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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE GARCIA,

Defendant and Appellant.

F062075

(Super. Ct. No. 08CM7398)

OPINION

APPEAL from a judgment of the Superior Court of Kings County. Thomas DeSantos, Judge.

Joan Isserlis, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Charles A. French and Max Feinstat, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury found prison inmate Jose Garcia guilty of murder, attempted murder, aggravated assault by a prisoner serving a life sentence, and aggravated assault by a state prisoner. The jury also found true the enhancement allegations that the attempted murder

was willful, premeditated, and deliberate and that Garcia personally inflicted great bodily injury in the commission of the offenses.

Garcia contends that (1) the jury was misled about the provocative-act doctrine for murder; (2) the prosecutor misstated the law with respect to attempted murder; (3) he cannot be convicted of both aggravated assault by a prisoner serving a life sentence under Penal Code¹ section 4500 and aggravated assault by a state prisoner under section 4501 for the assault of a fellow inmate; (4) he received ineffective assistance of counsel; and (5) he should be resentenced because the trial court did not realize it had discretion to impose concurrent terms.

The People concede that Garcia cannot be convicted under both sections 4500 and 4501. We accept the People's concession and reverse Garcia's conviction under section 4501. We reject Garcia's remaining contentions.

FACTUAL AND PROCEDURAL HISTORIES

On May 23, 2006, Garcia was serving a life sentence at the Substance Abuse Treatment Facility in Corcoran. He shared a cell with inmate Lawrence Alvarado. Correctional Officers Raymond Montion and Barnabe Torres were on duty that day in the elevated control booth of the building where Garcia was housed. From the booth, the officers had full control of every door in the two-tiered building. They were able to open and close inmates' cells, and they monitored the inmates' movement throughout the building.

Around 8:40 a.m., Montion opened inmate Ricardo Acosta's cell door, releasing him to go to his work assignment as a clerk in the psychiatric building. Acosta left his cell, Montion closed the cell door, and Acosta walked down the stairs. At the first tier, rather than go directly to his work assignment, Acosta walked to cell 118 to talk to an inmate who had beckoned him. Montion explained that this is not allowed, but inmates

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

do it. Montion next opened Garcia and Alvarado's cell door, releasing them to go to their work assignments within the building; Garcia worked as a porter and Alvarado as a barber. Garcia walked to cell 120 and Alvarado walked to cell 114. From the control booth, Montion ordered Acosta to report to work. Acosta acknowledged the order and turned from cell 118 and started walking.

As that point, Garcia and Alvarado approached Acosta from opposite directions. According to Montion, when Garcia reached Acosta, he hit Acosta in the head with his fist. Acosta fell on one knee. Alvarado approached from the other side, and he and Garcia both struck Acosta. Montion saw that Alvarado had an instrument in his hand and was making thrusting motions, stabbing Acosta in the head and neck. Montion testified that Garcia and Alvarado each struck Acosta more than 20 times. Acosta tried to defend himself, putting his arms up to try to block the blows.

Torres testified that he saw Garcia run toward Acosta and then reach into his pocket and pull out something that appeared to be a weapon. He described Garcia's and Alvarado's actions as an "attack." Garcia and Alvarado "were striking stabbing motions on Inmate Acosta."

Montion and Torres commanded the inmates to stop, both yelling, "Get down, get down." Garcia and Alvarado ignored the commands and kept fighting. Montion activated his personal alarm, which sounds an alarm throughout the facility. He then used his 40-millimeter gas launcher, a nonlethal weapon that fires rubber rounds. He fired one round, striking Garcia in the right thigh area. Garcia stepped back and paused for a moment. Montion turned his attention to Alvarado, who continued to assault Acosta. Montion loaded another round and fired, aiming toward Alvarado's lower extremities. The shot missed and landed on the floor. Garcia started punching Acosta again. Torres observed that after Montion sounded the alarm and fired the first round, Garcia and Alvarado's attack of Acosta only intensified. He said, "The force, the frequency, ... it was just the intensity was even greater." Torres explained that inmates know that, after

the alarm sounds, they only have a certain amount of time before staff arrives on the scene.

As Montion began to load a third rubber round, he heard Torres fire a Ruger mini-14 rifle. Torres had seen that Acosta could no longer defend himself, and he decided to use the weapon because he feared for Acosta's life. Torres aimed at Alvarado and fired. He testified that he would have been justified in aiming at Garcia as well, explaining that the officers had commanded both inmates to stop, sounded the alarm, fired two rubber rounds, and yet there were no signs that either Garcia or Alvarado was going to stop assaulting Acosta.

When he was shot, Alvarado stopped, moved his hand toward his left hip, and fell back. Acosta, who had been on his knees and almost down on the ground, stood up, and he and Garcia started fighting. Torres was about to fire his weapon at Garcia when he saw prison staff approaching and held his fire.

