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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN ALEJANDRO AGUILA,

Defendant and Appellant.

F068593

(Super. Ct. No. 12CM7489B)

**OPINION**

APPEAL from a judgment of the Superior Court of Kings County. Donna L. Tarter, Judge.

James Bisnow, under appointment by the Court of Appeal; Law Offices of Ron E. Rayes and Ron E. Rayes for Defendant and Appellant.

Kamala D. Harris, Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and John G. McLean, Deputy Attorneys General, for Plaintiff and Respondent.

Juan Alejandro Aguila was convicted of two counts of attempted willful, deliberate and premeditated murder. Two enhancements for personal use of a firearm resulting in great bodily injury were also found true. Aguila argues there is insufficient evidence to support the verdict, and he received ineffective assistance of counsel. We reject each of these arguments. We will remand the matter to the trial court to correct a minor error in the sentencing minute order and the abstract of judgment, but otherwise affirm the judgment.

## **FACTUAL AND PROCEDURAL SUMMARY**

### ***The Information***

The information charged Aguila with the attempted murder of Vanessa Gutierrez and Francisco Mendoza (Pen. Code, §§ 187, subd. (a), 664).<sup>1</sup> Each count also alleged the crime was committed willfully, deliberately and with premeditation within the meaning of section 664, subdivision (a), that Aguila personally inflicted great bodily injury within the meaning of section 12022.7, subdivision (a), and that he personally and intentionally discharged a firearm within the meaning of section 12022.53, subdivision (d).

### ***The Evidence***

Anna Guizar attended a birthday party for Audel Cervantes on the date in question. Eventually a group ended up in front of Mendoza's apartment with a keg of beer. Mendoza's house was about four houses down from Cervantes's residence. At one point a dark vehicle with five people inside pulled up to Mendoza's apartment. The occupants went inside the apartment to socialize. After a while, an argument began, which eventually included Mendoza, Gutierrez and a lady from the vehicle. The lady, who was the driver of the vehicle, then made a phone call. She appeared to be angry while on the phone. The lady and her companions then left the gathering.

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<sup>1</sup> All statutory references are to the Penal Code unless otherwise stated.

The group at the party decided to return to Cervantes's residence to continue the party. After about five minutes or so, Mendoza and Gutierrez returned to Mendoza's apartment to lock the doors. About 10 minutes later, Guizar heard shooting and then saw Mendoza and Gutierrez run to the back of the apartment.

Audel Cervantes testified in a similar manner. He was having a party to celebrate his 21st birthday. At one point, the party moved to Mendoza's apartment. A vehicle arrived and about four people from the vehicle joined the party. An argument ensued between Mendoza and a lady from the vehicle. Cervantes asked the group to leave because they were not invited and were causing problems. The group was still yelling as they left. The party returned to Cervantes's residence. A short while later Cervantes heard gunshots. When he ran out the back, Cervantes saw Gutierrez lying on the ground.

Vanessa Gutierrez testified the party was at Mendoza's house when she arrived at about 10:30 p.m. Gutierrez heard an argument began between Mendoza and a woman that lasted about 20 minutes. The woman eventually left the party. The party moved to Cervantes's house a short while later. At around this time, Gutierrez took a short walk. As she was returning to Mendoza's apartment, she saw a vehicle stopped near Mendoza's apartment. Someone exited the vehicle as Gutierrez approached the apartment. Mendoza was walking toward Gutierrez and the two met in front of Cervantes's apartment. The man who had exited the vehicle began shooting at the two of them. Gutierrez ran towards the back of the house. Gutierrez thought she was shot five times. She had to have surgery, and one of the bullets could not be removed. At the time of trial, Gutierrez was in custody charged with conspiracy to bring marijuana into the prison.

Francisco Javier Mendoza admitted he did not want to testify in this case because he did not want to be a snitch. He claimed he could not remember either Cervantes or his party, where he lived before he was arrested, and if he had ever been shot. He denied anyone called him Harvey. Essentially, Mendoza claimed he could not remember anything about his past, which the trial court found to be a feigned loss of memory.

