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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN EFREN PRADO et al.,

Defendants and Appellants.

F060754

(Super. Ct. Nos. BF124350 &
BF124350B)

OPINION

APPEAL from a judgment of the Superior Court of Kern County. Gary T. Friedman, Judge.

Susan D. Shors, under appointment by the Court of Appeal, for Defendant and Appellant Juan Efren Prado.

Sharon G. Wrubel, under appointment by the Court of Appeal, for Defendant and Appellant Jesse Perez III.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, David A. Rhodes and Jesse Witt, Deputy Attorneys General, for Plaintiff and Respondent.

Following a joint trial, Juan Efren Prado and Jesse Perez (jointly, appellants) were both convicted of the following: count 1, deliberate and premeditated murder (Pen. Code, § 187, subd. (a)),¹ counts 2, 3, and 4, attempted murder (§§ 664, 187, subd. (a)); counts 5, 6, and 7, assault with a firearm (§ 245, subd. (a)(2)); count 8, unlawful taking of a vehicle (Veh. Code, § 10851, subd. (a)); count 9, arson (§ 451, subd. (d)) and count 11, active participation in a criminal street gang (§ 186.22, subd. (a)). In count 10, Prado alone was convicted of possession of methamphetamine for purpose of sale (Health & Saf. Code, § 11378).

Various allegations were found true as to both appellants: that count 1 was intentional and committed while an active participant in a criminal street gang (§ 190.2, subd. (a)(22)); that counts 1-9, were committed for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)); and that counts 2, 3, and 4 were done with premeditation and deliberation (§ 189).

As to Prado only, additional allegations were found true: in counts 1, 2, and 3, that he personally discharged a firearm causing great bodily injury or death (§ 12022.53, subd. (d)); in counts 1-10, that he had suffered a prior conviction for grand theft (§§ 487, subd. (c), 667.5, subd. (b)); in counts 2, 3, 5, and 6, that he personally inflicted great bodily injury (§ 12022.7); in count 4 that he personally discharged a firearm (§ 12022.53, subd. (c)); in counts 5, 6, and 7, that he personally used a firearm (§ 12022.5, subd. (a)); and in count 10, that he committed the offense for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)). The trial court subsequently struck Prado's prior felony conviction allegation on all counts.

As to Perez only, it was found true that he was 16 years of age or older when he committed all of the offenses. (Welf. & Inst. Code, § 707, subd. (d)(1).)

¹ All further statutory references are to the Penal Code unless otherwise stated.

The trial court sentenced Prado to life without the possibility of parole plus 140 years to life with a determinate sentence of 12 years. Perez was sentenced to life without the possibility of parole, plus 90 years to life with a determinate term totaling eight years eight months.

On appeal, appellants contend they were denied their constitutional rights when the trial court admitted expert opinion evidence on their mental states elicited through “mirror” hypothetical questions; that the trial court made various instructional errors; that there is insufficient evidence to uphold the arson conviction; and that the trial court made various sentencing errors. Because we address all issues on the merits, we need not address the alternate argument of incompetency of counsel. We find several sentencing errors, but in all other respects affirm.

FACTS

We summarize the facts in accordance with the usual rules on appeal. (*People v. Virgil* (2011) 51 Cal.4th 1210, 1263.) On July 18, 2008, appellants, both Norteno criminal street gang members, drove around town in a pickup truck stolen from the City of Delano until they found Salvador Gandarilla, Luis Celaya, and brothers Carlos Rodriguez and Alejandro Rodriguez standing outside the Rodriguez residence. Prado got out of the truck and asked the four whether they were Sureno gang members. Gandarilla was a founder of a local Sureno gang, the Rodriguez brothers may have been former gang members, and Celaya was not gang affiliated. After a general denial that they were gang members, Gandarilla asked, “What are you gonna do if we are Surenos?” In response, Prado reached into the truck, pulled out a long-barreled firearm, fatally shot Gandarilla, and seriously injured Carlos Rodriguez and Celaya. Before he was shot, Carlos Rodriguez pulled a loaded flare gun from his pocket and tried to fire it at the shooter, but he dropped it when he was injured. It was uncertain whether the flare gun fired or hit anyone. Perez and Prado then drove off and abandoned the truck after attempting to burn it by igniting some papers inside the cab. Minor damage to the pickup resulted.

In a subsequent search of Prado's residence, police officers discovered methamphetamine.