Correctional Officer Rodolfo Padilla was among the prison staff who responded to the alarm that Montion had sounded. Padilla testified that when he arrived at the scene, Alvarado and Garcia were attacking Acosta. They were on top of Acosta using stabbing motions toward his head and upper torso. He saw that both Garcia and Alvarado had inmate-manufactured weapons in their hands. Padilla commanded the inmates, "Stop your actions. Drop the weapon, prone out." He heard Montion's two shots of rubber rounds and then heard the distinctive crack of the mini-14 rifle. Garcia appeared shocked and stopped momentarily but then resumed his attack on Acosta. Padilla pepper sprayed Garcia, whom he perceived as the aggressor. According to Torres, this had no effect on Garcia, and two officers struck him with their batons.

Prison staff eventually stopped the assault, and Montion observed Garcia and Acosta lying on the floor in a prone position (on their stomachs with their hands behind their backs). Garcia and Acosta were handcuffed, and medical staff carried Alvarado out

of the building on a gurney. An inmate-manufactured weapon was found in Alvarado's back pocket. Alvarado was pronounced dead later that day.

A correctional officer who responded to the alarm found a weapon on the floor in the area where the attack occurred. A criminal investigator for the Kings County District Attorney's Office went to the prison on the morning of the attack to investigate and found another inmate-manufactured weapon on the floor in the same area.

A nurse at the prison examined Acosta. She testified that he had six to eight puncture wounds on the back of his head and multiple puncture wounds, scratches, and abrasions all over his arms, head, and back area. Acosta also had some swelling on the back of his head and on his arms and back, and there were reddened areas that may have been caused by pepper spray. Another nurse testified that Acosta had some abrasions to the back of his head, bruises on his knees, and abrasions on his arms. He had no puncture wounds.

A doctor performed an autopsy on Alvarado. He testified that Alvarado bled to death from the gunshot wound.

On June 12, 2009, the district attorney of Kings County filed a five-count information against Garcia. Count 1 alleged murder of Alvarado (§ 187, subd. (a)). Count 2 alleged attempted murder of Acosta (§ 664, § 187, subd. (a)) and further alleged that the attempt was committed willfully, deliberately, and with premeditation (§ 664, subd. (a)). Counts 3 and 4 alleged aggravated assault in violation of sections 4500 and 4501, respectively. With respect to counts 2, 3 and 4, it was alleged that Garcia personally inflicted great bodily injury upon Acosta in commission of the crimes (§ 12022.7, subd. (a)). Count 5 alleged possession by a prisoner of a sharp instrument, dirk, or dagger (§ 4502, subd. (a)). Finally, it was alleged that Garcia had 10 prior serious felony convictions (§ 667, subd. (a)(1)), which were also "strikes" (§ 1170.12, subds. (a)-(d), § 667, subds. (b)-(i)).

On January 18, 2011, a jury trial began. On January 21, 2011, the jury reached a verdict, finding Garcia guilty of counts 1 through 4 and not guilty of count 5. The jury found all the enhancement allegations to be true.

The trial court sentenced Garcia to 15 years to life, tripled to 45 years (§ 667, subd. (e)(2)(A)(i)), plus two, five-year enhancements for prior serious felony convictions (§ 667, subd. (a)(1)) for count 1; 25 years to life, plus enhancements of three years for infliction of great bodily harm (§ 12022.7) and 10 years for two prior serious felony convictions for count 2; 27 years to life, plus 13 years for great bodily harm and prior serious felony convictions (same enhancements as count 2) for count 3; and 25 years to life, plus 13 years of enhancements (same as count 2) for count 4. By agreement, the terms for counts 2 and 4 were stayed pursuant to section 654. The sentence was to run fully consecutive to the life sentence that Garcia was already serving for a prior criminal case from Orange County.

DISCUSSION

I. Provocative-act murder

In this case, Garcia did not directly kill Alvarado; a correctional officer shot and killed Alvarado. Garcia was charged with Alvarado's murder under the "provocative act" murder doctrine. On appeal, Garcia contends that the jury was misled about the doctrine. He finds fault with the jury instructions, the prosecutor's closing argument, and the trial court's response to a jury question. We begin our analysis with a review of the provocative-act murder doctrine.

"Murder is the unlawful killing of a person with malice aforethought. (§ 187.) Murder includes both actus reus and mens rea elements. To satisfy the actus reus element of murder, an act of either the defendant *or an accomplice* must be the proximate cause of death.... To satisfy the mens rea element of murder, the defendant must personally act with malice aforethought." (*People v. Concha* (2009) 47 Cal.4th 653, 660.)

