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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY DARNELL OWENS,

Defendant and Appellant.

D068333

(Super. Ct. No. SCD240446)

APPEAL from a judgment of the Superior Court of San Diego County, Peter C. Deddeh, Judge. Affirmed as modified.

Raymond Mark DiGuseppe, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Barry Carlton and Sabrina Y. Lane-Erwin, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Larry Darnell Owens of two counts of first degree murder for killing two of his fellow gang members. Defendant contends the trial court erred prejudicially by instructing the jury on aiding and abetting and unanimity principles, even though the prosecutor pursued only a single theory of liability based on a single act directly perpetrated by defendant. We conclude the trial court erred by instructing the jury regarding inapplicable and irrelevant principles, but further conclude the error did not prejudice defendant.

Defendant also contends the trial court erred by imposing (though staying) certain gang-related firearm sentence enhancements even though the jury found the crimes were not gang-related. We agree and modify the judgment to strike the inapplicable enhancements as set forth below. As so modified, we affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Prosecution Case

Defendant grew up in a "gang neighborhood" in southeast San Diego with murder victims Steven Bankhead and Clifford Lambert. Defendant and Bankhead grew up "[v]ery close" friends, and defendant and Lambert "considered each other family."¹ Defendant also grew up with Jamar Wilson and Taketa Winston. When defendant was about 13 years old, he joined the 5/9 Brims criminal street gang. Bankhead, Lambert, Wilson, and Winston also joined at various times.

¹ Lambert was defendant's cousin's cousin.

In June 2002, when defendant was 23 years old, Wilson and Bankhead got into a dispute over "money" and "respect" after Bankhead sold Wilson a stolen cell phone that stopped working and Bankhead refused to refund Wilson's money. On June 19, Wilson and Bankhead argued verbally. On June 20, they fought. Defendant was at the home of fellow gang member Alonzo Love, along with Wilson and Winston. Bankhead arrived and pistol-whipped Wilson in the head with a handgun. Defendant separated the two, and either he or Love told them to fistfight without weapons. Bankhead put his gun in his car so he and Wilson could fistfight in the backyard. When Bankhead returned, Winston tossed Wilson a gun and Wilson tried to shoot Bankhead. The gun initially jammed, then Wilson fired and missed. Bankhead ran off in one direction, and Wilson in the other. Defendant broke into Bankhead's vehicle and stole his gun.

Later that night, Bankhead gave his mother his bank account information and work identification card. He asked his cousin by phone to take care of his daughters if anything happened to him. Their call was interrupted by incoming calls, which Bankhead told his cousin were defendant and Wilson "calling, hanging up, making threats."²

The next day, June 21, Bankhead told a fellow gang member, Robert Catlin, he intended to make peace about (or "squash") the cell phone dispute with Wilson. He asked Lambert to "catch his back," and Lambert agreed.

² Bankhead identified defendant and Wilson to his cousin by their gang monikers.

That evening, defendant, Wilson, and Winston were drinking, smoking marijuana, and playing video games at the apartment of defendant's girlfriend (Patricia Monroe) in the Mayberry Apartments in southeast San Diego. Someone called defendant to warn him that Bankhead and Lambert were on their way to the apartment. Defendant warned Wilson to leave because he "didn't want anything to happen." Wilson ran outside to the parking lot and tried to start his car, but the battery was dead. He borrowed jumper cables from Monroe, but Bankhead and Lambert arrived before he could get his car started.

Bankhead and Lambert parked their Honda Accord outside a gate that secured the apartment complex's parking lot. They then either jumped over the gate or pushed it off its track and approached defendant, Wilson, and Winston. Bankhead told Wilson they should "squash" the dispute, and they apologized and hugged each other. Bankhead then asked for his gun back, to which Wilson responded he did not know where it was.

Meanwhile, defendant and Lambert were "tussling" and grabbing each other. Lambert threatened to kill Wilson and Winston "on gangster Ern," a well-respected 5/9 Brims member (now deceased). Wilson knew Lambert owned guns—including a fully automatic AK-47 machine gun—but never saw Lambert or Bankhead with any guns that day. Lambert and Bankhead jumped over the security gate and started walking toward the Honda.