DISCUSSION

1. Gang Expert Testimony

To show that the crimes were gang related, the prosecution called an expert, Delano Police Sergeant Jerry Nicholson, to testify about criminal street gangs. In part, Sergeant Nicholson responded to hypothetical questions. Appellants contend that the five "mirror" hypothetical questions impermissibly allowed Sergeant Nicholson to testify on their mental states. As a result, they contend the special circumstance allegation (§ 190.2, subd. (a)(22)), the gang benefit enhancements (§ 186.22, subd. (b)) and the conviction for active gang participation (§ 186.22, subd. (a)) must be reversed. The People assert both Prado and Perez forfeited this argument by failing to object at trial. Prado asserts in his reply brief that an adequate objection was made and overruled. We will address the issue on the merits. We review a challenge to the admission of testimony for an abuse of discretion. (*People v. Gonzalez* (2006) 38 Cal.4th 932, 944.) We find no abuse of discretion in this case.

In general,

“[g]ang sociology and psychology are proper subjects of expert testimony [citation] as is ‘the *expectations* of gang members ... when confronted with a specific action’ (*People v. Killebrew* (2002) 103 Cal.App.4th 644, 658 (*Killebrew*); [citation].) Expert testimony is admissible to establish the existence, composition, culture, habits, and activities of street gangs; a defendant's membership in a gang; gang rivalries; the ‘motivation for a particular crime, generally retaliation or intimidation’; and ‘whether and how a crime was committed to benefit or promote a gang.’ (*Killebrew*, at pp. 656-657.)” (*People v. Hill* (2011) 191 Cal.App.4th 1104, 1120.)

An expert may properly “render opinion testimony on the basis of facts given “in a hypothetical question that asks the expert to assume their truth.” [Citations.]” (*People v. Gonzalez, supra*, 38 Cal.4th at p. 946-947.)

Perez and Prado argue that the hypothetical questions asked of Sergeant Nicholson were “in no essential way different from asking the officer directly whether he thought appellant[s were] guilty of all counts.” For instance, one of the five hypothetical questions asked:

“[W]ould you please assume two Norteno gang members, one Norteno gang member is driving a white city vehicle which had been stolen. The second Norteno gang member is the passenger in that same vehicle. That vehicle drives up slowly on a group of four men standing at a corner in a residential neighborhood. The passenger Norteno says, as the truck comes to a complete stop near the four men, do you bang or do you bang South Side or are you Surenos or some statement like that; that he gets the response from three of the men no, in one version or another, and one of the men says something like so what if we are, what are you gonna do about it? Norteno passenger then steps out of the truck with a 7.62-millimeter rifle and at very close range begins shooting, first at the fellow who made the statement in response so what if we are, and then at the others as they fled; that one of the men is hit in the left shoulder as he flees north and west; that one of the men is hit in the leg as he flees south; and that one of the men flees south and west and sees bullets striking around him, but is not hit. [¶] Considering those facts, do you have an opinion as to whether that crime would be committed for the benefit of the Norteno street gang?”

In response, Sergeant Nicholson stated, “Yes,” and added his opinion was based on:

“The fact that they took a vehicle without permission, a stolen vehicle, which is common in the use of drive-by shootings and homicides so the vehicle cannot be linked back to them. Shortly after taking the vehicle without permission they drove it to a group of men. A City of Delano pickup truck would not be something you would look at twice as fearing the occupants of that vehicle. The fact that the passenger asked the four if they banged South Side or something to that effect. The fact that the one that replied back was a known past member of the South Side criminal street gang. The shooting of the three that were fleeing, based on their mere acquaintance to the one that replied back so what if we do, what are you gonna do about it? The fact that it was a 7.62 millimeter rifle, which I know to be a very high-caliber, high-velocity weapon. And the fact the vehicle flees away from the scene, which is indicative of not—trying not to be located or apprehended by law enforcement.”

We disagree with Prado and Perez’s claim. Although the hypotheticals that formed the basis of the expert’s opinion were grounded in the evidence adduced at trial—

as is required for such questions (*People v. Gardeley* (1996) 14 Cal.4th 605, 618)—his testimony was an opinion about hypothetical persons based on his knowledge of gang culture and activities.

In *People v. Ward* (2005) 36 Cal.4th 186, the defendant argued that the prosecutor “impermissibly used fact-specific hypothetical questions to elicit testimony from [gang experts] that a gang member going into rival territory—like defendant—would do so as a challenge and would protect himself with a weapon.” (*Id.* at p. 209.) The defendant maintained “the specificity of the hypothetical questions converted the answers by the experts into improper opinions on his state of mind and intent at the time of the shooting.” (*Ibid.*)

Our high court rejected this argument and concluded the experts “did not render an impermissible opinion as to defendant’s actual intent; rather, they properly testified as to defendant’s motivations for his actions.” (*People v. Ward, supra*, 36 Cal.4th at p. 209.) The court explained that an expert may properly give opinion testimony on the basis of facts given in a hypothetical question and that such questions must be rooted in facts shown by the evidence. (*Ibid.*) The court concluded that, unlike expert testimony in *Killebrew*, the expert opinions in *Ward* fell

“within the gang culture and habit evidence approved in *People v. Gardeley, supra*, 14 Cal.4th at page 617. The substance of the experts’ testimony, as given through their responses to hypothetical questions, related to defendant’s motivation for entering rival gang territory and his likely reaction to language or actions he perceived as gang challenges. [Citations.] This testimony was not tantamount to expressing an opinion as to defendant’s guilt.” (*People v. Ward, supra*, 36 Cal.4th at p. 210.)

