dalke by handing him a knife in the car. The jury thus could have found Robins guilty on count 1 pursuant to an aiding and abetting theory of liability, without finding that he *conspired* to commit a murder. In fact, the prosecutor argued as much during his closing argument, telling the jury that there were "two ways to attach liability . . . to a person who didn't actually commit a crime." The prosecutor explained that Robins could be found guilty of counts 1 and 3 as *either* an aider and abettor, or as a conspirator. In short, the jury's verdicts on the attempted murder count do not demonstrate that the jury found that appellants committed all of the necessary elements of

conspiracy to commit murder, and there is no other basis in the record for concluding that the jury's verdicts on count 2 were actually based on a valid ground.

Reversal is also required under *Chapman* because the People have not demonstrated "beyond a reasonable doubt that the error[s] did not contribute to this jury's verdict." (*People v. Huggins, supra*, 38 Cal.4th at p. 212; *Chapman, supra*, 386 U.S. at p. 26 [reversing because "it is completely impossible for us to say that the State has demonstrated, beyond a reasonable doubt, that the prosecutor's comments and the trial judge's instruction did not contribute to petitioners' convictions"].)

For the reasons stated in III.A.3.b.i., *ante*, the net effect of the trial court's multiple, fundamental instructional errors pertaining to the offense of conspiracy to commit murder was to permit the jury to convict appellants of conspiracy to commit murder without finding that they committed any of the elements of that offense. More specifically, under the court's instructions, the jury was not required to find that appellants entered into an agreement to commit murder, intended to commit murder, or committed any overt acts toward the commission of a murder.¹⁴ Instead, the jury was told that they could find appellants guilty of conspiracy to commit murder if the jury

¹⁴ In their harmlessness argument, the People cite *Cortez, supra*, 18 Cal.4th at page 1229, and contend that the trial court's failure to instruct on the target offense of the conspiracy (i.e. murder) may be deemed harmless because the trial court adequately instructed the jury concerning the elements of murder in its instruction on *attempted* murder. Even assuming that this is so, the trial court's instruction on conspiracy to commit murder was erroneous for numerous additional reasons described in the text. The People have failed to demonstrate that these fundamental instructional errors may be deemed harmless beyond a reasonable doubt.

found that appellants conspired to commit murder, attempted murder *or* assault with a deadly weapon.

Further, contrary to the People's argument that "the evidence presented to the jurors showed only an agreement to kill Sundgren," the evidence as to the existence of a conspiracy between Robins and Dalke to commit murder was not overwhelming. The People cite Albini's testimony that Robins told Dalke at a gas station in Baker that Robins wanted Sundgren to be killed.¹⁵ When asked how Dalke responded to Robins's statement, Albini testified, "[Dalke] said if [Sundgren] . . . gets out of control, [Dalke will] deal with the situation." The following colloquy then occurred:

"[The prosecutor]: What were Mr. Dalke's exact words or response to [Robins's statement that he wanted Sundgren to be killed]?"

"[Albini]: That it could happen."

The prosecutor then asked, "[I]t would be fair to say in your mind Mr. Dalke indicated in [*sic*] agreement?" Albini responded in the affirmative.

Even assuming that the jury believed Albini's testimony, the conversation to which she testified is ambiguous and does not conclusively establish that both Dalke and Robins specifically intended to enter into an agreement to murder Sundgren, and that they further specifically intended to commit a murder, as would be required to establish their guilt for the offense of conspiracy to commit murder. (See *Cortez, supra*, 18 Cal.4th at p. 1232 ["conspiracy is a specific intent crime requiring both an intent to agree or conspire and a further intent to commit the target crime or object of the conspiracy"].) Albini did *not*

¹⁵ Sundgren testified at trial that he did not hear any conversation between Dalke and Robins at the gas station in Baker.

testify that Robins and Dalke entered into a specific and clear agreement to kill Sundgren. Rather, Albin testified that Robins spoke in terms of "want[ing] [Sundgren] to be killed," and Dalke responding vaguely "[t]hat it could happen."

In light of such testimony, and evidence that Robins handed Dalke a knife shortly before the stabbing, some members of the jury might have reasonably found that Robins and Dalke entered into a conspiracy to commit an assault with a deadly weapon on Sundgren rather than a conspiracy to commit murder. Because the jury was improperly instructed that it could find appellants guilty of conspiracy to commit murder based on evidence of a conspiracy to commit an assault with a deadly weapon, any juror who found that appellants had conspired to commit an assault with a deadly weapon might have improperly voted to convict appellants guilty of conspiracy to commit murder. Under these circumstances, we cannot conclude that the trial court's instructional errors were harmless beyond a reasonable doubt.¹⁶

¹⁶ We also reject the People's contention that "any ambiguities in the [trial court's] instructions," were cured by the prosecutor's closing argument, for the reasons stated in part III.A.3.b.ii., *ante*.