Through several witnesses, the prosecution established the woman with whom Mendoza was arguing was Beatrice Gonzalez. Gonzalez was married to Mendoza's cousin. Aguila, whose nickname is Alla, is Gonzalez's son.

Sergeant William Smith of the Corcoran Police Department responded to the scene of the shooting on the day in question. He contacted the two victims in the backyard of an apartment. Both victims were bleeding and seeking assistance. Smith recognized both Gutierrez and Mendoza from previous contacts. Emergency medical personnel arrived within approximately two minutes and both victims were transported to the hospital.

Smith attempted to record his initial conversation with Mendoza, but Mendoza refused to speak with him. Mendoza became more cooperative when Smith turned the recorder off. Four spent shell casings were found in the front of the residence, as were four bullet strikes to the front of the residence.

The identity of the person who shot Mendoza was introduced through the testimony of various law enforcement officials. Detective Smith testified that when he spoke with Mendoza at the scene, Mendoza identified the person who shot him as his cousin, Alla.

Sergeant Pedro Castro, who interviewed Mendoza after Mendoza was released from the hospital, testified that Mendoza explained that he was at a party at a friend's house. Mendoza again identified the person who shot him as his cousin's wife's son, Alla. Mendoza identified a photo of Aguila as Alla, the person who shot him. Mendoza also told Castro that Aguila was in a brown sedan.

Detective Alex Chavarria of the Corcoran Police Department interviewed Mendoza at the hospital. Mendoza refused to speak with Chavarria in a recorded conversation, but did speak to him when the recorder was turned off. Mendoza explained that his cousin, Hugo, and his wife, Beatrice, arrived at the party late and an argument ensued. The two eventually left the party. About 30 minutes later a brown sedan

returned to the complex. Beatrice's son, Alla, exited the vehicle and shot Mendoza and Gutierrez.

Chavarria also spoke with Mendoza at the courthouse the day before he testified. Mendoza stated he did not want to testify because he would be labeled a snitch. He also said he was mad at the district attorney's office because they refused to provide any assistance with the charges he was currently facing.

Officer Sergio Moran of the Corcoran Police Department spoke with Mike Aguila. The interview took place at Mike Aguila's house. In the driveway of the house was a beige or light tan sedan. Mike Aguila told Moran that his grandson, Victor Aguila, had access to the sedan. Mike Aguila also told Moran that neither Victor nor Aguila was home the night of the shooting, and they had left in the sedan, but the vehicle was home when he awoke at 4:30 that morning. Moran arrested both Aguila and Victor Aguila. He also confiscated their cell phones and took them to the police station.

Chavarria retrieved some text messages from Aguila's phone. Of particular interest were some messages sent between an individual identified as Lucky and Aguila.<sup>2</sup> At 1:59 a.m. on the day in question, which was shortly before the shooting, Aguila sent a text message to Lucky asking in which apartment Harvey lived. Lucky responded, "IDK" (I don't know). Lucky also inquired why Aguila was interested. Aguila replied, "[j]ust wonderin. Is it like the third or second one?"

The next set of messages were sent beginning at 3:59 a.m., shortly after the shooting. The first is a message from Lucky to Aguila, and says "WTF, you niggas shot my cousin, and now it is like I set him up. What kind of shit is that?" Aguila replied, "You didn't. I am gonna talk to you in person soon. Don't speak though." The next message is again from Aguila to Lucky and said, "But I don't [know] what you're talking about though."

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<sup>2</sup> Chavarria's attempts to determine the true name of Lucky were unsuccessful.

Both Victor Aguila and Aguila were tested for gunshot residue. A single particle of gunshot residue was found on the sample taken from Aguila's right palm.

