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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. RYAN CHRISTOPHER PAGAN et al., Defendants and Appellants.	D059505 (Super. Ct. No. RIF137370)

APPEALS from judgments of the Superior Court of Riverside County, Mark E. Petersen, Judge. Affirmed.

A Riverside County jury found Ryan Christopher Pagan guilty of the first degree murder (Pen. Code,[1] § 187, subd. (a)) of Gary Bolt as charged in count 1 of the second amended information, and of the willful, deliberate, and premeditated attempted murder of Raymond Hernandez (§§ 664 & 187, subd. (a)) as charged in count 2. The jury found true both a count 1 enhancement allegation that Pagan personally and intentionally discharged a firearm causing death during the commission of the murder within the

1 Undesignated statutory references will be to the Penal Code.

meaning of subdivision (d) of section 12022.53, and a count 2 enhancement allegation that he personally and intentionally discharged a firearm during the commission of the attempted murder within the meaning of subdivision (c) of that section.

The jury found Pagan's codefendant, Paul David Martinez, guilty as an aider and abettor of both the second degree murder of Gary Bolt (§ 187, subd. (a); count 1) and the willful, deliberate, and premeditated attempted murder of Hernandez (§§ 664 & 187, subd. (a); count 2). The jury found not true enhancement allegations in counts 1 and 2 that Martinez personally used a firearm within the meaning of subdivision (b) of section 12022.53.

The jury also found both Pagan and Martinez not guilty of assaulting a third and fourth alleged victim with a firearm (§ 245, subd. (a)(2)) as charged in counts 3 and 4.

The court sentenced Martinez to a total prison term of 22 years to life and sentenced Pagan to a total prison term of 57 years to life plus 20 years.

Martinez appeals, contending there is insufficient evidence to support his convictions of murder and attempted murder because he did not aid and abet Pagan in committing either of those crimes or any other crime of which the murder and attempted murder could be said to be natural and probable consequences.

Pagan separately appeals, contending (1) his convictions of must be reversed because there is insufficient evidence to support the jury's findings that he committed those crimes with premeditation and deliberation; (2) his convictions of must be reversed due to ineffective assistance of counsel because his counsel prejudicially failed to request that the jury be instructed under CALCRIM No. 522 that provocation may reduce a

murder from first to second degree, and may also negate the premeditation and deliberation elements of the attempted murder charge; and (3) his convictions must be reversed due to ineffective assistance of counsel because his counsel prejudicially failed to object to the prosecutor's legally incorrect argument (which the Attorney General concedes was incorrect) that there was insufficient evidence of provocation because a reasonable person would not have done what Pagan did.

Martinez's and Pagan's contentions are unavailing. Accordingly, we affirm the judgments.

FACTUAL BACKGROUND

A. *The People's Case*

1. *Horseshoe Lounge*

On Friday, May 25, 2007, Pagan and Martinez were at a bar called the Horseshoe Lounge in Mira Loma. Also present at that bar were Steven Bolt, his cousins Raymond Hernandez and Jerry Hughes, Richard Teves, and several other people. Steven Bolt was the brother of the murder victim in this case, Gary Bolt.

Hernandez had taken prescription drugs for his own joy and was intoxicated after he drank a dozen beers. He was walking around, putting himself into other groups of people and brandishing a "quick flick" knife. A bouncer took the knife from Hernandez and gave it to one of the members of Steven Bolt's group.

After last call, as everyone was exiting the Horseshoe Lounge, Steven Bolt saw Pagan and Martinez standing inside the bar near the exit door. He did not speak to them. Hughes then got into a fight with some other people outside the bar, and Steven Bolt and

Hernandez joined in the fight. The fight ended when Hernandez was tasered by a bouncer.

2. *Linda's Bar*

The next night, Saturday, May 26, at around 11:00 p.m., Pagan and Martinez were at Linda's Bar in Mira Loma when Steven Bolt and a group of his friends, including Hernandez, arrived at the bar.

Pagan and Martinez talked to Hernandez about his behavior at the Horseshoe Lounge the night before, and Pagan told Hernandez he was drunk and trying to start a problem. Hernandez bought them beer and then socialized with his friends.

Steven Bolt testified he met Pagan and Martinez in the bar, and he had seen them the night before in the Horseshoe Lounge. When asked to describe what Pagan and Martinez were wearing in Linda's Bar, Steven Bolt testified that one was wearing a white shirt and dark jeans, and the other was wearing a gray shirt and dark jeans. Steven Bolt also testified that, after he and Hernandez spoke to Martinez, he saw Martinez leave the bar several times that night to talk on his cell phone.

Gary Bolt and his girlfriend, Alexandra Naglich, arrived at Linda's Bar at around 12:30 a.m., about 90 minutes after Hernandez arrived. Gary Bolt got into an argument with two Mexican men over the music being played on the jukebox. When Steven Bolt stepped in between Gary Bolt and the two other men, a punch was thrown, Steven Bolt returned a punch, and a fistfight broke out and quickly moved outside into the parking lot.