4. *The jury's verdicts indicate that the jury found appellants guilty of conspiracy to commit murder*¹⁷

Appellants contend that the jury's verdicts on count 2 are ambiguous as to whether the jury found appellants guilty of conspiracy to commit murder, conspiracy to commit attempted murder, or conspiracy to commit assault with a deadly weapon. Appellants maintain that because the verdicts are ambiguous in this respect, this court should modify the judgment on count 2 to reflect a conviction for conspiracy to commit assault with a deadly weapon. We reject this contention. The jury's verdicts indicate that the jury found appellants guilty of conspiracy to commit murder, albeit pursuant to fatally flawed instructions, as discussed above.

a. *Principles of law governing the interpretation of a jury's verdict*

In *People v. Paul* (1998) 18 Cal.4th 698, 706-707 (*Paul*), the Supreme Court outlined the following law, which governs the interpretation of a jury's verdict:

"A verdict should be read in light of the charging instrument and the plea entered by the defendant. [Citations.] Otherwise, as we have explained, 'the ordinary forms of verdict, "Guilty," "Guilty of manslaughter," etc. [citations] would be entirely without meaning; while, in connection with the information, they cannot be understood otherwise than as referring to the defendant and to the crime named in the information or indictment.' [Citation.] In addition, the form of the verdict generally is immaterial, so long as the intention of the jury to convict clearly may be seen. [Citations.]"

¹⁷ We assume for purposes of this decision that appellants may raise this claim on appeal notwithstanding the lack of any objection as to the verdict forms in the trial court. (But see *People v. Jones* (2003) 29 Cal.4th 1229, 1259 ["defendant waived this issue by failing to object to the form of the verdict when the court proposed to submit it or when the jury returned its finding"].)

Similarly, in *People v. Bratis* (1977) 73 Cal.App.3d 751, 763-764 (*Bratis*), the court emphasized that a jury's verdict should be interpreted in light of the charging document, by stating, "No particular form of verdict is required, so long as it clearly indicates the intention of the jury to find the defendant guilty of the offense with which he is charged. It is sufficient if it finds him guilty by reference to a specific count contained in the information."

" "A verdict is to be given a reasonable intendment and be construed in light of the issues submitted to the jury and the instructions of the court." [Citations.]' [Citations.]" (*People v. Jones* (1997) 58 Cal.App.4th 693, 710 (*Jones*).)

b. *Application*

Just prior to instructing the jury at the conclusion of the case, the trial court read to the jury the third amended information, which charges appellants in count 2 with conspiracy to commit *murder*.¹⁸ The jury then rendered verdicts finding each appellant guilty of conspiracy to commit a crime "as charged in Count 2 of the information." (See *Paul, supra*, 18 Cal.4th at pp. 706-707 ["A verdict should be read in light of the charging instrument"]; *Bratis, supra*, 73 Cal.App.3d at pp. 763-764 [verdict is "sufficient if it finds [defendant] guilty by reference to a specific count contained in the information"].)

¹⁸ We assume for purposes of this opinion that the jury was required to determine the object or target offense of appellants' conspiracy in order to find appellants guilty of conspiracy to commit murder as charged in count 2. (See *People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1706 ["Under Penal Code section 182, the jury must determine which felony the defendants conspired to commit"]; but cf. *People v. Vargas* (2001) 91 Cal.App.4th 506, 558 ["So long as there is unanimity that crime was the object of the agreement, conspiracy is established regardless of whether some jurors believe that crime to be murder and others believe that crime to be something else"].)

In addition, the court instructed the jury on two occasions that the People had charged appellants with conspiracy to commit murder. We acknowledge that at one point in its instructions, the court did erroneously instruct the jury that the People had alleged that appellants conspired to commit "murder, attempted murder, or assault with a deadly weapon." However, in light of the fact that the court informed the jury just prior to its deliberations that count 2 of the information charged appellants with conspiracy "to commit the crime of murder," and the jury rendered verdicts finding defendants guilty "as charged in count 2 of the information," we conclude that, reasonably construed, the verdicts indicate that the jury intended to find appellants guilty of conspiracy to commit murder. (See *Jones, supra*, 58 Cal.App.4th at p. 710 [jury verdict must be construed reasonably].)