“The provocative act murder doctrine was originally conceived as a form of implied malice murder, derived as an offshoot of the felony-murder rule.” (*People v. Cervantes* (2001) 26 Cal.4th 860, 867.) Under the doctrine, “[w]hen the defendant or his accomplice, with a conscious disregard for life, intentionally commits an act that is likely to cause death, and his victim or a police officer kills in reasonable response to such act, the defendant is guilty of murder. In such a case, the killing is attributable, not merely to the commission of a felony, but to the intentional act of the defendant or his accomplice committed with conscious disregard for life.” (*People v. Gilbert* (1965) 63 Cal.2d 690, 704, vacated on other grounds in *Gilbert v. California* (1967) 388 U.S. 263.) “[T]he victim’s self-defensive killing or the police officer’s killing in the performance of his duty cannot be considered an independent intervening cause for which the defendant is not liable, for it is a reasonable response to the dilemma thrust upon the victim or the policeman by the intentional act of the defendant or his accomplice.” (*People v. Gilbert, supra*, at p. 705.)

In a provocative-act murder, the actus reus is “an act that provokes a third party to fire a fatal shot [or use other privileged lethal force]. The mens rea element is satisfied if the defendant knows that his or her provocative act has a high probability—not merely a foreseeable possibility—of eliciting a life-threatening response from the person who actually fires the fatal bullet.” (*People v. Briscoe* (2001) 92 Cal.App.4th 568, 582.)

In cases where the underlying offense does not involve an intent to kill, “mere participation in the underlying criminal offense is not sufficient to invoke the doctrine of provocative act murder. The provocative act must be something beyond that necessary to commit the underlying crime.” (*People v. Briscoe, supra*, 92 Cal.App.4th at p. 582-583; *People v. Garcia* (1999) 69 Cal.App.4th 1324, 1329; see also *In re Joe R.* (1980) 27 Cal.3d 496, 506, fn. 6.) For example, in *People v. Garcia, supra*, at page 1328, the underlying crime was armed robbery, and the victim shot and killed two of the three robbers. The *Garcia* court recognized that the prosecutor had to show a provocative act

“other than those implicit in the crime of armed robbery” in order to invoke the provocative-act murder doctrine against the surviving robber. (*Id.* at p. 1329.) In that case, the act of discharging a handgun into an occupied bedroom was held to be substantial evidence of a provocative act, as the act “was not inherent in armed robbery and was ... done with a conscious disregard for life.” (*Id.* at p. 1330.)

On the other hand, in cases where the underlying offense *does* involve intent to kill, the criminal offense itself may constitute the provocative act. (*People v. Garcia, supra*, 69 Cal.App.4th at p. 1329, fn. 3 [“It is not required that the provocative act be independent of the felony when the underlying felony is attempted murder”]; *In re Aurelio R.* (1985) 167 Cal.App.3d 52, 60 [where defendant and fellow gang members have intent to kill, “no separate and independent ‘provocative act’ need be committed”].)

In *People v. Gallegos* (1997) 54 Cal.App.4th 453, the defendant was in a crowded nightclub where a band was performing. He jumped onto the stage and began shooting at the singer of the band. The singer pulled out a handgun from his waistband and fired back. Eventually, the defendant was subdued by other patrons of the nightclub. The singer survived, but a patron in the audience died from a bullet wound. (*Id.* at p. 455) In that circumstance, the defendant’s underlying offense of attempted murder of the singer was itself the provocative act that caused the death of the patron. The *Gallegos* court explained, “[The defendant] was in an extremely crowded dance hall, jumped up on the slightly elevated stage crowded with band members, which was inches from patrons dancing on the floor, began shooting at the attempted murder victim, and continued to do so after the latter jumped off the stage and was trying to leave the hall, and even while [defendant] was on the dance floor and was being subdued by other patrons. This satisfies both the ‘actus reus’ and ‘mens rea’ elements of provocative murder” (*Id.* at p. 461-462.)

With this background on the doctrine of provocative-act murder, we turn to Garcia’s contentions.

A. Jury instructions

Garcia argues that the trial court incorrectly instructed the jury that he could be liable for murder even if Alvarado committed the provocative act that resulted in his own killing. He argues that the case law is clear that a defendant cannot be held liable for provocative-act murder if the person killed is the defendant's accomplice and that accomplice committed the provocative act that caused his own death. He relies on *People v. Antick* (1975) 15 Cal.3d 79, 91, partly abrogated by constitutional amendment, as explained in *People v. Castro* (1985) 38 Cal.3d 301, 306-313, and disapproved on another point in *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1123.

An appellate court reviews de novo the adequacy of jury instructions. (*People v. Cole* (2004) 33 Cal.4th 1158, 1217.) We conclude that the jury instructions in this case did not misstate the law.

The trial court instructed the jury with CALCRIM No. 560, "Homicide: Provocative Act by Defendant." This instruction provided:

"The defendant is also charged in Count I with murder. A person can be guilty of murder under the Provocative Act Doctrine even if someone else ... did the actual killing.