### ***Closing Arguments, Verdict, Sentence***

The prosecutor argued the elements of the case were all proven, and Aguila was conclusively identified as the perpetrator. Defense counsel argued the only issue in the case was the identity of the perpetrator, and the only evidence connecting Aguila to the crime was Mendoza's identification. He then argued Mendoza was not believable for a variety of reasons, including his past criminal conduct, his trial testimony, and the conditions under which the identification was made. In her rebuttal argument, the prosecutor pointed out the corroborating evidence that supported Mendoza's identification to the police, including the type of vehicle seen at the scene was the same type of vehicle available to Aguila and his brother, and the text messages sent by Aguila both before and after the shooting.

The jury found Aguila guilty as charged, and found all of the enhancements true. The trial court sentenced Aguila to the prescribed terms of life for each count of attempted murder, enhanced by 25 years to life on each count for personal use of a firearm.

## **DISCUSSION**

### ***Sufficiency of the Evidence***

Mirroring defense counsel's closing argument, Aguila argues the evidence is insufficient to support the verdict because Mendoza failed to identify him at trial as the perpetrator, and his statements to the police in which he did identify Aguila as the perpetrator were not believable.

To assess the evidence's sufficiency, we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances true beyond a reasonable doubt. (*People v. Maury* (2003) 30 Cal.4th 342, 403 (*Maury*)). The record must disclose substantial evidence to support the

verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*Id.* at p. 396.) In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Boyer* (2006) 38 Cal.4th 412, 480.) “Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” (*Maury, supra*, at p. 403.) A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’” the jury’s verdict. (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

The same standard governs in cases where the prosecution relies primarily on circumstantial evidence. (*Maury, supra*, 30 Cal.4th at p. 396.) We “must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]” (*Ibid.*) “Although it is the jury’s duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant’s guilt beyond a reasonable doubt. [Citation.]” (*People v. Kraft* (2000) 23 Cal.4th 978, 1053–1054 (*Kraft*)). Where the circumstances reasonably justify the trier of fact’s findings, a reviewing court’s conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment’s reversal. (*Id.* at p. 1054.)

Aguila begins by asserting the prosecution failed to prove beyond a reasonable doubt that Aguila had a motive to attempt to murder Gutierrez and Mendoza. He asserts the prosecution’s evidence that Aguila’s mother argued with Mendoza and/or Gutierrez

shortly before the shooting does not prove he had a motive to shoot the victims. We agree that a motive for the shooting was not proved beyond a reasonable doubt, but motive is not an element of the crime and this failure is not relevant. (See, e.g., CALCRIM No. 370.)

Next, Aguila argues Mendoza's out of court statements identifying Aguila as the perpetrator is not evidence that is reasonable, credible, and of solid value. We disagree. Mendoza knew Aguila as a member of his extended family, and positively identified him three times to three different officers of the Corcoran Police Department. He also identified him in a photo. The facts that Mendoza had an extensive criminal history, had been drinking before the shooting, and was only shown a single photo to identify Aguila, (instead of a group of photos commonly referred to as a six-pack) were all presented to the jury to argue that Mendoza's identification was not reliable.

Aguila also argues the text messages sent by Aguila did not prove he was guilty beyond a reasonable doubt. While we agree the text messages alone are not substantial evidence of Aguila's guilt, these messages were corroborating evidence that, when combined with Mendoza's identification, provided substantial evidence to support the verdict.

The jury, whose job it was to weigh the evidence, rejected each of the arguments Aguila makes to this court. We are not permitted to reweigh the evidence and, therefore, reject this argument.

### ***Ineffective Assistance of Counsel***

Aguila argues his trial counsel failed to object to four separate parts of the testimony resulting in defense counsel being ineffective and thereby violating his Sixth Amendment right to assistance of counsel. (*Strickland v. Washington* (1984) 466 U.S. 668, 686.)