As this was happening, Pagan and Martinez, who were not involved in the fight, went out into the parking lot. Steven Bolt testified he saw Pagan and Martinez speaking with a man sitting in a pickup truck. Hernandez later told an investigator he saw Pagan retrieve a handgun from the trunk of a car parked in the parking lot.

Hernandez, Steven Bolt, and Teves, who was Gary Bolt's brother-in-law, were standing in the parking lot when a beer bottle flew past them. Steven Bolt turned around and saw Martinez rushing at him at a full run. Martinez picked him up while hugging his legs, slammed him into the ground, and hit him in the face. Teves kicked Martinez and Steven Bolt grabbed Martinez's shirt, pushed him away, and got back on his feet.

Steven Bolt testified that when he stood back up he saw Pagan holding a chrome or silver revolver and looking at Hernandez. Hernandez took off running and Pagan chased him while pointing the gun at Hernandez with his finger on the trigger. Pagan chased Hernandez around the building and across the street. He fired several rounds at Hernandez but did not hit him. Hernandez was able to escape by running into a Circle K store.

As Pagan was chasing Hernandez, Martinez turned on Gary Bolt, who was walking towards Naglich's truck. Martinez hit Gary Bolt from behind as he was trying to get to Naglich's truck, causing Gary Bolt to fall down behind the truck. Gary Bolt struggled to get back onto his feet and then opened the truck door on the passenger's side. As he was trying to get inside the truck, Pagan, who was running towards the truck, said "fuck you," and shot him in the back.

3. *Other evidence*

A ballistics expert testified the bullet removed from Gary Bolt's body was fired from a revolver, either a .38-caliber special or a .357-caliber magnum. A forensic pathologist for the Riverside County Sheriff-Coroner determined that the cause of Gary Bolt's death was the gunshot wound.

B. *The Defense Case*

Martinez did not present a defense.

Pagan presented the testimony of his uncle, Patrick Trumbach. Trumbach indicated that Pagan was a nonviolent person who was not capable of committing murder.

Pagan's neighbor, Enrique Romero, testified it was "out of character" for Pagan to "be in this position."

Heidi Conway testified on Pagan's behalf that she was at Linda's Bar on the night of the murder and witnessed the fight inside the bar and the shooting. She described the shooter as "Hispanic, six foot, with a dark shirt and tan pants or shorts."

Pagan testified on his own behalf. He acknowledged he was wearing a white shirt on the night of the shootings, but said a lot of people were wearing a white shirt. Pagan indicated he did not shoot Gary Bolt or shoot at Hernandez. He testified he could not remember whether he was in a position to see Gary Bolt being shot. When asked whether he knew who was shooting, Pagan replied, "Um. Steve. Steve and, uh, and Marvin." When asked how he knew they were shooting, Pagan stated, "I seen them with the guns." When asked how he saw them with guns, Pagan stated, "I just remember just seeing them and, I don't know, everything happened so fast. Everything happened so fast

and, you know, it was a long time ago. You know, it was three years ago. I've been locked up in jail for something I didn't do."

DISCUSSION

I

MARTINEZ'S APPEAL

Martinez contends there is insufficient evidence to support his convictions of murder and attempted murder because he did not aid and abet Pagan in committing either of those crimes or any other crime of which the murder and attempted murder could be said to be natural and probable consequences. This contention is unavailing.

A. *Background*

1. *Jury instructions on direct and vicarious aiding and abetting liability*

The court instructed the jury under CALCRIM Nos. 400 and 401 on the law governing the liability of a person who has directly aided and abetted the perpetrator's commission of a crime. It also instructed the jury under a modified version of CALCRIM No. 403 on the law governing aiding and abetting liability under the natural and probable consequences doctrine (discussed, *post*). Specifically, with respect to the natural and probable consequences theory of aiding and abetting liability, the court instructed the jury in part as follows:

> "The People are alleging that [Martinez] originally intended to aid and abet either *assault likely to produce great bodily injury* or *battery*. [Martinez] is guilty of murder[or] attempted murder . . . if you decide that [he] aided and abetted one of these crimes and that murder[or] attempted murder . . . was the *natural and probable result of one of these crimes*. However, you do not need to agree

> about which of these two crimes [Martinez] aided and abetted." (Italics added.)

After the court gave the standard instruction on assault with force likely to produce great bodily injury (CALCRIM No. 875), it gave a modified version of CALCRIM No. 960, the standard instruction on simple battery, stating in part:

> "To prove that [Martinez] is guilty of this crime, the People must prove that: [¶] One, [he] willfully touched *Steven Bolt and/or Gary Bolt* in a harmful or offensive manner." (Italics added.)

Thus, regarding the prosecution's natural and probable consequences theory of aiding and abetting liability, the court instructed the jury that (1) the crime Martinez allegedly aided and abetted was either assault likely to produce great bodily injury or battery committed against Steven Bolt "and/or" Gary Bolt; (2) the murder of Gary Bolt and the attempted murder of Hernandez were the alleged natural and probable consequences of the crime or crimes Martinez aided and abetted; and (3) the jury could find Martinez guilty of murder and attempted murder if it found beyond a reasonable doubt that (a) he aided and abetted the commission of such an assault or a battery against Steven Bolt "and/or" Gary Bolt, and (b) the murder of Gary Bolt and the attempted murder of Hernandez were natural and probable results of the crime or crimes Martinez aided and abetted.