"To prove that the defendant is guilty of murder under the Provocative Act Doctrine the People must prove that: [¶] One, in committing or attempting to commit the crimes set forth in Counts II, III or IV the defendant intentionally did a provocative act. [¶] Two, the defendant knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life. [¶] Three, in response to the defendant's provocative act, Correctional Officer Barnabe Torres killed Lawrence Alvarado. [¶] And four, Lawrence Alvarado's death was the natural and probable consequence of the defendant's provocative act."

Garcia agrees that CALCRIM No. 560 was appropriate. The trial court also instructed the jury with CALCRIM No. 561, "Homicide: Provocative Act by Accomplice" as follows:

“The defendant is charged in Counts II, III and IV with attempted murder, Penal Code Section 664/187, assault with a deadly weapon or by means of force likely to produce great bodily injury by an inmate serving a life term, Penal Code Section 4500, [and] assault with a deadly weapon or by means of force to commit great bodily injury by a state inmate, Penal Code Section 4501 respectively.

“The defendant is also charged in Count I with murder.

“A person can be guilty of murder under the Provocative Act Doctrine even if someone else did the actual killing.

“To prove that the defendant is guilty of murder under the Provocative Act Doctrine the People must prove that:

“One, the defendant was an accomplice of Lawrence Alvarado in committing or attempting to commit the above mentioned crimes in Counts II, III or IV.

“Two, in committing or attempting to commit the above mentioned crimes in Counts II, III or IV Lawrence Alvarado intentionally did a provocative act.

“Three, Lawrence Alvarado knew that the natural and probable consequences of the provocative act were dangerous to human life and then acted with conscious disregard for life.

“Four, in response to Lawrence Alvarado’s provocative act Correctional Officer Barnabe Torres killed Lawrence Alvarado.

“And five, Lawrence Alvarado’s death was the natural and probable consequence of his own provocative act or acts.

“A provocative act is an act whose natural and probable consequences are dangerous to human life because there’s a high probability that the act will provoke a deadly response.

“The defendant is an accomplice of Lawrence Alvarado if the defendant is subject to prosecution for the identical offense that you conclude Lawrence Alvarado committed or attempted to commit.

“The defendant is subject to prosecution if he committed or attempted to commit the crime or if ... he knew of Lawrence Alvarado’s criminal purpose to commit the crimes set forth in Counts II, III and IV, and

the defendant intended to and did in fact aid, facilitate, promote, encourage or instigate the commission of the crimes in Counts II, III and IV.

“An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is at the scene of a crime even if he or she knows that a crime will be committed or is being committed and does nothing to stop it.

“In order to prove that Lawrence Alvarado’s death was the natural and probable consequence of his own provocative act or acts the People must prove that:

“One, a reasonable person in Lawrence Alvarado’s position would have foreseen that there was a high probability that his act could begin a chain of events resulting in someone’s death.

“Two, Lawrence Alvarado’s act was a direct and substantial factor in causing his death.

“And three, Lawrence Alvarado’s death would not have happened if he [had] not committed the provocative act.

“A substantial factor is more than a trivial or remote factor; however, it does not need to be the only factor that caused the death.

“The People have alleged that both Lawrence Alvarado and Defendant Garcia committed provocative acts as set forth in Counts II, III and IV.

“You may not find the defendant guilty unless you all agree that the People have proved that:

“One, Lawrence Alvarado or Defendant Garcia committed at least one provocative act.

“And two, at least one of the provocative acts committed by Lawrence Alvarado or Defendant Garcia was a direct and substantial factor that caused the killing.

“However, you do not all need to agree on which provocative act has been proved. If you decide that the only provocative act that caused Lawrence Alvarado’s death was committed by himself then the defendant is not guilty of Lawrence Alvarado’s murder.

“A defendant is not guilty of murder if the killing of Lawrence Alvarado was caused solely by the independent criminal act of someone other than the defendant or Lawrence Alvarado.

“An independent criminal act is a free, deliberate and informed criminal act by a person who is not acting with the defendant.

“If you decide that the defendant committed murder that crime is murder in the second degree.”

Garcia argues that CALCRIM No. 561 allowed the jury to find Garcia guilty even if his own acts were not a direct and substantial factor causing Alvarado’s death. We disagree.² The instruction provides, “If you decide that the only provocative act that caused Lawrence Alvarado’s death was committed by himself then the defendant is not guilty of Lawrence Alvarado’s murder.” As a result, to find Garcia guilty, the jury must have found that Garcia’s own provocative act or acts caused Alvarado’s death.