Winston pulled out the same gun Wilson had used the day before and started shooting at Bankhead and Lambert. Bankhead and Lambert took cover behind their car. None of Winston's shots hit them.

Meanwhile, defendant ran inside Monroe's apartment and retrieved Bankhead's 9mm handgun.³ By then, Winston had stopped firing. Defendant returned and began firing from inside the parking lot. Wilson recalled bullets flying past him from his left and right, but did not believe either Bankhead or Lambert fired from behind the car.

Defendant jumped over the security gate, approached the Honda, and went around to the side where Bankhead and Lambert were taking cover. Defendant shot Lambert near the car, striking him three times in the neck and head. As Bankhead fled toward a church parking lot across the street, defendant pursued and shot him six times, initially in the upper body, then in the head as Bankhead fell.

Defendant and Winston fled on foot. Wilson fled in his car and later picked them up.

A neighbor called 911 to report the shooting. In providing the "play-by-play" to the operator, he said he "saw four black males running away from two other black males. All of them were exchanging shots between each other." When police responded, the neighbor clarified that he never saw the victims actually shoot back; instead, one victim appeared to be pretending to shoot back from behind the car with his hand formed in the shape of a gun. The witness reported that all the gun shots were fired from the Mayberry apartment complex toward the church across the street.

³ Testimony conflicted regarding whether defendant retrieved the gun before or after Lambert threatened to kill Wilson and Winston. Wilson testified defendant retrieved it after, but a police officer who questioned Wilson in 2009 testified that Wilson told him defendant retrieved the gun before the threat.

Forensic crime scene analysis indicated all the shots had been fired toward the car from the apartment complex parking lot and toward the church across the street where the victims' bodies were found. Police recovered the gun Winston fired, but never found the gun defendant used to kill Bankhead and Lambert.

The crimes went unsolved until detectives took a "second look" at the case in 2009. Wilson pleaded guilty to murdering Bankhead and Lambert, but denied during defendant's trial any involvement in the shooting.⁴ The record suggests Winston was never arrested or charged with any crimes for his role in the shooting.

Defense Case

Defendant testified to establish a self-defense theory. He gave a similar accounting of events leading up to the shooting, but added that after Bankhead pistol-whipped Wilson the day before the shooting, Bankhead chambered a round in the gun, pointed it at Wilson's head, and said, "You been telling motherfuckers you are going to kill me. I will kill you right now." Defendant explained he stole Bankhead's gun that night to delay Bankhead's inevitable retaliation against Wilson. He stored the gun in a cabinet at Monroe's apartment.

As for the day of the shooting, defendant testified that Winston reported the rumor on the street was that "[Bankhead] hooked up with [Lambert] and they [were] riding around with [Lambert's AK-47]" because of the confrontation with Wilson the day

⁴ Catlin, a member of a family with deep and longstanding 5/9 Brims connections, testified that Wilson called his family home the day after the shooting and insinuated he was the shooter and threatened "Y'all next if y'all stay buttin' in."

before.⁵ When Love called to warn defendant that Bankhead and Lambert were on their way, defendant told Wilson to leave because he couldn't "afford for nothing to happen over here at [his] girl's house."

When Wilson's car would not start, Winston asked for Wilson's gun in case they had to flee on foot. Wilson retrieved the gun from the trunk and gave it to Winston. Bankhead and Lambert then pulled up and parked just outside the complex. Monroe arrived around the same time and parked in the lot near Wilson's car. Bankhead and Lambert jumped out of their car, "kind of smashed the gate back and rushed up onto the property." They were "irate"—Bankhead threatened "somebody was going to get killed" if he did not get his gun back. Defendant felt they were "disrespecting" Monroe's house, in contravention of the gang culture of respecting members' families' homes. Defendant tried to help Wilson jumpstart his car, while simultaneously doing "all [he] could to physically come in between" Wilson and Bankhead and Lambert. Bankhead and Lambert were making threatening statements "on Bloods, on gangster Ern, on the dead homies."