After briefing was complete in this case, our high court, in *People v. Vang* (2011) 52 Cal.4th 1038, again held that hypothetical questions are proper to elicit gang expert testimony, and that such questions *must* be rooted in the evidence of the case. (*Id.* at pp. 1045-1046.) Further, the court criticized our reasoning in *Killebrew*, the case Perez

and Prado primarily rely upon to support their argument that the expert's testimony impermissibly described their mental state.² In *People v. Vang*, the court explained:

“To the extent *Killebrew, supra*, 103 Cal.App.4th 644, purported to condemn the use of hypothetical questions, it overlooked the critical difference between an expert's expressing an opinion in response to a hypothetical question and the expert's expressing an opinion about the defendants themselves. *Killebrew* stated that the expert in that case ‘simply informed the jury of his belief of the suspects’ knowledge and intent on the night in question, issues properly reserved to the trier of fact.’ (*Killebrew, supra*, 103 Cal.App.4th at p. 658.) But, to the extent the testimony responds to hypothetical questions, as in this case (and, it appears, in *Killebrew* itself), such testimony does no such thing. Here, the expert gave the opinion that an assault committed in the manner described in the hypothetical question would be gang related. The expert did *not* give an opinion on whether defendants did commit an assault in that way, and thus did *not* give an opinion on how the jury should decide the case.” (*People v. Vang, supra*, 52 Cal.4th at p. 1049.)

Similarly, in this case, the gang expert's testimony was permissible opinion testimony in response to a hypothetical question. The expert did not give an opinion on whether Prado or Perez was a participant in the shooting as described in the hypothetical, whether they stole the pickup used in the shooting or got the pickup from someone else who stole it, whether they set the pickup truck on fire, or whether, in Prado's case, he was in possession of methamphetamine. Further, the expert did not opine whether Prado or Perez had the necessary mental state to commit the crimes alleged. Although the expert's opinion was relevant to the ultimate question of Prado and Perez's intent, the testimony explored a gang member's expectations and probable motivations, and was not tantamount to an opinion of either Prado or Perez's guilt. As in *Vang*, the gang expert

² In *Killebrew*, the defendant was charged with conspiracy to possess a handgun. The prosecution's theory was that gang members in three cars conspired to possess a handgun in one of the cars, for gang-related purposes. The gang expert testified that when one gang member in a car possessed a gun, every other gang member in the car knew of the gun and constructively possessed the gun. (*Killebrew, supra*, 103 Cal.App.4th at p. 652.) We concluded this testimony told the jury how the expert thought the case should be decided and was therefore improper. (*Id.* at p. 658.)

properly could “express an opinion, based on hypothetical questions that tracked the evidence,” whether the shooting, theft, arson, or possession, if the jury found they in fact occurred, would have served a gang-related purpose. (*People v. Vang, supra*, 52 Cal.4th at p. 1048.)

The trial court did not abuse its discretion in admitting the gang expert testimony.

2. Jury Instructions

Prado and Perez claim various prejudicial instructional errors. We disagree.

A trial court in a criminal case is required, with or without a request, to give correct jury instructions on the general principles of law relevant to issues raised by the evidence. (*People v. Michaels* (2002) 28 Cal.4th 486, 529-530.) “[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) Instructional error warrants reversal only if there is a reasonable probability that the defendant would have obtained a more favorable outcome without the error. (*People v. Breverman* (1998) 19 Cal.4th 142, 178 (*Breverman*); *People v. Fuentes* (2009) 171 Cal.App.4th 1133, 1138.) We address each argument in turn.

A. CALCRIM No. 370

Prado contends first that the trial court modified CALCRIM No. 370 and “in so doing combined the concepts of motive and of specific intent with respect to the gang-related allegations” and, as a result, “the jury could have used mere evidence of motive to satisfy the specific intent requirements of the active gang participation count, the gang benefit enhancements and the gang murder special circumstance.” The record indicates some general confusion about the applicability of motive, and respondent acknowledges that the trial court “incorrectly and inexplicably thought that ‘motive’ can be confused with ‘intent,’” but argues that any error was harmless. We agree with respondent.