In any event, assuming for the sake of argument that CALCRIM No. 561 was misleading or misstated the law, Garcia cannot show harm. He posits that the jury may have found that Garcia attacked Acosta with his fists, while Alvarado used a knife, and Garcia hit Acosta’s legs or feet, while Alvarado concentrated on the vital organs. “Hence, the jury may have decided that Officer Torres was prompted to shoot a live round at Alvarado not by anything [Garcia] did” This is unpersuasive. The jury found Garcia guilty of attempted murder of Acosta and additionally found that he personally inflicted great bodily injury. Here, as in *People v. Gallegos, supra*, 54 Cal.App.4th 453, Garcia’s underlying crime of attempted murder was itself the provocative act. The evidence showed that correctional officers commanded Garcia and Alvarado to stop, an

²The instruction is more common in cases where a defendant is tried for the murder of an accomplice based on the provocative act of another surviving accomplice. (See, e.g., *People v. Garcia, supra*, 69 Cal.App.4th at p. 1331 [defendant Garcia liable for murder of accomplice Alvarez, who was killed by victim in response to provocative act of accomplice Quezada].) Nonetheless, the jury was not given an incorrect statement of the law.

alarm was sounded throughout the building, a correctional officer shot Garcia with a rubber bullet and then shot at Alvarado, but Garcia continued to assault Acosta and even intensified his attack. Since the correctional officers' nonlethal force was ineffective to stop Garcia from harming Acosta, a lethal response was to be expected. Torres testified that he would have been justified in directing his first round at Garcia. After he shot Alvarado, Torres only stopped himself from shooting Garcia because he saw that prison staff was approaching the inmates. Given the evidence of his nearly unstoppable attack of Acosta and the jury's determination that he attempted to murder Acosta, Garcia's conduct unquestionably had high probability "of eliciting a life-threatening response from the person who actually fire[d] the fatal bullet." (*People v. Briscoe, supra*, 92 Cal.App.4th at p. 582.) Under these circumstances, we conclude there is no reasonable probability that the jury would have reached a verdict more favorable to Garcia if it had not received CALCRIM No. 561.

B. Prosecutor's statements

Garcia argues that the prosecutor misstated the law of provocative-act murder in his closing argument. The prosecutor told the jury that Garcia could be guilty "if you believe Inmate Alvarado did the provocative act." He said that an element of the murder charge was that "Inmate Alvarado's death was the natural and probable consequences of the defendant's or Inmate Alvarado's own provocative act." The prosecutor also told the jury: "[Y]ou ... don't need to wonder, and this is really the theme of my whole argument I guess, whether the defendant or his accomplice did the provocative act. If it's this defendant or if it's his accomplice, or it's both of them ... this defendant, Mr. Garcia, is still guilty of provocative act murder because the defendant and Inmate Alvarado were accomplices and they aided and abetted one another."

The People argue that the prosecutor did not misstate the law. (See, e.g., *In re Aurelio R., supra*, 167 Cal.App.3d at pp. 60-61 [defendant gang member who drove fellow gang members into rival territory with intent to shoot rivals "was an active

accomplice” liable for his fellow gang member’s death, even if defendant did not fire weapon].) Even assuming the prosecutor’s statements were misleading, defense counsel did not object and, consequently, Garcia has forfeited this issue on appeal. (*People v. Bell* (1989) 49 Cal.3d 502, 539; *People v. Medina* (1995) 11 Cal.4th 694, 760.)

In addition, Garcia cannot show prejudice. Garcia claims that the prosecutor’s statements “[c]ompounded [t]he [e]rror” of the incorrect jury instruction on provocative-act murder, but the jury instruction was not incorrect. The trial court specifically told the jury, “If you decide that the only provocative act that caused Lawrence Alvarado’s death was committed by himself then the defendant is not guilty of Lawrence Alvarado’s murder.” The trial court also instructed, “If you believe that the [attorneys’] comments on the law conflict with my instructions you must follow my instructions.” (See *People v. Medina, supra*, 11 Cal.4th at p. 760 [prosecutor’s misstatement of law during closing argument was harmless where jury was instructed that court’s instructions on law controlled over conflicting statements from attorneys].) Further, as we have observed, the jury found Garcia guilty of attempting to murder Acosta, which is a provocative act in itself. For all these reasons, we conclude it is not reasonably probable that the jury’s verdict was affected by the prosecutor’s statements about which Garcia now complains.

C. Jury question

Soon after deliberations began, the jury submitted a question. The trial court read the question into the record: ““We, the jury, in the above entitled action request the following: Additional clarification regarding what constitutes a provocative act and how it could apply to the facts. Signed by the foreperson.”” The trial court responded, in part, “I’m not going to comment on the evidence. I’m not going to interpret it for you because that’s your job, and you’re to take nothing from what I say or do as any indication of what ... I think the case should or should not be. That is your job.”

The jury indicated that it would be helpful for the court to read them the instructions again. Counsel had no objection, and the trial court read to the jury CALCRIM Nos. 560 and 561.