Wilson got his car started, which "fueled the fire even more." Defendant stayed between the two factions and urged Bankhead and Lambert to settle their "beef" elsewhere because Monroe was "right there" in the parking lot. Bankhead and Lambert kept pushing against defendant trying to get to Wilson and Winston. Winston then brandished the gun from Wilson's trunk and warned Bankhead and Lambert to back up.

⁵ Winston reportedly referred to Bankhead and Lambert by their gang monikers.

Lambert responded, " 'Motherfucker, you pull a gun out, you better use it. I'm going to tell you right now, if you don't kill me, I'm going to kill your ass.' " Winston climbed over a fence and into an adjacent backyard, still brandishing the gun. Defendant told Winston not to shoot.

As Wilson tried to leave in his car, Lambert warned, "Everybody in this motherfuckin' house is fittin' to die. I'm gonna spray this whole house up." He and Bankhead headed toward the Honda. Although defendant had not seen either Bankhead or Lambert with weapons that day, he "figured they had guns." Defendant ran inside Monroe's apartment to arm himself with Bankhead's gun. As soon as he reached the apartment, he heard gunshots. He retrieved Bankhead's gun, ran outside, and fired toward the Honda to keep whoever was behind it from popping up to shoot at him. No one popped up from behind the car, but defendant still heard bullets firing around him. He moved "through gunfire" and "turned around the backside of the Honda Accord and began firing."

Defendant testified he shot Lambert first, initially hitting him in the torso before shooting him in the head. Defendant was "shooting to kill." When Bankhead jumped up and started running away, defendant "fired on him as well, striking him in the upper body." As Bankhead fell to the ground, defendant shot him in the head. Defendant explained that although he did not see Bankhead or Lambert with a gun before he opened fire on them, he was certain they were armed and did not feel he had time to determine otherwise. Defendant further explained his rationale for shooting to kill: "Because the imminent danger, the threat, the thought of knowing that, if they were alive, somebody's

going to die. The fact that I felt like that, . . . if they would have opened fire and killed [Monroe] or one of her kids, I wouldn't have been able to live with myself"

Defendant acknowledged he had decided to kill Bankhead and Lambert when he left the parking lot to retrieve Bankhead's gun from the apartment. He also admitted lying to police when they questioned him about his involvement in the incident. He further admitted to several prior convictions for drug offenses and for possessing stolen property.

In addition to his own testimony, defendant introduced evidence regarding Bankhead's and Lambert's character. In an interview with police shortly after the shooting, Lambert's wife said, "When [Lambert] was younger, he was real violent. I mean, violent. Real, real, real, real, real, real violent." She also said Lambert had done "a lot of time in his life," although he "had changed after they got married over the last year."

The parties stipulated to Bankhead's "criminal history as it pertains to violence," which included convictions for battery, domestic violence, spousal abuse, and "interfering with a police officer using force."

As to defendant's character, Lambert's wife testified he had been a violent bully since elementary school. Wilson testified defendant had a reputation for being someone who "would make sure you knew not to disrespect him again." In that vein, the jury learned defendant had a tattoo on his neck that read "death before dishonor."

Trial Court Proceedings

The People charged defendant with two counts of murder. (Pen. Code,⁶ § 187, subd. (a).) As to each count, the People alleged the following eight gang and firearm enhancements: (1) the crimes were gang-related (§ 186.22, subd. (b)(1)); (2) defendant personally used a firearm (§ 12022.5, subd. (a)(1)); (3) defendant personally used a firearm during the commission of a serious felony (§ 12022.53, subd. (b)); (4) defendant personally used a firearm during the commission of a gang-related serious felony (§ 12022.53, subds. (b), (e)(1)); (5) defendant personally discharged a firearm during the commission of a serious felony (§ 12022.53, subd. (c)); (6) defendant personally discharged a firearm during the commission of a gang-related serious felony (§ 12022.53, subds. (c), (e)(1)); (7) defendant personally discharged a firearm during the commission of a serious felony, causing great bodily injury or death (§ 12022.53, subd. (d)); and (8) defendant personally discharged a firearm during the commission of a gang-related serious felony, causing great bodily injury or death (§ 12022.53, subds. (d), (e)(1)). The People also alleged defendant suffered one prison prior. (§§ 667.5, subd. (b), 668.)