The trial court instructed with a modified version of CALCRIM No. 370 as follows:

“With the exception of Count 11, active participation in a criminal street gang, in violation of Penal Code Section 186.22[, subdivision](a), committing a crime for the benefit of a street gang, in violation of Penal Code Section 186.22[, subdivision](b)(1) as alleged in Counts 1 through 10, and the special circumstance killing by a street gang member, in violation of Penal Code Section 190.2[, subdivision](a)(22) as alleged in Count 1, the People are not required to prove that [Prado] had a motive to commit any of the other crimes or allegations charged. In reaching your verdict you may, however, consider whether [Prado] had a motive in regard to Counts 1 through 10, but not to the allegation of committing a crime for the benefit of a criminal street gang. [¶] Having a motive may tend to be a factor tending to show that [Prado] is guilty. Not having a motive may be a factor tending to show that [Prado] is not guilty.”

The jury was also instructed in CALCRIM No. 1403 that it could consider evidence of gang activity only for the purpose of whether appellant acted with intent, purpose, and knowledge in order to prove the gang-related allegations and that evidence of motive could be considered for the crimes charged. As argued by Prado,

“the jury was instructed using the modified CALCRIM 370 that while the prosecution had the burden of proving motive for Count 11’s active gang participation and the gang benefit enhancement, the jury could not consider motive for either that charge or that enhancement. The jury was instructed using the modified CALCRIM 370 that motive must be proven for the gang murder special circumstance and it was implied that motive may be considered for the special circumstance.”

Under these circumstances, according to Prado, the jury “would have confused mere motive with the element of specific intent.”

We disagree. The instruction for the substantive offense (§ 186.22, subd. (a)) stated: “To prove that [Prado] is guilty of this crime, the People must prove that: [¶] One, [Prado] actively participated in a criminal street gang; [¶] Two, when [Prado] participated in the gang he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity; [¶] And three, [Prado] willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang” The instruction for

the section 190.2, subdivision (a)(22), special circumstance required a finding that the murder was “carried out to further the activities of the criminal street gang.” And the instruction for the section 186.22, subdivision (b), enhancement required a finding that “[Prado] intended to assist, further, or promote ... criminal conduct by gang members.” Finally, the trial court instructed the jury that section 186.22, subdivision (a), section 190.2, subdivision (a)(22), and section 186.22, subdivision (b)(1) each required specific intent or mental state.

Although each of these instructions required a finding that Prado had a specific intent to further gang activity, he argues that the motive instruction contradicted this, telling the jury it did not have to make that finding. We disagree.

Motive, intent, and malice are separate and disparate mental states. (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504; *People v. Snead* (1993) 20 Cal.App.4th 1088, 1098, overruled on other grounds in *People v. Letner and Tobin* (2010) 50 Cal.4th 99, 181.) “Motive describes the reason a person chooses to commit a crime. The reason, however, is different from a required mental state such as intent or malice.” (*People v. Hillhouse, supra*, at p. 504.) As explained by this court in *People v. Fuentes, supra*, 171 Cal.App.4th 1133:

“An intent to further criminal gang activity is no more ‘motive’ in legal terms than is any other specific intent. We do not call a premeditated murderer’s intent to kill a ‘motive,’ though his action is motivated by a desire to cause the victim’s death. Combined, the instructions here told the jury the prosecution must prove that [the defendant] intended to further gang activity but need not show what motivated his wish to do so.” (*Id.* at pp. 1139-1140.)

We agree with respondent that, while the people did not have to prove motive, Prado has suffered no prejudice since the jury had to find beyond a reasonable doubt that he acted with specific intent before it could find him guilty and the enhancement allegations true. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1248 [correctness of jury instructions determined from entire charge to jury].)

B. CALCRIM No. 375

Prado also contends that the trial court omitted a required final paragraph of CALCRIM No. 375, thereby prejudicially lightening the prosecutor's burden of proof to find true the active gang participant count, the gang benefit enhancements, and the gang murder special circumstance based on Prado's uncharged prior offense. We disagree.

The trial court instructed the jury, in relevant part, pursuant to CALCRIM No. 303, that evidence that Prado possessed a .22-caliber pistol and was previously convicted of grand theft was admitted for the limited purpose of determining whether he was an active participant in a criminal street gang. It subsequently instructed, pursuant to CALCRIM No. 375:

“The People have presented evidence that [Prado] committed the offense of felon in possession of a firearm, in violation of Penal Code Section 12021[, subdivision](a) that was not charged in this case. You may consider this evidence only if the People have proved by a preponderance of the evidence that [Prado], in fact, committed the uncharged offense. [¶] Proof by a preponderance of evidence is a different burden of proof than proof beyond a reasonable doubt. A fact is proved by the preponderance of evidence if you conclude that it is more likely than not that the fact is true. If the People have not met this burden, you must disregard this evidence entirely. If you decide that [Prado] committed the uncharged offense, you may, but are not required to, consider the evidence for the limited purpose of deciding whether or not [Prado] was engaged in one of the primary activities of a criminal street gang and whether ... Prado was an active participant in a criminal street gang. Do not consider this evidence for any other purpose. Do not conclude from this evidence that [Prado] has a bad character or is disposed to commit crime.”