B. There is insufficient evidence in the record to support the trial court's finding that Dalke suffered a prior serious or violent felony conviction

Dalke contends that there is insufficient evidence in the record to support the trial court's finding that he suffered a prior conviction for a serious or violent felony (i.e., a "strike"). Specifically, Dalke contends that there is insufficient evidence that his prior conviction for attempted assault in the second degree under New York law (Penal Law §§ 110.00, 120.05, subd. (2)) constituted a strike under California law (§§ 1170.12, subds. (a)-(d), 667, subds. (b)-(i)).

1. Factual and procedural background

In the third amended information, the People alleged that in 1999, Dalke suffered a prior conviction for a violation of New York Penal Law sections 110.00 and 120.05 in Case Number 99-4070. The People alleged that this prior conviction constituted a serious

or violent felony within the meaning of sections 1170.12, subdivisions (a) through (d) and 667, subdivisions (b) through (i).

The court held a court trial on the prior conviction allegation. At the trial, the prosecutor offered 23 exhibits in evidence. Among the documents offered was an information dated October 14, 1999, charging Dalke with the crime of "Attempt to Commit the Crime of Assault in the Second Degree." The information alleged in relevant part, "The defendant, Joshua Dalke on or about June 27, 1999, in the City of Rochester, Monroe County, New York, did attempt to cause physical injury to Brent Derouen, by means of a dangerous instrument, to wit: a knife." Another document, entitled "Certificate of Conviction," stated that Dalke had suffered a conviction for attempted assault in the second degree in violation of New York Penal Law sections 110.00 and 120.05.¹⁹ The People also offered in evidence several witness statements and police reports related to the offense. In addition, the People offered a handwritten letter that Dalke sent the trial judge in this case in which he discussed the prior offense.

Dalke objected to the admission of all of the exhibits, on hearsay and relevancy grounds. The trial court admitted the exhibits in evidence over Dalke's objections. In addition to the exhibits, the prosecutor noted that Dalke had admitted during the trial of the substantive offenses in this case that he had suffered the prior conviction in

¹⁹ The certificate states that Dalke suffered a conviction for "ATT ASSAULT 2/1 ct(s) PL-110-120.05-02 -EF-."

question.²⁰ After the court heard argument from the prosecutor and Dalke's counsel concerning whether the record established that Dalke had suffered a strike under California law, the court found the prior conviction allegation true.

2. *Governing law and standard of review*

a. *Determining whether an out-of state conviction constitutes a strike under California law*

In *People v. Rodriguez* (2004) 122 Cal.App.4th 121, 128-129 (*Rodriguez*), the court described the law that a trial court must apply in determining whether an out-of-state conviction constitutes a serious or violent felony conviction under California law:

"California's 'Three Strikes' law (§§ 667, subd. (b)-(i), 1170.12) provides longer sentences for persons convicted of a felony who have been previously convicted of a violent felony, as defined in section 667.5, subdivision (c), or a serious felony, as defined in section 1192.7, subdivision (c). A prior conviction that qualifies as a violent or serious felony is commonly known as a 'strike.' [Citation.] [¶] A conviction in another jurisdiction qualifies as a strike if it contains all of the elements required for a crime to be deemed a serious or violent felony in this state. [Citations.] In determining the truth of the existence of a prior felony conviction in another jurisdiction for purposes of the Three Strikes and other enhancement laws, 'the [trier of fact] may look to the entire record of the conviction to determine the substance of the prior foreign conviction; but when the record does not disclose any of the facts of the offense actually committed, the court will presume that the prior conviction was for the least offense punishable under the foreign law.' [Citation.]"

²⁰ At trial, Dalke's counsel asked Dalke if he had been "in trouble" for "some kind of an assault with a deadly weapon case." Dalke responded "Yeah." When asked whether he went to trial on the "case in New York," Dalke responded, "No. I turned myself in on that one."

On appeal, we must determine where there is substantial evidence in the record to support the trial court's finding that a defendant's prior conviction constitutes a strike under California law. (*Rodriguez, supra*, 122 Cal.App.4th at p. 129.)

b. *Relevant provision of the Three Strikes law*

The Three Strikes law contains a list of offenses that are considered to be " 'serious felon[ies].' " (§ 1192.7, subd. (c).) Among the offenses listed is "any felony in which the defendant personally used a dangerous or deadly weapon." (§ 1192.7, subd. (c)(23).)²¹

c. *Relevant New York Penal Law provisions*

New York Penal Law section 110.00 provides, "A person is guilty of an attempt to commit a crime when, with intent to commit a crime, he engages in conduct which tends to effect the commission of such crime."