The jury rejected defendant's self-defense theory and convicted him of two counts of first degree murder. The jury found true the non-gang-related firearm enhancement allegations. (§§ 12022.5, subd. (a)(1), 12022.53, subds. (b), (c), & (d).) However, the jury found the general gang enhancement allegations (§ 186.22, subd. (b)(1)) not true. Based on that finding, the jury explained it did not make a finding as to one of the gang-

⁶ Undesignated statutory references are to the former Penal Code statutes in effect when the crimes were committed.

related firearm enhancements alleged as to each murder count. (§ 12022.53, subds. (b), (e)(1).) However, despite its not true finding on the general gang enhancement allegations, the jury made true findings as to the remaining gang-related firearm enhancement allegations. (§ 12022.53, subds. (c) & (e)(1); § 12022.53, subds. (d) & (e)(1).)

The trial court sentenced defendant to consecutive terms of 25 years to life on each murder count and each enhancement for personally discharging a firearm during the commission of a serious felony, causing great bodily injury or death (§ 12022.53, subd. (d)), for a total prison term of 100 years to life. The court imposed but stayed additional prison terms on all the remaining firearm enhancement allegations on which the jury made true findings, including the gang-related firearm enhancements, despite the jury's contrary underlying finding that the crimes were not gang-related.⁷ When the prosecutor brought this irregularity to the court's attention, the court orally struck the gang-related firearm enhancements. (§ 12022.53, subd. (c) & (e)(1), (d) & (e)(1).) However, the abstract of judgment and the sentencing minutes still reflect these stayed sentences.

⁷ According to the reporter's transcript of the sentencing hearing, the trial court also imposed but stayed an enhancement on the gang-related firearm allegation under section 12022.53, subdivisions (b) and (e)(1) as to count 1, for which the jury made *no finding*. This appears to be a typographical error. First, the length of the sentence enhancement the trial court imposed (25 years) corresponds to section 12022.53, subdivision (d), not (b) (10 years). Second, the reporter's transcript does not otherwise indicate the trial court addressed the gang-related firearm enhancement alleged under section 12022.53, subdivisions (d) and (e)(1) as to count 1, for which the jury *did* make a true finding. Finally, the abstract of judgment and sentencing minutes indicate the trial court imposed but stayed a 25-year enhancement under section 12022.53, subdivisions (d) and (e)(1), not (b) and (e)(1).

DISCUSSION

I. *Instructional Error*

According to defendant, "everyone was in agreement that [defendant] was being prosecuted under a *single theory*, based upon the *single act* of having shot and killed Bankhead and Lambert: first degree, premeditated and deliberate murder as the *direct perpetrator*." (Italics added.) Thus, he contends, the trial court committed reversible error by giving the jury "a series of inapplicable, irrelevant, and confusing instructions" regarding aiding and abetting liability, unanimity as to the act constituting the offense, and unanimity (or lack thereof) as to the theory of guilt. The People agree the trial court erred by giving these instructions, but contend the error did not prejudice defendant because it was necessarily obvious to the jury that the instructions were inapplicable to the facts and theories presented at trial. We agree the trial court erred, but find no prejudice.

A. *Relevant Legal Principles*

" 'The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence" ' " (*People v. Avila* (2009) 46 Cal.4th 680, 704.) On the other hand, the court "has the correlative duty 'to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of confusing the jury or relieving it from making findings on relevant issues.' " (*People v. Saddler* (1979) 24 Cal.3d 671, 681; see *People v. Armstead* (2002) 102 Cal.App.4th 784, 792.)

Thus, it is error to give an instruction that correctly states a principle of law but does not apply to the facts of the case. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 (*Guiton*); see *People v. Rowland* (1992) 4 Cal.4th 238, 282 ["an 'abstract' instruction [is] 'one which is correct in law but irrelevant' "].) However, if this is the only error, "it is one of state law subject to the traditional [*People v. Watson* (1956) 46 Cal.2d 818 (*Watson*)] test" (*Guiton*, at p. 1130), "which permits the People to avoid reversal unless 'it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error' " (*People v. Mower* (2002) 28 Cal.4th 457, 484). Error in giving an abstract instruction "is usually harmless, having little or no effect 'other than to add to the bulk of the charge.' " (*People v. Rollo* (1977) 20 Cal.3d 109, 123; see *People v. Cross* (2008) 45 Cal.4th 58, 67 ["giving an irrelevant or inapplicable instruction is generally ' "only a technical error which does not constitute ground for reversal." ' "].) "There is ground for concern only when an abstract or irrelevant instruction creates a substantial risk of misleading the jury to the defendant's prejudice." (*Rollo*, at p. 123.) "[T]he jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278 (*Frandsen*).