The court failed to include the last paragraph of the instruction, which reads:

“If you conclude that the defendant committed the (uncharged offense[s]/ act[s]), that conclusion is only one factor to consider along with all the other evidence. It is not sufficient by itself to prove that the defendant is guilty of _____ <insert charge[s]> or that the defendant is guilty of _____ <insert allegation[s]> has been proved]. The People must still prove (the/each) [charge/ [and] allegation) beyond a reasonable doubt.” (CALCRIM No. 375.)

Prado contends that the omission of this final paragraph permitted the jury to use a lower standard of proof—that of preponderance of the evidence—to find true the active gang participant count, the gang benefit enhancement and the gang murder special circumstance based on his uncharged prior offense. We disagree.

The trial court instructed the jury thoroughly on reasonable doubt (CALCRIM No. 220), and also, pursuant to CALCRIM No. 224, on the sufficiency of evidence as it pertains to circumstantial evidence:

“Before you may rely on circumstantial evidence to conclude that a fact necessary to find [Prado] guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.”

In addition, the trial court instructed on the elements of the active gang participant count, the gang benefit enhancement and the gang murder special circumstance.

Given the instructions as a whole, it is unlikely that the jury applied the uncharged offense evidence to convict Prado on a standard less than beyond a reasonable doubt. (*People v. Musselwhite, supra*, 17 Cal.4th at p. 1248 [correctness of jury instructions determined from entire charge to jury].) We reject his argument to the contrary.

C. CALCRIM No. 417

Perez was prosecuted as the driver of the city truck used in the shootings, not as the shooter. Instructions were given on direct aiding and abetting and on an uncharged conspiracy to commit counts 1 through 9. Perez first contends that the instruction as given allowed the jury to find him guilty of all nine counts by only finding that attempted murder was a natural and probable consequence of a common design or plan. As discussed below, CALCRIM No. 417 as given was not correct in law, but we find no prejudicial error.

Here, the trial court instructed with CALCRIM No. 416 regarding evidence of an uncharged conspiracy. The instruction defined the elements of a conspiracy, set forth various overt acts, and repeatedly posited that Perez conspired “to commit murder,

assault with a firearm, theft of a motor vehicle and/or arson.” The court then instructed, pursuant to CALCRIM No. 417, as follows:

“A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime.

“A member of a conspiracy is also 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. This rule applies even if the act was not intended as part of the original plan. Under this rule[,] a defendant who is a member of the conspiracy does not need to be present at the time of the act.

“A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. [¶] In deciding whether a consequence is natural and probable, kindly consider all of the circumstances established by the evidence.

“A member of a conspiracy is not criminally responsible for the act of another member if that act does not further the common plan or is not a natural and probable consequence of the common plan.

“To prove that [Perez] is guilty of the crimes charged in Counts 1 through 9, the People must prove that:

“One, [Perez] conspired to commit one of the following crimes: murder, assault with a firearm, theft of a motor vehicle, and/or arson;

“Two, a member of the conspiracy committed attempted murder to further a conspiracy;

“And, three, attempted murder was a natural and probable consequence of the common plan or design of the crime that [Perez] conspired to commit.

“[Perez] is not responsible for the acts of another person who was not a member of the conspiracy even if the acts of the other person helped accomplish the goal of the conspiracy.

“A conspiracy member is not responsible for the acts of another—of other conspiracy members that are done after the goal of the conspiracy has been accomplished.”

Perez contends that the instruction, as given, confusingly and incorrectly permitted him to be convicted under the natural and probable consequences doctrine of all the charges, except for street gang terrorism, “if a coconspirator committed attempted murder and attempted murder was a natural and probable consequence of the common plan or design of the crime [Perez] conspired to commit, and [Perez] conspired to commit one of the following crimes: ‘murder, assault with a firearm, vehicle theft and/or arson.’”

The standard form of CALCRIM No. 417 is as follows:

“To prove that the defendant is guilty of the crime[s] charged in Count[s] _____, the People must prove that:

“1. The defendant conspired to commit one of the following crimes:
_____ <insert target crime[s]>;

“2. A member of the conspiracy committed _____ <insert nontarget offense[s]> to further the conspiracy;

“AND

“3. _____ <insert nontarget offense[s]> (was/were) [a] natural and probable consequence[s] of the common plan or design of the crime that the defendant conspired to commit.” (CALCRIM No. 417 (Summer 2011 ed. [new Jan. 2006]), p. 209.)

“All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission ... are principals in any crime so committed.” (§ 31.) A person is liable for aiding and abetting when, (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing, or encouraging, or facilitating the commission of the crime, that person (3) by act or advice aids, promotes, encourages, or instigates the commission of the crime. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 386.) An aider and abettor is guilty not only of an offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. (*People v. Hickles* (1997) 56 Cal.App.4th 1183, 1193.) Thus, an aider and abettor is guilty of any offense that is the natural and probable

consequence of the target offense. But guilt of one such foreseeable offense does not render the aider and abettor responsible for an offense not reasonably foreseeable. Each offense must be the natural and probable consequence of the target offense.