Garcia now argues that, in responding to the jury, the trial court failed in its duty to clear up the jury's expressed confusion about the jury instructions, citing *People v. Beardslee* (1991) 53 Cal.3d 68, 97. The People do not raise the point, but we observe that defense counsel did not object or request an additional response to the jury's question. For this reason, the issue has been forfeited. (*People v. Dykes* (2009) 46 Cal.4th 731, 802.)

Moreover, Garcia's argument fails on the merits. The *Beardslee* court observed that the trial court need not "always elaborate on the standard instructions." (*People v. Beardslee, supra*, 53 Cal.3d at p. 97.) "Indeed, comments diverging from the standard are often risky." (*Ibid.*) The trial court's obligation is to "*consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*Ibid.*)

Here, the jury asked how the provocative-act theory "could apply to the facts." The trial court appropriately responded that it would not comment on the evidence, explaining, "I'm not going to interpret [the evidence] for you because that's your job" The court also told the jury to reread the instructions, discuss them, and if they had further questions, to write them down and send them to the court. The jury had no additional questions. We conclude there was no error in the trial court's response to the jury's question.

In sum, we reject Garcia's claim that the jury was misled about the doctrine of provocative-act murder to his prejudice.

II. Prosecutor's statements on aiding and abetting

Garcia argues that his conviction for attempted murder, count 2, must be reversed because the jury was misled about aiding and abetting an attempted murder. This argument is based solely on the prosecutor's remarks in his closing argument.

Garcia points to five instances of the prosecutor misstating the law or misleading the jury. First, the prosecutor stated that the intent element was satisfied if "the defendant or his accomplice intended to kill" Second, he told the jury that Garcia could be found guilty of attempted murder "even if you're not convinced that the defendant intended to kill him" Third, the prosecutor said, "you can also find him guilty if ... you're not convinced that he intended to kill, but that he aided and abetted someone else who did, he's still liable. He's still guilty." Fourth, the prosecutor told the jury that Garcia could be guilty "even if he didn't know that Mr. Alvarado was going to kill or attempt to kill" Fifth, he stated that when Garcia "joined in" the attack of Acosta, he "assumed the risk" of being held criminally liable for an attempt to murder Acosta even if "only Mr. Alvarado had planned" the attack.

"Although counsel have 'broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law. [Citation.]' [Citation.]" (*People v. Mendoza* (2007) 42 Cal.4th 686, 702.) The prosecutor in this case may have misspoken³

³For example, the prosecutor said, "[T]he defendant is also guilty ... if he aided and abetted. So I don't want you to get confused because this instruction says the defendant took at least one step and the defendant intended to kill. That's one way that you can find Mr. Garcia guilty. [¶] But you can also find him guilty ... if you're not convinced that he intended to kill, but that he aided and abetted someone else who did, he's still liable.... [¶] The next thing I want to talk about is the intent to kill"

Read in context, it is possible that the prosecutor misspoke when he said, "if you're not convinced that *he intended to kill*, but that he aided and abetted someone else who did, he's still liable" It appears that he intended to say, if you're not convinced that *he took at least one step toward killing another person*, but aided and abetted someone else who did, he's still liable. This seems likely given that the prosecutor

on occasion, but defense counsel did not object. Had defense counsel raised timely objections, any potential juror misunderstanding or confusion could have been corrected by admonitions from the court. (*People v. Bell, supra*, 49 Cal.3d at p. 539; *People v. Pike* (1962) 58 Cal.2d 70, 88.) Since defense counsel failed to object to any of the prosecutor’s statements, Garcia has forfeited this claim on appeal. (*People v. Bell, supra*, at p. 539; *People v. Medina, supra*, 11 Cal.4th at p. 760.)

Further, any error was harmless in light of the correct instructions given to the jury. The trial court properly instructed the jury on the elements of attempted murder and criminal liability as an aider and abettor. The trial court also told the jury, “If you believe that the [attorneys’] comments on the law conflict with my instructions you must follow my instructions.” The jury was also given a written copy of the instructions, which included the admonition to follow the court’s instructions over conflicting attorney statements. Under these circumstances, it is not reasonably probable that the jury was misled by the prosecutor’s statements. (*People v. Medina, supra*, 11 Cal.4th at p. 760 [prosecutor’s misstatement of law during closing argument was harmless where jury was instructed that court’s instructions on law controlled over conflicting statements from attorneys].)

III. Penal Code sections 4500 and 4501

Section 4500 creates the offense of “assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury” by a person “undergoing a life sentence.” Section 4501 provides: “Except as provided in Section 4500, every person confined in a state prison of this state who commits an assault upon the person of another with a deadly weapon or instrument, or by any means of force likely to produce great bodily injury, shall be guilty of a felony”

continued his argument by saying “next thing I want to talk about is the intent to kill,” indicating an intention to change subjects from actus reus to mens rea.

Garcia was convicted under section 4500 in count 3, and under section 4501 in count 4. The parties agree that Garcia cannot be convicted under both statutes and that section 4500 is the appropriate statutory offense in his case. We agree and reverse the conviction for count 4 for violation of section 4501.