"In determining whether there was prejudice, the entire record should be examined, including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict." (*Guiton*, *supra*, 4 Cal.4th at p. 1130.)

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.)

B. *Aiding and Abetting*

Even though the prosecution's trial theory was that defendant was liable as the direct perpetrator, the trial court instructed the jury with pattern instructions regarding aiding and abetting principles. (See CALCRIM Nos. 400, 401.) There was little discussion of these instructions during the conference on instructions. We agree with the parties that it was error to give these instructions—they were irrelevant to the prosecution's direct-perpetrator theory of liability and were not supported by substantial evidence at trial. However, the error was harmless.

People v. Hairgrove (1971) 18 Cal.App.3d 606 (*Hairgrove*) is instructive. There, the prosecution tried the defendant for burglary on a direct-perpetrator theory. (*Id.* at p. 608.) The defendant asserted an alibi defense. (*Ibid.*) Even though, "[c]learly, the only issue for the jury to decide was whether [the defendant] was the principal in the crime, [i.e.,] the man who broke into the automobile," the trial court instructed the jury regarding aiding and abetting and conspiracy. (*Ibid.*) The Court of Appeal found the trial court erred by instructing the jury on theories that "had no application to the facts presented at the trial." (*Ibid.*) However, applying the *Watson* standard, the appellate court concluded that "[b]ecause the erroneous instructions were so clearly inapplicable," the court was "convinced that the jury disregarded them in reaching its verdict." (*Id.* at p. 609.)

The same holds true here. Defendant testified he personally shot and killed Bankhead and Lambert. Thus, the only issue for the jury to decide was whether defendant did so with deliberation and premeditation, or to defend himself and/or others (Monroe, Wilson, and/or Winston). The trial court instructed the jury regarding those principles. The court further instructed the jury that "[s]ome . . . instructions may not apply, depending on your findings about the facts of the case" and to "follow the instructions that do apply to the facts" as the jury found them. (CALCRIM No. 200.) Because the aiding and abetting instructions "were so clearly inapplicable" (*Hairgrove*, *supra*, 18 Cal.App.3d at p. 609) in light of the theories and evidence advanced at trial, "we are convinced that the jury disregarded them in reaching its verdict" (*ibid.*; see *Frandsen*, *supra*, 196 Cal.App.4th at p. 277).

C. *Unanimity*

1. *The Challenged Instructions*

Defendant takes issue with three instructions regarding the concept of unanimity: CALCRIM Nos. 521, 3500, and a special instruction.

CALCRIM No. 521 sets forth the requirements of first degree murder and identifies several theories on which a jury may base such a verdict.⁸ The first two paragraphs contain template language that applies when the prosecution pursues more

⁸ Those bases are "Deliberation and Premeditation," "Torture," "Lying in Wait," "Destructive Device or Explosive," "Weapon of Mass Destruction," "Penetrating Ammunition," "Discharge from Vehicle," and "Poison." (CALCRIM No. 521.)

than one theory of first degree murder liability.⁹ In light of the prosecution's theory of the case, the trial court questioned whether the template language applied: "So there's only one theory—it's not felony murder. It's not murder by bomb or something [or] [m]urder by poison. [¶] So the defendant has been prosecuted under the theory that murder was willful, deliberate, or premeditated. Should I even put in the second—should we even have the sentence that says 'each theory of first-degree murder,' because there's only one theory of first-degree murder in this case[?] Do we need that?" Counsel agreed the court should omit the second paragraph and modify the first to reflect the prosecution's sole theory.