CALCRIM No. 417, as given to the jury here, informed the jury that Perez could be found guilty of counts 1 through 9 if attempted murder was a natural and probable consequence of the common plan. But the law requires that to be guilty of all of the counts under this theory, each offense must be a natural and probable consequence of the conspiracy. The challenged instruction was therefore not correct in law.

Any “misdirection of the jury” (Cal. Const., art. VI, § 13), that is instruction error (*Breverman, supra*, 19 Cal.4th at p. 173), cannot be the basis of reversing a conviction unless “an examination of the *entire cause, including the evidence,*” indicates that the error resulted in a “miscarriage of justice,” (*Ibid.*) “Under such circumstances, ‘[t]he prejudicial effect of such error is to be determined, for purposes of California law, under the generally applicable reasonable-probability test’” in *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Breverman, supra*, at p. 174.) Applying that test here, we find the instructional error to be harmless.

It is not reasonably likely that had the correct instruction been given, a more favorable result for Perez would have ensued. (*People v. Prince* (2007) 40 Cal.4th 1179, 1267.) The prosecution’s theory of this case was that Perez was culpable as an aider and abettor and a coconspirator. The evidence at trial indicates that Perez was intimately involved in the assaults, attempted murders, and murder. Perez was the driver of the stolen vehicle, and he, with Prado as the passenger, drove the vehicle until they found and confronted four people about their gang status. Prado, with Perez still at the wheel, got out of the car and fired at the four individuals, killing Gandarilla and injuring two others. Prado then returned to the vehicle and Perez drove the truck from the scene. Perez was a full and active participant in all the steps that led to the assaults, murder, and attempted murders. Under these circumstances, the evidence supports a finding that a reasonable

person in Perez's position would have known that the assaults, attempted murder, and murder were likely to occur.

In addition, the error was harmless because the jury necessarily resolved Perez's guilt under other instructions. (See *People v. Rogers* (2006) 39 Cal.4th 826, 890 [issue posed by incorrect instruction was necessarily resolved adversely to appellant under the properly given instructions].) The jury necessarily found Perez had the intent to kill Gandarilla (count 1) and acted with that intent when it found true the allegation that Perez committed the murder for the benefit of a criminal street gang. (CALCRIM No. 702.) The jury was instructed that, in order to find Perez and Prado guilty of attempted murder, it had to find that they intended not only to kill Gandarilla, but also either intended to kill the Rodriguez brothers (counts 2 and 3) and Celaya (count 4), "or intended to kill everyone within the kill zone." (CALCRIM No. 600.) On the facts of this case, the assaults with a firearm (counts 5, 6 & 7) involve the same acts that constituted the attempted murders.

Perez appears to concede that the alleged erroneous jury instruction was harmless as to the vehicle theft charge (count 8), stating, "Because [Perez] was driving a stolen city truck, the jury likely found [Perez] guilty of directly committing count 8 The jury also likely concluded that because Prado was in the truck, [Perez] and Prado conspired to commit count 8." As for the arson (count 9), respondent concedes that "it does not necessarily follow that the murderers/assaulters would set the truck on fire," but the jury was instructed that, to find Perez guilty of arson, it had to find he "set fire to or burned or counseled, helped, or caused the burning of property; [¶] And, two, he acted willfully and maliciously." (CALCRIM No. 1515.) We therefore find the alleged error harmless.

Relying on *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), Perez also contends that the instruction on the natural probable consequences doctrine was erroneous because it did not direct the jury to determine whether *premeditated* murder and attempted murder, not just murder and attempted murder, were a natural and

probable consequence of the conspiracy. In other words, he contends that the instruction, as given, made it appear that if the shooter acted with deliberation and premeditation as to the shootings, Perez was automatically liable for this mental state as well. We find the alleged instructional error harmless beyond a reasonable doubt.

Our Supreme Court has not specifically determined whether a defendant can be guilty of a homicide offense of a lesser degree than that committed by the perpetrator under the natural and probable consequence doctrine. However, a quartet of cases emanating from the Second and Third District Courts of Appeal have concluded that a defendant can be guilty under the natural and probable consequences doctrine of a lesser crime than the perpetrator and that instruction on this principle is required in appropriate factual circumstances. (See, e.g., *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*); *Hart, supra*, 176 Cal.App.4th 662; *People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*); *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*).