IV. Ineffective assistance of counsel

In connection with count 3, aggravated assault by a person undergoing a life sentence, the trial court admitted into evidence an abstract of judgment in order to show that Garcia was serving a life sentence. The abstract of judgment showed that Garcia had been convicted of five counts of attempted murder in Orange County in 2001, and he had been sentenced to five consecutive terms of 15 years to life with the possibility of parole, plus 43 years for enhancements.

Garcia claims that he received ineffective assistance of counsel because defense counsel did not seek to prevent the jury from learning that he had been convicted of five attempted murders. He argues that defense counsel should have moved to bar evidence of his prior convictions and requested that the prosecutor stipulate to the fact that Garcia was serving a life term at the time Acosta was assaulted.

“Establishing a claim of ineffective assistance of counsel requires the defendant to demonstrate (1) counsel’s performance was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) counsel’s deficient representation prejudiced the defendant, i.e., there is a ‘reasonable probability’ that, but for counsel’s failings, defendant would have obtained a more favorable result. [Citations.]” (*People v. Dennis* (1998) 17 Cal.4th 468, 540.)

“A court must indulge a strong presumption that counsel’s acts were within the wide range of reasonable professional assistance.” (*People v. Dennis, supra*, 17 Cal.4th at p. 541.) “[I]f the record contains no explanation for the challenged behavior, an appellate court will reject the claim of ineffective assistance ‘unless counsel was asked

for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation’ [Citation.]” (*People v. Cudjo* (1993) 6 Cal.4th 585, 623.)

The People point out that defense counsel was aware that Garcia could stipulate or admit to the life sentence, as Garcia admitted that he had prior convictions for purposes of the enhancements allegations. It appears, the People conclude, that defense counsel made a tactical choice not to stipulate to the fact that Garcia was serving a life sentence at the time of the assault. The record contains no explanation for the decision not to stipulate, and defense counsel was not asked for an explanation. Perhaps defense counsel reasoned that it was better to tell the jury what crimes Garcia had committed rather than have them speculate on the subject. It is even possible that defense counsel thought that, compared to other potential life crimes, attempted murder was not particularly prejudicial—at least the jury would learn that Garcia had not killed anyone in the past. Given the strong presumption that defense counsel’s conduct was within the wide range of reasonable professional assistance, we cannot say, based on the record before us, that counsel’s performance was deficient.

In any event, Garcia cannot show prejudice. The trial court instructed the jury that the abstract of judgment “was admitted to support the fact that the defendant was at the time of the offense serving a life sentence in state prison and you are not to consider that document for any other purpose or reason.” During his closing argument, the prosecutor told the jury, “The only importance of this document [the abstract of judgment] is really to prove that this defendant was serving a life sentence” Defense counsel also reminded the jury of the limiting instruction and reiterated, “you’re not to use that document for any other purpose.”

Garcia relies on *People v. Chacon* (1968) 69 Cal.2d 765, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22, for the proposition that evidence of prior convictions may be prejudicial. In *Chacon*, the defendants were charged with assault by a life prisoner under section 4500. (*Chacon, supra*, at p. 770.)

The defendants argued on appeal that the prosecutor committed misconduct by emphasizing their prior felony convictions at the outset of trial—the first witness for the prosecution testified about the defendants’ prior convictions. The *Chacon* court acknowledged that “evidence of these prior convictions was admissible to prove that each was serving a life term,” but the presentation of “cumulative testimony” on the issue was more prejudicial than probative. (*Id.* at p. 777.) *Chacon* is distinguishable. Here, the prosecutor did not emphasize Garcia’s prior convictions and there was no witness testimony on the subject at all.

Garcia also cites *People v. Cunningham* (2001) 25 Cal.4th 926. In *Cunningham*, our Supreme Court recognized that when prior felony status is an element of a currently charged offense and the defendant stipulates that he is an ex-felon, the jury must be advised that the defendant is an ex-felon, but the jury is not entitled to learn the nature of the prior conviction. Garcia’s premise is that a jury is more likely to convict if it knows the nature of the defendant’s prior conviction than if it simply knows that the defendant previously has been convicted of a crime. Given the wide range of criminal offenses that are classified as felonies, this may be true in cases where the current offense involves ex-felon status. In *Cunningham*, for example, the defendant previously had been convicted of second degree murder and assault. (*Id.* at p. 983.) Obviously, such a defendant would prefer the jury to know only that he had been convicted of a felony, not that he was a convicted murderer. In the present case, on the other hand, the current offense involves status as a life prisoner. Where the criminal offense requires a showing that the defendant is serving a life sentence, it is not apparent that the nature of the prior conviction would be more prejudicial than the fact that the defendant has been convicted of crimes, the sentence for which is life in prison. Jurors likely would assume that only very serious offenses would result in a life sentence. (See *People v. Hernandez* (2003) 30 Cal.4th 835, 879 (conc. opn. of Baxter, J.) [“the extreme penalties of death and life without parole must be reserved for the most serious and heinous of offenses”].)