The court and counsel did not address the third paragraph, which provides: "You may not find the defendant guilty of first degree murder unless all of you agree that the People have proved that the defendant committed murder. *But all of you do not need to agree on the same theory.*" (CALCRIM No. 521, italics added.) Consequently, CALCRIM No. 521, as modified, instructed the jurors, on one hand, that "defendant has been prosecuted for first degree murder under *the* theory that the murder was willful,

⁹ These paragraphs of CALCRIM No. 521 read as follows:

"The defendant has been prosecuted for first degree murder under (two/<insert number>) theories: (1) <insert first theory, e.g., 'the murder was willful, deliberate, and premeditated'> [and] (2) <insert second theory, e.g., 'the murder was committed by lying in wait'> [<insert additional theories>]

"Each theory of first degree murder has different requirements, and I will instruct you on (both/all <insert number>)."

deliberate, and premeditated," but on the other hand, that "all of [the jurors] need not agree on the *same* theory." (Italics added.)

The second challenged unanimity instruction, CALCRIM No. 3500, reads as follows in its unmodified template form:

"The defendant is charged with _____ <insert description of alleged offense> [in Count ____] [sometime during the period of __ to __].

"The People have presented evidence of *more than one act* to prove that the defendant committed this offense. You must not find the defendant guilty unless you all agree that the People have proved that the defendant committed at least one of these acts and you all agree on which act (he/she) committed." (Italics added.)

Although the bench notes to this instruction explain it is to be given "if the prosecution presents evidence of *multiple acts* to prove a single count" (Bench Notes to CALCRIM No. 3500, italics added, citing *People v. Russo* (2001) 25 Cal.4th 1124, 1132), the trial court expressed its understanding (in the context of a different instruction) that the prosecution's case was premised on a single act: "it's shots that killed him. [¶] . . . [¶] . . . Not like there's two competing factors like shots or stabbings." The trial court's oral instruction to the jury omitted the first paragraph of the pattern instruction, but the written instruction included the unmodified template formatting.

The final challenged unanimity instruction is a special instruction given at the prosecutor's request. Even though the prosecutor pursued a single theory of liability based on defendant being the direct perpetrator, the court instructed the jury as follows:

"I have instructed you regarding *multiple theories* under which the Defendant may be found guilty. As long as each juror is convinced beyond a reasonable doubt that the defendant is guilty of murder as defined by these instructions, the jury need not unanimously decide

by which theory he is guilty. Likewise, the jury need not unanimously decide whether a defendant is guilty as an *aider and abettor* or as the direct perpetrator. [¶] Not only is there no unanimity requirement as to the theory of guilt, but you as individual jurors need not choose among the theories, so long as each is convinced of guilt beyond a reasonable doubt." (Italics added.)

2. Analysis

It is undisputed that the prosecutor pursued a single theory of liability (deliberate and premeditated murder) based on a single act (shooting Bankhead and Lambert). Therefore, it was error for the trial court to instruct the jury regarding the inapplicable and irrelevant principles of unanimity regarding theory and act.

Defendant contends this error requires reversal. He reasons that because the court instructed the jury regarding a *single* theory of liability for first degree murder (directly perpetrating deliberate and premeditated murder), yet also instructed the jury that it need not agree unanimously regarding the theory of liability, "the jurors were no longer fixed to the legal boundaries of the single legally applicable theory of guilt in determining [defendant]'s guilt of the charged offenses. Instead, . . . each juror was free to divine his or her own individual hypotheses of guilt, based upon nothing more than the 'ordinary, everyday meaning' of a 'theory'—that is, 'abstract thought: speculation;' 'a hypothesis assumed for the sake of argument or investigation;' or 'an unproved assumption: conjecture.'" He asserts that "[i]nstructing the jury there . . . was evidence of '*more than one act,*' any of which could 'prove the defendant committed this offense,' could only have served to artificially bolster the similarly faulty notion that there were *multiple,*

equally valid 'theories' of first degree murder liability." We find the argument unpersuasive.

Based on our review of "the entire record . . . , including the facts and the instructions, the arguments of counsel, any communications from the jury during deliberations, and the entire verdict," we conclude the error did not prejudice defendant under the applicable *Watson* standard. (*Guiton, supra*, 4 Cal.4th at p. 1130.)