In *Hart, supra*, 176 Cal.App.4th 662, two defendants attempted to rob the victim. During the course of the robbery, one of the defendants shot the victim in the abdomen. Both defendants were convicted of first degree attempted murder. (*Id.* at pp. 665-666.) The Third District Court of Appeal concluded that the jury was not properly instructed on the natural and probable consequences doctrine because the instruction failed to inform the jury that to find the accomplice guilty of attempted premeditated murder “it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery.” (*Id.* at p. 673.) *Hart* held that “the trial court has a duty, sua sponte, to instruct the jury in a case such as this one that it must determine whether premeditation and deliberation, as it relates to attempted murder, was a natural and probable consequence of the target crime.” (*Ibid.*) It explained that the instructions “merely failed to inform the jury that it could convict [the accomplice] of a lesser crime than [the shooter] under the natural and probable consequences doctrine.” (*Id.* at p. 674.) It reasoned, “[u]nder the instructions given, the

jury may have found [the accomplice] guilty of attempted murder using the natural and probable consequences doctrine, an objective test, and then found the premeditation and deliberation element true using the only instruction given as to that element, which described a subjective test” and, therefore, the jury charge was “prejudicially deficient.” (*Ibid.*) It also stated that based on the facts of the case, the jury could have found that attempted unpremeditated murder was a natural and probable consequence of the armed robbery but that attempted premeditated murder was not foreseeable. (*Id.* at p. 672.) The accomplice’s premeditation finding was reversed.

Respondent argues there is a split in authority, citing the Second District Court of Appeal’s 2005 decision in *People v. Cummins* (2005) 127 Cal.App.4th 667, but we discern no convincing basis to depart from the substantive line of reasoning developed in *Woods*, *Hart*, *Samaniego*, and *Nero*. Accordingly, we agree with Perez that the jury should have been instructed it could find him guilty of premeditated murder and attempted murder under the natural and probable consequences doctrine only if it found premeditated murder and attempted murder were objectively foreseeable.

We now turn to the assessment of prejudice. Since the instructional error at issue resulted in the omission or misdescription of an element of the charged offense, the *Chapman* standard applies. (*Chapman v. California* (1967) 386 U.S. 18, 24; *Neder v. United States* (1999) 527 U.S. 1, 15.) Error instructing the jury concerning lesser forms of culpability is reversible error unless it can be shown that the jury properly resolved the question under the instructions as given. (*Hart, supra*, 176 Cal.App.4th at p. 673.) “Under [the *Chapman*] test, an appellate court may find the error harmless only if it determines beyond a reasonable doubt that the jury verdict would have been the same absent the error. [Citation.]” (*Samaniego, supra*, 172 Cal.App.4th at p. 1165.)

After examination of all the circumstances, we conclude that it appears beyond a reasonable doubt that the instructional error did not contribute to the verdict. First, the jury did not need the natural and probable consequences theory to find Perez liable for

first degree murder and attempted murders. The prosecutor argued both that Perez conspired to commit murder and that he aided and abetted in the commission of the murder. During the prosecutor's remarks, he did not tell the jurors that they were barred from convicting Perez of a lesser offense, but that they needed to make the determination whether Perez also deliberated and premeditated in the murder and attempted murders.

Further, we know the jury found that Perez possessed the intent to kill because of the true finding on the special circumstance. The jury was instructed that, pursuant to CALCRIM No. 702, if it found Perez was guilty of first degree murder but was not the actual killer, it also had to determine whether Perez acted with the intent to kill. The instruction specifically stated:

“In order to prove the special circumstance for a defendant who is not the actual killer, but who is guilty of first-degree murder as an aider and abettor or a member of a conspiracy, the People must prove that [Perez] acted with the intent to kill. [¶] If [Perez] was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with the intent to kill for the special circumstance of killing by a street gang member under Penal Code, section 190.2[, subdivision](a)(22) to be true. If the People have not met this burden, you must find this special circumstance not to have been proved.”

Finally, as we previously discussed, the evidence at trial indicates that Perez was intimately involved in the assaults, attempted murders, and murder. Perez was the driver of the stolen vehicle, and, with Prado as a passenger, drove the vehicle until they found and confronted four people about their gang status. Prado, with Perez still at the wheel, got out of the car and fired at the four individuals, killing Gandarilla and injuring two others. Prado then returned to the vehicle and Perez drove the truck from the scene. Perez was a full and active participant in all the steps that led to the assaults, murder, and attempted murders.

Thus, in light of all of the circumstances we conclude it is not reasonably possible that the misinstruction affected the verdict. Therefore, the error is harmless beyond a reasonable doubt.

3. Sufficiency of the Evidence

Prado and Perez both contend that their conviction of arson must be reversed for insufficiency of evidence. We disagree.

Our inquiry into appellants' contention follows established principles.

“In determining whether the evidence is sufficient to support a conviction ..., ‘the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.’ [Citations.] Under this standard, ‘an appellate court in a criminal case ... does not ask itself whether it believes that the evidence at the trial established guilt beyond a reasonable doubt.’ [Citation.] Rather, the reviewing court ‘must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation].” (*People v. Vy* (2004) 122 Cal.App.4th 1209, 1224.)