2. *Prosecutor's closing arguments*

During his closing argument, the prosecutor argued as follows that Martinez directly aided and abetted Pagan in murdering Gary Bolt and attempting to murder Hernandez:

> "Counts1[and 2, Pagan] was the perpetrator who committed the crime[s]. [Martinez] knew [Pagan] intended to commit the crime[s]. . . . [Martinez] knew [Pagan] intended to commit th[ese] crime[s]. He knew they called for guns. He knew they called for backup. They had called people to come. He was absolutely in a position to know and to see everything that [Pagan] was doing, to see that his friend was armed, to know that his friend was armed, and to know that he intended to commit the crimes that came out of this.
>
> "Before or during the crime[s], [Martinez] intended to aid and abet. He intended to help encourage, facilitate, promote. Those are the words that the law uses to define aiding and abetting, to instigate, to encourage th[ese] crime[s]. [Martinez] encouraged th[ese] crime[s] by calling for the backup, by waiting by the truck, by going over to the truck and getting a gun himself, by pointing a gun at the crowd, by punching and fighting with the individuals involved, and very specifically by becoming involved in a fight punching and detaining Gary Bolt and keeping him from getting in the truck so he could be shot. All of those acts show that [Martinez] aided and abetted in these crimes."

The prosecutor also argued as follows that even if Martinez either did not act with intent to directly aid Pagan in murdering Gary Bolt and attempting to murder Hernandez or did not know Pagan intended to commit those crimes, the jury should find him guilty as to both offenses under the theory that (1) he aided and abetted either an assault likely to produce great bodily injury or a battery committed against Steven Bolt "and/or" Gary Bolt, and (2) the murder and attempted murder were natural and probable consequences of the aided and abetted assault or battery:

> "Aiding and abetting goes further, and you've got an instruction on this. It's CALCRIM No. 403 in your packet, if that helps you to go back and read it. It defines the law and lays out what needs to be proved for this kind of further extension of aiding and abetting liability that's known as *natural and probable consequences*.
>
> "Natural and probable consequences is actually a very common sense theory because what it's telling you is that aiding and abetting

> goes further. It states that even if the person didn't want to aid and abet the murder or the attempted murder . . . , even if they didn't necessarily know that second element from before, the knowing the perpetrator intended to commit the crime, even if they didn't want to aid and abet those acts necessarily, they're still guilty. They're still liable and responsible for all of the crimes if they committed a battery, in this case in particular, if they committed a battery or an assault. This is essentially being involved in the fist fight. And what this really applies to is it takes it a step further.
>
> "[Martinez] is responsible under aiding and abetting just by his acts and that he knew what was happening in that parking lot when he went out there and was doing these acts. But the law says that even if he didn't know what was happening, if he chose to commit a battery or an assault likely to cause great bodily injury -- and you'll get definitions on those crimes. . . . So the facts that we have here that support that are . . . [Martinez] tackling and attacking Steven Bolt, and the evidence that [Martinez] was also beating Gary Bolt by the truck prior to Gary Bolt being shot. [¶] . . .
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> " . . . [I]f [Martinez] knew that there were guns involved, which we know he did from the testimony and the evidence, if he knew and he chose to participate in this fight and attack people and have a gun and he knew his buddy had a gun and was using it, if it's a natural and probable consequence that someone would be shot or shot at . . . , then he is responsible for all of those acts. [¶] . . .
>
> " . . . [I]f [Martinez] is working in concert . . . with [Pagan] to commit th[ese] crime[s], he's responsible for the outcome. He's responsible for what [Pagan] did when he shot at and shot people . . . ." (Italics added.)

B. *Applicable Legal Principles*

1. *Standard of review*

When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a

reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.)

The uncorroborated testimony of a single witness is sufficient to sustain a conviction or true finding on an enhancement allegation, "unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

2. *Aider and abettor liability*

"Because section 31 defines as principals all who directly commit a given offense or who aid and abet in its commission, the same criminal liability attaches whether a defendant directly perpetrates the offense or aids and abets the perpetrator." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1038-1039, italics omitted.)

A person incurs criminal liability as an aider and abettor when he or she (1) by act or advice, aids, promotes, encourages, or instigates the commission of the crime; (2) with knowledge of the perpetrator's unlawful purpose; and (3) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259.)

"When the definition of the offense includes the intent to do some act or achieve some consequence beyond the actus reus of the crime [citation], the aider and abettor must share the specific intent of the perpetrator." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Ibid*.)

"'Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.'" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) While a defendant's mere presence at the scene of an offense is not sufficient in itself to sustain a conviction of aiding and abetting its commission, it is a circumstance that will tend to support a finding that the accused was an aider and abettor. (*Ibid*.; *People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) Companionship, and conduct before and after the offense, are also relevant factors the trier of fact may consider in determining whether the accused aided and abetted the commission of a crime. (*People v. Campbell*, p. 409; *People v. Miranda*, at p. 407.)

a. *Natural and probable consequences doctrine*

"The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages." (*People v. Beeman*, *supra*, 35 Cal.3d at p. 560.)