A defendant is entitled to a new trial if he received ineffective assistance of counsel at trial. (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1036.) "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, [the] defendant would have obtained a more favorable result. [Citations.] A 'reasonable probability' is one that is enough to undermine confidence in the outcome. [Citations.] [¶] Our review is deferential; we make every effort to avoid the distorting effects of hindsight and to evaluate counsel's conduct from counsel's perspective at the time. [Citation.] A court must indulge a strong presumption that counsel's acts were within the wide range of reasonable professional assistance. [Citation.] ... Nevertheless, deference is not abdication; it cannot shield counsel's performance from meaningful scrutiny or automatically validate challenged acts and omissions. [Citation.]" (*People v. Dennis* (1998) 17 Cal.4th 468, 540–541.)

“If the record contains an explanation for the challenged aspect of counsel's representation, the reviewing court must determine ‘whether the explanation demonstrates that counsel was reasonably competent and acting as a conscientious, diligent advocate.’ [Citation.] On the other hand, if 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.)

Aguila's claim that defense counsel was ineffective because he failed to object to some items of evidence brings into consideration additional principles. “Generally, failure to make objections is a matter of trial tactics as to which we will not exercise judicial hindsight. [Citation.] ‘[Counsel's] conduct should not be judged by appellate courts in the harsh light of hindsight ... and except in rare cases, an appellate court should not attempt to second-guess trial counsel.’ [Citation.] ‘It is not sufficient to

allege merely that the attorney's tactics were poor, or that the case might have been handled more effectively ... Rather, the defendant must affirmatively show that the omissions of defense counsel involved a critical issue, and that the omissions cannot be explained on the basis of any knowledgeable choice of tactics.' [Citations.]" (*People v. Lanphear* (1980) 26 Cal.3d 814, 828–829, overruled on other grounds in *People v. McKinnon* (2011) 52 Cal.4th 610, 638–643.)

### ***The Photograph***

With these principles in mind, we turn to the specific arguments made by Aguila. The first argument relates to the photograph of Aguila identified by Mendoza. Sergeant Pedro Castro testified he met with Mendoza shortly after he had been released from the hospital. Castro showed Mendoza a single photograph. Mendoza identified the person in the photograph as Aguila. Mendoza then initialed the photograph. The photograph was entered into evidence.

On cross-examination, defense counsel asked Castro to explain a six-pack of photographs, and confirmed that in this case Mendoza was not shown a six-pack of photographs. Defense counsel concluded his cross-examination by pointing out Mendoza had only a single photograph from which to choose.

The prosecution's redirect was limited to the issue of why a six-pack of photographs was not used in this case. Castro explained that "both the victims had already advised the other officer he knew the identity of the shooter," so the reason he was shown a photograph was to make sure they had identified the correct Mr. Aguila (inferring the police did not erroneously identify Victor Aguila).

Aguila argues defense counsel was ineffective for failing to object to the explanation provided by Castro for choosing to show Mendoza a single photograph. First, Aguila argues Castro's statement was a conclusion of law and his personal belief. Aguila misreads the record. We begin by observing that defense counsel's questioning inevitably led to the prosecutor's redirect examination. Defense counsel challenged the

failure to show Mendoza a six-pack of photographs, thereby inferring the identification by Mendoza was not reliable, which was a reasonable tactical choice. Once this criticism was raised by defense counsel, it was inevitable the prosecutor would have Castro explain why he did not show Mendoza a six-pack of photographs.

We also note that Castro's testimony was inconsistent in one respect with the testimony. He began his response by suggesting both victims had identified Aguila, but the conclusion to his response was that "he" knew the shooter. Since one victim was a woman, the reference to "he" referred to Mendoza. While this was an area that defense counsel could have chosen to clarify on recross-examination, the failure to do so did not result in ineffective assistance of counsel. Gutierrez testified at trial that she could not identify the person who shot her, and no officer ever testified that Gutierrez identified Aguila as the person who shot her. Accordingly, defense counsel could have made the reasonable tactical choice to refrain from clarifying a point that was already clear.