We also reject Garcia's assertion that the evidence that Garcia was trying to kill Acosta was weak and the jury likely would not have convicted Garcia of count 2 had it not known of his prior convictions for attempted murder. Witnesses testified that both Garcia and Alvarado used prison-made weapons to stab and strike Acosta. They continued to attack him despite repeated commands to stop. A witness testified that when the alarm sounded, Garcia and Alvarado intensified their attack. They were on top of Acosta and stabbed at his head and upper torso. Garcia was shot with a rubber bullet, but he continued to assault Acosta. Even pepper spray failed to subdue Garcia. His accomplice Alvarado was shot with a rifle, but Garcia continued his attack. Correctional Officer Torres testified that he shot Alvarado because he "feared for [Acosta's] life." Acosta suffered puncture wounds to his head, back, and arms. The use of weapons, the fact that Garcia acted in concert with Alvarado, and the focused and relentless nature of the attack created a strong inference that Garcia intended to kill (and not merely assault) the victim.

In light of the strong evidence of Garcia's guilt and the trial court's limiting instruction, we conclude that it is not reasonably probable that Garcia would have obtained a more favorable result if defense counsel had requested a stipulation that he was serving a life sentence.

V. Sentencing

Finally, Garcia contends that the trial court abused its discretion by imposing the terms for counts 1 and 3 to run consecutively. At the sentencing hearing, the trial court indicated that it intended to follow the recommendation in the probation officer's sentencing report. The report provided, "This officer is recommending consecutive sentencing be imposed in regards to Count[s] I and III as they were [1] independent of one another, [2] involved [separate] victims, and [3] were committed at different times."

After hearing argument from counsel, the trial court concluded, "At this point in time, given the defendant's record ... and ... what I would consider the aggressive nature

of the attack, that the recommended sentence is the one required by law and should be followed.”

Garcia points out that the probation report identifies three aggravating factors, but the first and third factors are factually incorrect. Counts 1 and 3 were not independent of each other—Torres shot Alvarado (count 1) because of the assault of Acosta (count 3)—and the offenses were not committed at different times. Garcia also argues that the trial court may have believed it was required to impose consecutive sentences.

“It is well established that a trial court has discretion to determine whether several sentences are to run concurrently or consecutively. [Citations.] In the absence of a clear showing of abuse, the trial court’s discretion in this respect is not to be disturbed on appeal. [Citation.] Discretion is abused when the court exceeds the bounds of reason, all of the circumstances being considered. [Citations.]” (*People v. Bradford* (1976) 17 Cal.3d 8, 20.)

As the probation report correctly noted, there were separate victims in this case, Alvarado and Acosta. Multiple victims properly may be considered an aggravating factor in deciding whether to impose concurrent or consecutive terms. (*People v. Valenzuela* (1995) 40 Cal.App.4th 358, 365.) The trial court could also take into account the “aggressive nature of the attack.” (See *People v. Williams* (1996) 46 Cal.App.4th 1767, 1782 [“viciousness” of crime was appropriate aggravating factor for imposing upper term].) We see nothing in the record to indicate that the trial court’s decision “exceeds the bounds of reason.” (*People v. Bradford, supra*, 17 Cal.3d at p. 20.)

Nor are we convinced that the trial court’s remarks demonstrate that it incorrectly believed it was required by law to impose consecutive sentences. The trial court stated, “the recommended sentence is the one required by law and should be followed.” The People note that this statement came directly after a discussion about the number of enhancements that could be imposed under section 667, subdivision (a)(1), for Garcia’s

two prior criminal cases, which had resulted in at least 10 felony convictions. The subject of whether consecutive terms should be imposed for each count was not discussed at all.

After reading the hearing transcript, we do not believe the trial court was under the mistaken impression that the law required the imposition of consecutive terms. However, even assuming the court incorrectly believed consecutive terms were required by law, we see no reason to remand this case for resentencing. Given the court’s observation of the “aggressive nature of the attack” and the statement that the recommendation “should be followed,” we are confident that, on remand, the trial court would impose consecutive sentences as a matter of discretion. (*People v. Williams, supra*, 46 Cal.App.4th at p. 1783 [“We are confident that, under the circumstances, an order of remand for a clarified statement of reasons [for the court’s sentencing decision] would be no more than an idle act”].)

DISPOSITION

The conviction under section 4501, count 4, is reversed. The trial court shall forward the amended abstract of judgment, omitting the conviction, to appropriate prison authorities. The judgment is affirmed in all other respects.

Wiseman, Acting P.J.

WE CONCUR:

Poochigian, J.

Franson, J.