Under the natural and probable consequences doctrine, an aider and abettor is guilty of not only the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the perpetrator. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 261.) "'[The defendant's] knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator.'" (*Ibid*.)

The elements of aider and abettor liability under the natural and probable consequences doctrine are: (1) the defendant by act or advice aided, promoted, encouraged, or instigated the commission of the intended target crime; (2) the defendant acted with knowledge of the perpetrator's unlawful purpose; (3) the defendant acted with the intent or purpose of committing, facilitating, or encouraging the commission of the target crime; (4) the defendant's confederate committed an offense (the nontarget offense) other than the target crime; and (5) the nontarget offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 262; *People v. Miranda*, *supra*, 192 Cal.App.4th at p. 408.)

In determining whether the nontarget offense committed by the defendant's confederate was a natural and probable consequence of the target crime the defendant aided and abetted, the question is not whether the defendant actually foresaw the confederate's commission of the nontarget offense, but whether, judged objectively, the commission of the nontarget crime was reasonably foreseeable. (*People v. Medina*

(2009) 46 Cal.4th 913, 920; *People v. Miranda*, *supra*, 192 Cal.App.4th at p. 408.) Thus, "[l]iability 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.'" (*People v. Medina*, at p. 920, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

To be reasonably foreseeable, the consequence of the confederate's act that the defendant aided and abetted (that is, the confederate's nontarget offense) """need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough.""" (*People v. Medina*, *supra*, 46 Cal.4th at p. 920, quoting *People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 535.)

Whether the consequence of the confederate's act was reasonably foreseeable is a factual issue to be resolved by the jury based on its evaluation of all the factual circumstances of the individual case. (*People v. Medina*, *supra*, 46 Cal.4th at p. 920.)

C. *Analysis*

Viewing the evidence in the light most favorable to the judgment, as we must (*People v. Johnson*, *supra*, 26 Cal.3d at p. 578), we conclude that Martinez's convictions of the attempted murder of Hernandez and the murder of Gary Bolt both must be affirmed because the prosecution presented substantial evidence from which any rational jury could find beyond a reasonable doubt that Martinez directly aided and abetted Pagan in the commission of those crimes.

As already discussed, a person incurs criminal liability as an aider and abettor when (1) by act or advice, he aids, promotes, encourages, or instigates the commission of

the crime; (2) with knowledge of the perpetrator's unlawful purpose; and (3) with the intent or purpose of committing, encouraging, or facilitating the commission of the crime. (*People v. Prettyman*, *supra*, 14 Cal.4th at p. 259.)

1. *Attempted murder of Hernandez*

With respect to the attempted murder of Hernandez, substantial evidence shows Martinez aided Pagan, the perpetrator, when Pagan committed this crime. In an apparently unprovoked attack outside Linda's Bar, Martinez rushed at Hernandez's cousin, Steven Bolt, slammed him to the ground, and hit him in the face. Steven Bolt testified that, as he stood back up─after Gary Bolt's brother-in-law, Teves (who was standing nearby), kicked Martinez─he saw Pagan, who was also standing nearby, holding a revolver and making eye contact with Hernandez, who took off running with Pagan chasing after him while pointing the gun at Hernandez with his finger on the trigger. Pagan fired several rounds at Hernandez, but did not hit him. By instigating a fight with Steven Bolt, Martinez allowed Pagan to pull out his handgun and confront Hernandez at close range and also impeded the ability of both Steven Bolt and Teves to assist Hernandez when Pagan assaulted and then tried to kill Hernandez with the handgun.

Substantial evidence also shows Martinez acted with both knowledge of Pagan's unlawful purpose and intent to commit, facilitate, or encourage the commission of the attempted murder of Hernandez. The prosecution presented ample evidence showing that prior to the shootings Pagan and Martinez had a *confrontational* meeting with Hernandez in Linda's Bar regarding his behavior the night before at the Horseshoe Lounge. When Hernandez testified that he bought beer for Pagan and Martinez at Linda's Bar, the

prosecutor asked him, "Do you remember making a statement to Investigator Ramirez the morning after Gary [Bolt] was shot?" Hernandez initially replied, "No." Hernandez, however, then acknowledged that he had listened to the recording of his statement and that he had been provided with a transcript of his statement. The prosecutor then asked him, "Do you remember . . . telling the detective who was interviewing you that morning, that you had run into or seen two guys in the bar and you had to *squash* something with them?" (Italics added.) Hernandez replied, "Yeah, I heard that on the tape." Hernandez acknowledged that "squash" was a word he used. When the prosecutor asked him for the meaning of that word, Hernandez replied, "Like if you have a *problem* with somebody and you just even it out or something." (Italics added.) A rational jury could reasonably infer from Hernandez's testimony that his conversation with Pagan and Martinez at Linda's Bar involved a "problem" and was confrontational.