New York Penal Law section 120.05, provides in relevant part:

"A person is guilty of assault in the second degree when:

"[¶]. . . . [¶]

"2. With intent to cause physical injury to another person, he causes such injury to such person or to a third person by means of a deadly weapon or a dangerous instrument."

²¹ Although the People note in their brief that "any felony in which the defendant *personally inflicts great bodily injury* on any person, other than an accomplice" (§ 1192.7, subd. (c)(8), italics added) also constitutes a serious felony under the Three Strikes law, the People make no argument that the record of conviction for Dalke's conviction for *attempted* assault in the second degree (New York Penal Law §§ 110.00, 120.05, subd. (2)) constitutes a serious felony under this provision. As noted in part III.B.1., *ante*, Dalke pled guilty to an information that alleged that he "did *attempt to cause physical injury*" (italics added) and the record of conviction for the offense does not otherwise demonstrate that Dalke actually *inflicted great bodily injury*. We therefore agree with the People's implicit concession that there is insufficient evidence that Dalke's prior conviction constituted a strike under section 1192.7, subdivision (c)(8).

3. Application

The People concede that the trial court erred in admitting several of the exhibits upon which the court based its finding that Dalke had suffered a prior strike conviction. Specifically, the People concede that "the statements within the police reports . . . were inadmissible hearsay," and that Dalke's "trial testimony or letter to the judge in his current case would not be part of the record of *prior* conviction." We accept the People's concessions.

The People also concede that although section 1192.7, subdivision (c)(23) requires that the defendants have "personally used a dangerous or deadly weapon," New York Penal Law section 120.05, subdivision (2) does *not* "require personal use a deadly or dangerous instrument." More specifically, the People acknowledge that a person may violate New York Penal Law section 120.05, subdivision (2) as an accomplice. For this reason, the People concede that "on its face, Dalke's prior conviction did not qualify as a 'strike'." Again, we accept the People's concessions.

However, the People contend that the "information sufficiently proved that Dalke personally used a knife in his assault on the victim" in the New York case. We disagree. The information merely alleges the elements of the crime by stating, "The defendant, Joshua Dalke on or about June 27, 1999, in the City of Rochester, Monroe County, New York did attempt to cause physical injury to Brent Derouen by means of a dangerous instrument, to wit: a knife." The information does not allege that Dalke

personally used a knife.²² In addition, the People point to no other evidence in the record of conviction that establishes that Dalke suffered a prior conviction for an offense in which he "personally used a dangerous or deadly weapon." (§ 1192.7, subd. (c)(23).) As noted, when the record of conviction does not disclose the facts of the prior offense, we must presume that the prior conviction was for the least offense punishable under the out-of-state law. (*Rodriguez, supra*, 122 Cal.App.4th at pp. 128-129.) Because the record of conviction does not disclose whether Dalke personally used a dangerous or deadly weapon in the New York case, and the offense with which he was charged in New York does not require personal use of a weapon, we must presume for purposes of our analysis that Dalke did not personally use a dangerous or deadly weapon in the commission of that offense.

Accordingly, we conclude that there is insufficient evidence in the record to support the trial court's finding that Dalke suffered a prior strike conviction.²³

²² Under New York law, the People are not required to allege "whether a defendant is being charged as a principal or as an accomplice. For charging purposes, the distinction between principal and accomplice is academic." (*People v. Rivera* (1995) 84 N.Y.2d 766, 771, [622 N.Y.S.2d 671, 674, 646 N.E.2d 1098, 1101].)

²³ In light of our reversal of the trial court's finding that Dalke suffered a prior strike conviction, we need not consider the People's contention that the trial court erred in failing to double the minimum parole eligibility period on count 1 pursuant to the Three Strikes law. We also note that the double jeopardy protections in the state and federal constitutions do not bar retrial of a prior conviction allegation found to be true at trial but reversed for insufficiency of the evidence on appeal. (*People v. Monge* (1997) 16 Cal.4th 826, 843-845.)

IV.

DISPOSITION

As to both appellants, the judgment is reversed as to count 2. The trial court's finding that Dalke suffered a prior strike conviction is reversed. Appellants' sentences are vacated. In all other respects, the judgment is affirmed. The matter is remanded to the trial court for further proceedings.

AARON, J.

WE CONCUR:

HUFFMAN, Acting P. J.

IRION, J.