Generally, a person commits arson when “he or she willfully and maliciously sets fire to or burns or causes to be burned or who aids, counsels, or procures the burning of, any structure ... or property.” (§ 451; see also CALCRIM No. 1515.) Appellants argue the evidence of arson was insufficient because the pickup was not found until 12 hours after the shooting, and the truck was unlocked and the ignition on when it was found. There were numerous fingerprints and palm prints on the truck, but none belonging to Perez or Prado.

However, the “very nature of the crime of arson ordinarily dictates that the evidence will be circumstantial. [Citation.]” (*People v. Beagle* (1972) 6 Cal.3d 441, 449, superseded by statute on other grounds as stated in *People v. Castro* (1985) 38 Cal.3d 301, 307-313.) “Consequently, the lack of an eyewitness placing defendant at the scene or other direct evidence to establish his guilt does not render the jury’s verdict of arson constitutionally deficient.” (*People v. Solis* (2001) 90 Cal.App.4th 1002, 1010; see also *People v. Maler* (1972) 23 Cal.App.3d 973, 983.)

At trial, a fire department arson investigator testified that when the pickup truck was found some 12 hours after the shooting, it had staining on the window caused by a slow-burning hydrocarbon fire. A paper on a clipboard inside the vehicle had been set on fire, and the fire spread to the truck seat and steering wheel before going out from a lack of oxygen in the airtight truck cab. Investigation ruled out that the fire was started by a flare gun. Furthermore, Perez and Prado were the last two people seen in the truck before the arson was discovered, and they certainly had a motive to dispose of it.

We find that there is sufficient evidence to support the jury's finding and we reject Prado and Perez's argument to the contrary.

4. Sentencing

Perez was convicted in counts 2, 3, and 4 of attempted murder with premeditation and deliberation and with gang enhancement findings under section 186.22, subdivision (b)(1). The trial court sentenced Perez on each count to 15 years to life for the premeditated attempted murder, plus 15 years to life for the gang enhancement. Perez contends that the sentence is incorrect for two reasons: (1) the sentence for premeditated attempted murder is life imprisonment and (2) the gang enhancement results in a 15-year minimum parole period, not an additional 15 years. Respondent agrees with Perez, as do we.

Pursuant to section 664, subdivision (a): “[I]f the crime attempted is willful, deliberate, and premeditated murder, as defined in Section 189, the person guilty of that attempt shall be punished by imprisonment in the state prison for life with the possibility of parole.” In addition, section 186.22, subdivision (b)(5), the gang enhancement statute, provides:

“Except as provided in paragraph (4),³ any person who violates this subdivision in the commission of a felony punishable by imprisonment in the state prison for life shall not be paroled until a minimum of 15 calendar

³ Paragraph (4) is not applicable here.

years have been served.” (See also *People v. Lopez* (2005) 34 Cal.4th 1002, 1006.)

Perez’s sentence must therefore be corrected to show a punishment of life imprisonment with a minimum parole eligibility period of 15 years on counts 2, 3, and 4.

5. Drug Fees

Perez contends that the imposition of drug related fees must be stricken from his abstracts of judgment because he was not convicted of a drug offense.⁴ Respondent concedes the issue and we agree.

Perez was not convicted of a drug related offense. Although the trial court did not impose any Health and Safety Code fines on Perez at sentencing, we agree that his abstract of judgment showing a \$50 laboratory fee pursuant to Health and Safety Code section 11372.5, subdivision (a) and a \$100 drug program fee pursuant to Health and Safety Code section 11372.7, subdivision (a) are errors and must be stricken.

6. Parole Revocation Fine

Prado contends the trial court erred in imposing a fine of \$200 pursuant to section 1202.45, which was stayed pending successful completion of parole. Respondent concedes the issue. Although not argued by Perez, we find the issue is also applicable to him.

Such a fine is not applicable in cases where the defendant’s sentence includes a term of life without parole. (*People v. Oganesyanyan* (1999) 70 Cal.App.4th 1178, 1185.) The fine should not have been imposed on Prado or Perez as both were sentenced to life without the possibility of parole.

⁴ Prado joined but later abandoned the issue.

DISPOSITION

The trial court is ordered to amend Prado's and Perez's abstract of judgment to delete the \$200 section 1202.45 fine which was ordered and stayed pending successful completion of parole; to amend Perez's abstract of judgment to delete the \$50 lab fee and \$100 drug program fee; and to correct Perez's abstract of judgment to life imprisonment with a minimum parole period of 15 years on counts 2, 3, and 4. A corrected abstract of judgment for both Prado and Perez is to be sent to the Department of Corrections and Rehabilitation.

In all other respects, the judgment is affirmed.

Kane, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.