This reasonable inference is also supported by the testimony of Senior Investigator Benjamin Ramirez of Riverside County's central homicide unit, who was assigned as the investigating officer in this case. Investigator Ramirez testified that he interviewed Hernandez at the scene of the shootings. The prosecutor asked Investigator Ramirez, "[W]ith [Hernandez], did you discuss whether there had been any kind of *confrontation* or issue arising with anyone over something that had happened the night before at the Horseshoe [Lounge]?" (Italics added.) Investigator Ramirez replied, "Yes." He testified that Hernandez said he had a conversation at Linda's Bar with two men who had seen him the night before and that there was "some issue." Hernandez identified Pagan as one of those men. Hernandez informed Investigator Ramirez that Pagan told him that he

(Hernandez) was drunk the night before and had tried to start a problem. Investigator Ramirez stated that Hernandez told him he had "squashed" his conversation with Pagan.

Investigator Ramirez also testified that when he interviewed Steven Bolt at the scene of the shootings, Steven Bolt—who was at the Horseshoe Lounge the night before with both Hernandez and Teves—told Investigator Ramirez that Martinez and Pagan "mad-dogged" him as soon as he entered Linda's Bar.

In light of the foregoing substantial evidence, which Martinez largely disregards, we reject as unsupported his claim that "[t]here was no confrontation at Linda's [Bar] between Steven Bolt, Hernandez and appellants."

The prosecution also presented substantial evidence from which a rational jury could find beyond a reasonable doubt that Martinez and Pagan acted together in planning the attack on Hernandez and, thus, that Martinez not only aided Pagan, but also knew about and shared Pagan's intent to shoot both Hernandez and Gary Bolt. At trial, Hernandez acknowledged he told Investigator Ramirez that he saw Pagan retrieve a handgun from the trunk of a car parked in the parking lot. Steven Bolt testified that after he and Hernandez spoke to Martinez in Linda's Bar he saw Martinez leave the bar several times that night to talk on his cell phone. Steven Bolt also testified he saw Pagan and Martinez speaking with a man sitting in a pickup truck in the parking lot.

This evidence supports a reasonable inference that Martinez and Pagan acted together to plan the attacks: Martinez and Pagan together confronted Hernandez at Linda's Bar prior to the shootings, Martinez used his cell phone to call for backup assistance, Pagan armed himself by retrieving the gun from the trunk of the car, and they

acted in concert during the shootings. Martinez and Pagan, who were still bothered by Hernandez's behavior the night before as evidenced by their confrontational meeting with him at Linda's Bar, stayed together after they finished their preparations, and their respective attacks on Steven Bolt and Hernandez occurred within a very short period of time, with Martinez acting first by instigating a fight with Steven Bolt and Pagan then assaulting, chasing, and trying to kill Hernandez with his handgun. We conclude substantial evidence supports Martinez's conviction of the willful, deliberate, and premeditated attempted murder of Hernandez under an aiding and abetting theory of liability.

2. *Murder of Gary Bolt*

The prosecution also presented substantial evidence from which any rational jury could conclude beyond a reasonable doubt that Martinez acted in concert with and directly aided and abetted Pagan with respect to the murder of Hernandez's cousin, Gary Bolt, in the parking lot outside Linda's Bar. It is undisputed that after Pagan failed in his attempt to shoot and kill Hernandez, who testified he was able to escape by running into a Circle K store, Pagan returned to the parking lot outside Linda's Bar and was able to shoot and kill Gary Bolt with Martinez's assistance. Specifically, the evidence shows that as Pagan was chasing and shooting at Hernandez, Martinez attacked Gary Bolt, who was walking towards Naglich's truck and trying to leave, causing him to fall down behind the truck. After he managed to get back on his feet, Gary Bolt opened the truck door on the passenger's side. As he was trying to get inside the truck, Pagan, who was running towards Pagan, said "fuck you" and fatally shot him in the back. This evidence shows

that Martinez assisted Pagan by preventing Gary Bolt from leaving in Naglich's truck, thereby allowing Pagan to shoot and kill him.

Substantial evidence shows that Martinez and Pagan continued to act in concert after Pagan murdered Gary Bolt with Martinez's assistance. Pagan and Martinez encountered Brenda Strader as they walked away from Naglich's truck. Strader testified that Pagan pointed his gun at her head and said, "You didn't see nothing, bitch." When Strader replied, "You're right, I didn't see shit," Pagan and Martinez got into Pagan's car and sped away.

We conclude Martinez's convictions of both the attempted murder of Hernandez and the murder of Gary Bolt must be affirmed because the prosecution presented substantial evidence from which any rational jury could find beyond a reasonable doubt that Martinez directly aided and abetted Pagan in the commission of those crimes. To the extent Martinez points to contrary evidence and contrary inferences to support his claim that his convictions of these crimes are not supported by substantial evidence, he misapplies the substantial evidence standard of review discussed, *ante*. In light of our conclusion, we need not address the Attorney General's argument that substantial evidence supports Martinez's conviction of these offenses under the natural and probable consequences doctrine.