First, the evidence at trial clearly framed the jury's role as determining whether defendant's admittedly intentional killing of Bankhead and Lambert was deliberate and premeditated murder, or done to defend himself or others. Wilson told police that defendant went to retrieve Bankhead's gun from Monroe's apartment before Lambert made his threat "on gangster Ern"; defendant admitted he had decided to kill Bankhead and Lambert before he went to retrieve the gun; and defendant admitted he intentionally shot the victims and was "shooting to kill" when he did so. Defendant rationalized his behavior by claiming it was necessary to protect himself, Monroe, Wilson, and Winston. Defendant acknowledges there was no evidence that would support any other theory of liability or constitute an act giving rise to an offense.

Second, the jury was instructed regarding the relevant principles. CALCRIM No. 521 specifically informed the jury of the prosecution's sole theory of deliberate and premeditated murder and that there could be no first degree murder unless the jury made such a finding. CALCRIM No. 520 informed the jury that a murder finding is by default second degree "unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521." Similarly, CALCRIM No.

521 advised that "[t]he People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder and the murder is second degree murder." The prosecutor's special instruction advised that the jury could only find defendant "guilty of murder *as defined by these instructions . . .*" (Italics added.) The court also instructed jurors not to "investigate the facts or the law or [to] do any research regarding this case." (CALCRIM No. 201.) Together, these instructions adequately informed the jury that it was only to consider legal theories supplied by the relevant instructions.

Theories of guilt aside, several instructions undermine defendant's assertion that the erroneous instructions suggested the jurors' verdict need not be unanimous. (See CALCRIM Nos. 521, 640, 3550.)¹⁰ The prosecutor's special instruction also reinforced that the juror's murder verdict must be unanimous: "As long as *each juror* is convinced beyond a reasonable doubt that the defendant is guilty of murder . . ." (Italics added.)

¹⁰ CALCRIM No. 521 provides in part: "You may not find the defendant guilty of first degree murder unless *all of you agree* that the People have proved that the defendant committed murder." (Italics added.)

CALCRIM No. 640, regarding completion of verdict forms, provides in part: "As with all of the charges in this case, to return a verdict of guilty or not guilty on a count, *you must all agree* on that decision. [¶] . . . [¶] . . . *If all of you agree* that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder, complete and sign that verdict form." (Italics added.)

CALCRIM No. 3550, regarding deliberations, provides in part: "Your verdict [on each count and any special findings] *must be unanimous. This means that, to return a verdict, all of you must agree to it.*" (Italics added.)

In addition, as noted, the court advised the jury that some instructions may not apply. (CALCRIM No. 200.)

Third, as defendant acknowledges, "the focus of the parties' [closing] arguments was whether [defendant] was guilty of first degree murder as the direct perpetrator or was not guilty of any crime because he had acted in complete self-defense." Defendant's assertion that this factor is legally "of little consequence" conflicts with *Guiton's* directive that we consider "the arguments of counsel" in "determining whether there was prejudice." (*Guiton, supra*, 4 Cal.4th at p. 1130.)

Fourth, the fact the jury submitted questions to the court about other instructions during deliberations but not about those pertaining to multiple theories or acts supports the finding the jury understood the latter were inapplicable. The fact the court submitted the written version of CALCRIM No. 3500 to the jury with unmodified, bracketed template information further suggests jurors reasonably understood it was inapplicable. Defendant's assertion that the lack of questions from the jury regarding the challenged instructions is a "non-starter" again ignores *Guiton's* directive that our review of the entire record include "any communications from the jury during deliberations" (*Guiton, supra*, 4 Cal.4th at p. 1130.)