II

PAGAN'S APPEAL

A. *Sufficiency of the Evidence of Premeditation and Deliberation*

Pagan first contends his convictions of the first degree murder of Gary Bolt and the willful, deliberate, and premeditated attempted murder of Hernandez must be reversed because there is insufficient evidence to support the jury's findings that he committed those crimes with premeditation and deliberation. We reject this contention.

1. *Applicable legal principles*

An unlawful killing of a human being with malice aforethought is murder and is of the first degree if it is willful, premeditated, and deliberate. (§§ 187, subd. (a), 189.) "To prove the killing was 'deliberate and premeditated,' it shall not be necessary to prove the defendant maturely and meaningfully reflected upon the gravity of his or her act." (§ 189.)

The California Supreme Court recently explained that, "[i]n the context of first degree murder, '"premeditated" means "considered beforehand," and "deliberate" means "formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action." [Citation.]' [Citation.] 'The process of premeditation and deliberation does not require any extended period of time. "The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . ."'" (*People v. Lee* (2011) 51 Cal.4th 620, 636.)

In *People v. Anderson* (1968) 70 Cal.2d 15, the California Supreme Court "distilled certain guidelines to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation. The *Anderson* analysis was intended only as a framework to aid in appellate review; it did not propose to define the elements of first degree murder or alter the substantive law of murder in any way. [Citation.] . . . The *Anderson* guidelines are descriptive, not normative. [Citation.] The goal of *Anderson* was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.)

"[T]he *Anderson* court identified three categories of evidence pertinent to the determination of premeditation and deliberation: (1) planning activity, (2) motive, and (3) manner of killing. . . . The *Anderson* factors, while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder, nor are they exclusive." (*People v. Perez*, *supra*, 2 Cal.4th at p. 1125.)

a. *Standard of review*

In assessing Pagan's challenge to the sufficiency of the evidence regarding the elements of premeditation and deliberation, we apply the substantial evidence standard of review (discussed, *ante*). (See *People v. Perez*, *supra*, 2 Cal.4th at pp. 1123-1124.)

2. *Analysis*

Viewing the evidence in the light most favorable to the judgment, we conclude substantial evidence supports the jury's findings that Pagan acted with deliberation and

premeditation when he attempted to murder Gary Bolt's cousin, Hernandez, and when he murdered Gary Bolt. We first address the sufficiency of the evidence supporting the finding that Pagan acted with deliberation and premeditation when he attempted to murder Hernandez.

a. *Pagan's willful, deliberate, and premeditated attempted murder of Hernandez*

With respect to the first *Anderson* factor, we have already concluded that the prosecution presented substantial evidence from which a rational jury could find beyond a reasonable doubt that Pagan and Martinez acted together in planning the attack on Hernandez. As already discussed, the evidence shows Pagan and Martinez had a confrontational meeting with Hernandez at Linda's Bar prior to the shootings, Martinez used his cell phone to call for backup assistance, Pagan was seen talking to a man in a vehicle in the parking lot, Pagan armed himself by retrieving a gun from the trunk of the car, and Pagan and Martinez acted in concert during the incident in which Pagan shot at Hernandez after Martinez tackled Steven Bolt. A defendant's act of arming himself with a weapon is evidence of planning activity for purposes of determining whether substantial evidence supports the jury's finding of premeditation and deliberation. (*People v. Perez*, *supra*, 2 Cal.4th at p. 1126.)

"""The process of premeditation . . . does not require any extended period of time[, and] '[t]he true test is not the duration of time as much as it is the extent of the reflection.''''' (*People v. Harris* (2008) 43 Cal.4th 1269, 1286.) Here, the foregoing substantial evidence supports a reasonable inference that Pagan's attempt to shoot and kill Hernandez was the result of planning and "preexisting reflection and weighing of

considerations rather than mere unconsidered or rash impulse." (*People v. Perez*, *supra*, 2 Cal.4th at p. 1125.) We conclude the prosecution presented ample evidence of Pagan's planning activity.

Regarding the second *Anderson* factor, substantial evidence supports a reasonable inference that Pagan had a motive to kill Hernandez. We have already concluded the prosecution presented ample evidence showing that prior to the shootings Pagan and Martinez had a confrontational meeting with Hernandez in Linda's Bar regarding his behavior the night before at the Horseshoe Lounge. The fact that Pagan felt the need to have such a meeting with Hernandez shows he was still upset about the prior incident.

Regarding the third *Anderson* factor, Pagan's manner of attempting to kill Hernandez also supported a reasonable inference that Pagan acted him with premeditation and deliberation. The testimony of Steven Bolt and Hernandez shows that almost immediately after Steven Bolt stood back up after Martinez tackled and hit him, Pagan chased Hernandez across the street and fired a handgun at him several times. We conclude the jury could reasonably infer from this evidence that Pagan acted with deliberation and premeditation.

Considering all three *Anderson* factors and the entire record, we conclude substantial evidence supports the jury's finding that Pagan premeditated and deliberated his attempted murder of Hernandez. To the extent Villalobos points to contrary evidence and contrary inferences to support his claim there is insufficient evidence to support the jury's finding, he misapplies the substantial evidence standard of review. Pagan has not

carried his burden to affirmatively show on appeal that there is insufficient evidence to support the jury's finding of deliberation and premeditation.

b. *Pagan's first degree murder of Gary Bolt*

Substantial evidence also shows Pagan acted with deliberation and premeditation when he murdered Gary Bolt. Substantial evidence shows that after Pagan failed to kill Hernandez, who escaped by running into a Circle K store, Pagan returned to the parking lot outside Linda's Bar, where he found Gary Bolt trying to get into Naglich's truck, with Martinez nearby. Pagan did not get into his car and leave. Instead, as Martinez was assaulting Gary Bolt, which impeded Gary Bolt's attempt to get away in Naglich's truck, Pagan ran over to the truck and, after Gary Bolt got back on his feet and tried to get into the truck, fatally shot him in the back. The calculated nature of Pagan's act of shooting Gary Bolt is demonstrated by the fact that he said "fuck you" immediately before he pulled the trigger.

Overwhelming evidence supports the jury's findings that Pagan committed the crimes charged in counts 1 and 2 with deliberation and premeditation.

B. *Counsel's Failure To Request CALCRIM No. 522*

Pagan next contends his convictions must be reversed due to ineffective assistance of counsel because his counsel prejudicially failed to request that the jury be instructed under CALCRIM No. 522 that provocation may reduce a murder from first to second degree and may also negate the premeditation and deliberation elements of the attempted murder charge. This contention is unavailing.

1. *Applicable legal principles*

A criminal defendant is constitutionally entitled to effective assistance of counsel. (U.S. Const., 6th Amend.; Cal. Const., art. I, § 15; *Strickland v. Washington* (1984) 466 U.S. 668, 684-685 (*Strickland*); *People v. Pope* (1979) 23 Cal.3d 412, 422, disapproved on another ground by *People v. Berryman* (1993) 6 Cal.4th 1048, 1081, fn. 10.) "We presume that counsel rendered adequate assistance and exercised reasonable professional judgment in making significant trial decisions." (*People v. Holt* (1997) 15 Cal.4th 619, 703.)

To establish a denial of the right to effective assistance of counsel, a defendant must show (1) his counsel's performance was below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient performance prejudiced the defendant. (*Strickland*, *supra*, 466 U.S. at pp. 687, 691-692; *People v. Ledesma* (1987) 43 Cal.3d 171, 217; *People v. Pope*, *supra,* 23 Cal.3d at p. 425.)

To show prejudice, a defendant must show a reasonable probability that he would have received a more favorable result had his counsel's performance not been deficient. (*Strickland*, *supra,* 466 U.S. at pp. 693-694; *People v. Ledesma*, *supra,* 43 Cal.3d at pp. 217-218.) In an appropriate case, we may dispose of a claim of ineffectiveness assistance of counsel on the ground of lack of prejudice without determining whether counsel's performance was deficient. (*Strickland*, at p. 697; *In re Fields* (1990) 51 Cal.3d 1063, 1079.)

We will reverse on the ground of ineffective assistance of counsel "'only if the record on appeal affirmatively discloses that counsel had *no rational tactical purpose* for his act or omission.'" (*People v. Zapien* (1993) 4 Cal.4th 929, 980, italics added.)

2. *Analysis*

Applying the foregoing principles, we conclude Pagan has failed to demonstrate that there could have been no rational tactical purpose for his trial counsel's failure to request that the court instruct the jury under CALCRIM No. 522 and that his trial counsel's performance was deficient. CALCRIM No. 522 provides in part:

> "*Provocation may reduce a murder from first degree to second degree* [*and may reduce a murder to manslaughter*]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]" (Italics added.)

CALCRIM No. 522 is a pinpoint instruction[2] that must be given on a defense theory *upon request* when there is evidence supportive of that theory; a trial court is not required to give a pinpoint instruction on the court's own motion. (See *People v. Rogers* (2006) 39 Cal.4th 826, 878-879 [addressing CALJIC No. 8.73, the CALJIC analogue to CALCRIM No. 522]; see also bench notes to CALCRIM No. 522.)

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2 "A pinpoint instruction 'relate[s] particular facts to a legal issue in the case or "pinpoint[s]" the crux of a defendant's case, such as mistaken identification or alibi.'" (*People v. Ward* (2005) 36 Cal.4th 186, 214, quoting *People v. Saille* (1991) 54 Cal.3d 1103, 1119.)

Here, the record shows Pagan's defense counsel made a rational tactical decision *not* to request an instruction under CALCRIM No. 522 in order to downplay provocation as a basis for reducing murder from either first degree to second degree or to manslaughter. Pagan's defense was the defense of mistaken indentity. Specifically, Pagan testified on his own behalf and indicated he did not shoot Gary Bolt or shoot at Hernandez. When his counsel asked whether he knew who the shooters were, Pagan replied, "Um. Steve. Steve and, uh, and Marvin." When asked how he knew they were shooting, Pagan stated, "I seen them with the guns." During his closing argument, defense counsel's principal argument was that various witnesses had misidentified Pagan as the shooter. Counsel did not expressly argue to the jury that if it found Pagan guilty of murdering Gary Bolt, it should find him guilty of second degree murder rather than first degree murder, nor did he argue that Pagan should be found guilty of manslaughter rather than murder. Defense counsel also did not argue that if the jury found Pagan guilty of the attempted murder of Hernandez, it should convict him of attempted murder without deliberation and premeditation. Such arguments would have been inconsistent with Pagan's defense of misidentification.