In a similar context, the California Supreme Court found no prejudicial error where a defendant was tried for first degree murder on a deliberate and premeditated theory, but the jury was also erroneously instructed on an inapplicable felony-murder theory. (*People v. Barnett* (1998) 17 Cal.4th 1044, 1154-1155.) The court explained: "Although the reading of CALJIC No. 8.10 inadvertently referred to felony murder, the

other instructions clearly informed the jurors there could be no conviction of first degree murder unless they found deliberation and premeditation. In addition, it was unmistakably clear from the outset of the prosecutor's opening statement to the close of his final argument that the instant case was being tried upon the theory of deliberate and premeditated murder. The prosecutor gave no indication at any time that a conviction was being sought on a felony-murder theory. Nor did the defense proceed as if such theory had been presented. On this record, no reasonable juror could possibly have understood that guilt could be predicated upon a felony-murder theory." (*Ibid.*, fn. omitted; see *People v. Roy* (1971) 18 Cal.App.3d 537, 550 ["The jury could not have been misled by the [inapplicable felony-murder] instruction. . . . [The] defendant was not charged with felony murder, instructions on second degree felony murder identifying the felony as assault with a deadly weapon and defining its elements were not given, and the prosecutor did not argue a theory of felony murder."], disapproved on other grounds in *People v. Ray* (1975) 14 Cal.3d 20, 32.) The record before us compels the same conclusion: reversal is unwarranted under the *Watson* standard.

Notably, and despite the fact *Guiron* provides that instructional error of this type is ordinarily subject to review under *Watson*, defendant does not address this standard for assessing prejudice. Instead, he argues the error is either structural, requiring reversal per se, or is subject to the harmless-beyond-reasonable-doubt standard announced in *Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*). We are not persuaded either standard applies.

" "[I]f the defendant had counsel and was tried by an impartial adjudicator, there is a strong presumption that any other [constitutional] errors that may have occurred are subject to harmless-error analysis." " (*People v. Mendoza* (2016) 62 Cal.4th 856, 900, quoting *Neder v. United States* (1999) 527 U.S. 1, 8.) "Only a "very limited class of errors" ' is considered structural and requires automatic reversal." (*Ibid.*, quoting *United States v. Davila* (2013) 133 S.Ct. 2139, 2149.) The error here was not structural. Although defendant asserts the erroneous instructions allowed jurors to convict him without reaching a unanimous verdict (because they could each supply their own theories untethered from the legal standards), we have already addressed the numerous instructions that adequately advised the jury of their obligation in this regard.

Defendant's contention that the *Chapman* standard applies is based on the erroneous underlying assumption that jurors were instructed that they could choose between one valid legal theory of first degree murder (deliberation and premeditation) and any number of self-supplied alternative theories. As noted, however, the instructions, read as a whole, are not reasonably susceptible to such a reading.

In summary, although the trial court erred by instructing the jury on irrelevant and inapplicable principles of unanimity regarding multiple theories and multiple acts, the error caused defendant no prejudice.

II. Sentencing Error

Defendant contends the trial court erred with respect to the sentences it imposed but stayed as to certain of the gang-related firearm enhancements. First, he argues the court erred by imposing enhancements under section 12022.53, subdivisions (c) and

(e)(1), and (d) and (e)(1) because the jury erroneously made true findings on these enhancements—which depend on an underlying finding that the crimes were gang-related—even though the jury made a contrary underlying finding. As noted, the trial court orally struck these enhancements during the sentencing hearing, but the abstract of judgment and sentencing minutes do not reflect this. The Attorney General concedes this is error. We agree and amend the judgment to strike the sentences imposed and stayed as to both counts under section 12022.53, subdivisions (c) and (e)(1), and (d) and (e)(1).

Second, defendant argues the trial court erred by not striking the gang-related firearm enhancement under section 12022.53, subdivisions (b) and (e)(1) because the jury made no finding on this enhancement due to its finding the crimes were not gang-related. (§ 186.22, subd. (b)(1).) For the reasons explained in footnote 7, *ante*, we conclude the reporter's transcript contains a typographical error with respect to this enhancement—the trial court did not impose a sentence under section 12022.53, subdivision (b) and (e)(1), but rather, it did so under section 12022.53, subdivision (d) and (e)(1).

DISPOSITION

The judgment is modified to strike the enhancements imposed on both counts under section 12022.53, subdivisions (c) and (e)(1), and (d) and (e)(1). As so modified, the judgment is affirmed. The trial court is directed to amend the abstract of judgment accordingly and to forward a certified copy to the Department of Corrections and Rehabilitation.

HALLER, Acting P. J.

WE CONCUR:

O'ROURKE, J.

AARON, J.