Even if Pagan had met his burden of demonstrating his trial counsel provided ineffective assistance by failing to request an instruction under CALCRIM No. 522, he has failed to show he suffered any prejudice. For reasons discussed, *ante*, we have already concluded that overwhelming evidence supports the jury's findings that Pagan committed the crimes charged in counts 1 and 2 with deliberation and premeditation.

Pagan contends, however, that "it is reasonably likely that the jurors would have 'found the middle ground' and returned verdicts of second degree murder and unpremeditated attempted murder had they been instructed that . . . provocation evidence, if not sufficient to reduce the crimes to voluntary manslaughter and attempted voluntary manslaughter, could reduce the crimes to second degree murder and unpremeditated attempted murder." This contention is unavailing.

The jury's note stated: "We would like clarification of the 'Special Instruction—No Unanimity Required' as it pertains to 1st degree murder and/or voluntary manslaughter. Does a simple majority of either theory place the choice as the ruling theory (i.e. 1st degree murder)?" The 'Special Instruction—No Unanimity Required" instruction to which the jury's note referred stated:

> "As long as each juror is convinced beyond a reasonable doubt that defendant is guilty of murder, attempted murder, or assault with a firearm as that offense is defined by the instructions, it need not decide unanimously by which theory he is guilty. The jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator. Not only is there no unanimity requirement as to the theory of guilt, the individual jurors themselves need not choose among the theories, so long as each is convinced of guilt."

As Pagan points out, the court "correctly responded by advising the jury that their verdict on any of the charges had to be unanimous."[3]

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[3] Specifically, the court told the jury that in arriving at a verdict on the charges, "the entire jury, all 12 of you must unanimously agree. It must be a unanimous verdict on a charge, okay? So all 12 of you. It can't be a simple majority. So no simple majority on a charge."

Pagan's contention that the jury would have returned verdicts of second degree murder and unpremeditated attempted murder had they been instructed under CALCRIM No. 522 is speculative at best and thus unavailing. In any event, the plain language contained in the note indicates the jury was requesting clarification of the mechanics to be used in reaching a verdict.

C. *Counsel's Failure To Object to the Prosecutor's Closing Argument*

Last, Pagan contends his convictions must be reversed due to ineffective assistance of counsel because his counsel prejudicially failed to object to the prosecutor's legally incorrect argument during closing arguments that there was insufficient evidence of provocation because a reasonable person would not have done what Pagan did. This contention is also unavailing.

A. *Background*

During closing argument, the prosecutor stated:

> "When we're talking about the lesser included offenses, voluntary manslaughter is a lesser of murder. [T]here are two different types actually of voluntary manslaughter. The first is heat of passion or provocation. And in that situation we would have to see that the defendant was provoked, that he acted under intense emotion, *and that it was a reasonable reaction*. Again, *the facts here* do not show provocation and do not show that [Pagan] was acting with intense emotion and *do not show that a reasonable person would have reacted in the same way. No reasonable person chases and shoots at someone or shoots someone in the back. That's not a reasonable response.* And there wasn't provocation. So again I would submit to you that we don't even have to get to this point. You don't have to consider it." (Italics added.)

B. *Analysis*

The italicized portion of the prosecutor's statement is incorrect, as the Attorney General acknowledges. An unlawful homicide is "'upon a sudden quarrel or heat of passion' [citation], and is thus voluntary manslaughter [citation], if the killer's reason was obscured . . . by a provocation sufficient to cause an "'ordinary [person] of average disposition . . . to act rashly and without due deliberation.'"" (*People v. Breverman* (1998) 19 Cal.4th 142, 163.) "The focus is on the provocation—the surrounding circumstances—and whether it was sufficient to cause a reasonable person to act rashly. *How the killer responded to the provocation and the reasonableness of the response is not relevant to sudden quarrel or heat of passion*." (*People v. Najera* (2006) 138 Cal.App.4th 212, 223, italics added.)

Assuming defense counsel provided ineffective assistance by failing to object to the prosecutor's legally incorrect argument, we conclude Pagan's claim of ineffective assistance of counsel must fail because he has failed to meet his burden of showing he would have received a more favorable result had his counsel's performance not been deficient. (See *Strickland*, *supra,* 466 U.S. at pp. 693-694; *People v. Ledesma*, *supra,* 43 Cal.3d at pp. 217-218.) Pagan claims that "the evidence of premeditation and deliberation . . . was far from overwhelming." This claim is unavailing, as we have already concluded that overwhelming evidence supports the jury's findings that Pagan committed the crimes charged in counts 1 and 2 with deliberation and premeditation.

DISPOSITION

The judgments are affirmed.

NARES, J.

I CONCUR:

BENKE, Acting P. J.

I CONCUR IN THE RESULT:

McDONALD, J.