We reject Aguila's suggestion that Castro's statement was one of personal belief and a conclusion of law. A fair reading of the record establishes that Castro testified that he showed Mendoza only a single photograph because Mendoza had previously identified Aguila as the person who shot him. Detective Smith testified before Castro that Mendoza had identified Aguila as the person who shot him. Therefore, Castro's statement merely summarized the information he had before he met with Mendoza, and was not an opinion or legal conclusion.

Aguila also argues Castro's statement was hearsay. However, an objection on this basis would have been met with an explanation that the statement was not being offered for the truth of the matter, but only to explain Castro's decision to show Mendoza a single photograph. A statement not offered for its truth is not hearsay. Defense counsel was not ineffective for failing to object on this basis. Accordingly, we reject the claim of ineffective assistance of counsel for failing to object to Castro's testimony.

### ***Suppression of Mendoza's Identification***

Aguila next argues defense counsel was ineffective for failing to move to suppress the photograph identification because the procedure used by Castro was unduly suggestive.

“A pretrial identification procedure violates a defendant’s due process rights if it is so impermissibly suggestive that it creates a very substantial likelihood of irreparable misidentification. The defendant bears the burden of proving unfairness as a ‘demonstrable reality,’ not just speculation. [Citations.]

“On review we must consider the totality of the circumstances to determine whether the identification procedure was unconstitutionally suggestive. We must resolve all evidentiary conflicts in favor of the trial court’s findings and uphold them if supported by substantial evidence. [Citation.]” (*People v. Contreras* (1993) 17 Cal.App.4th 813, 819.)

We reject Aguila’s argument for at least two reasons. While there was only a single photograph shown to Mendoza, there is not any possibility of an irreparable misidentification. Mendoza had identified the perpetrator before being shown the picture, a person to whom he was related and he personally knew. The photograph was merely a confirmation of the information previously provided by Mendoza. Second, Aguila cannot prove the alleged unfairness was a demonstrable reality. This is not a case where the police were trying to identify the perpetrator. Mendoza had already done so on two prior occasions (at the scene and at the hospital). Accordingly, trial counsel was not ineffective for failing to make a meritless objection. (*People v. Thompson* (2010) 49 Cal.4th 79, 122 (*Thompson*).)

### ***Impeachment of Mike Aguila***

Mike Aguila is Aguila’s grandfather. He testified he owned a tan sedan to which Aguila and his brother had access. He also testified that on the night in question, both Aguila and his brother were home when he went to bed about 8:00 p.m. Mike Aguila did not recall telling a police officer that Aguila and his brother were not home that night and

that they had left in the sedan. Corcoran Police Department Officer Sergio Moran testified that when he interviewed Mike Aguila the morning of the shooting, Mike Aguila said Aguila and his brother were not at home the previous night, and they had borrowed the sedan.

Aguila asserts defense counsel was ineffective because he failed to object when the prosecutor elicited testimony about Mike Aguila's former statements. The statements were elicited to impeach Mike Aguila's trial testimony pursuant to Evidence Code section 1235, which allows hearsay statements to be introduced if they are inconsistent with the declarant's testimony at the hearing.

Aguila argues that because Mike testified he could not remember telling the police that Aguila and his brother had left in the tan sedan on the night in question, it was impermissible to impeach him with his out of court statement. (*People v. Sam* (1969) 71 Cal.2d 194, 210 [right of impeachment does not exist where witness does not have a recollection of the fact on which he was examined].)

To the extent Aguila's argument could be construed to suggest that it was improper to impeach Mike Aguila with his prior statement that Aguila and his brother were not at home on the night in question, we would reject the argument. Mike Aguila testified at trial that Aguila and his brother were home when he went to bed, and he did not know if they left that night. Therefore, Mike Aguila's statement to Moran that Aguila and his brother were not home on the night in question was proper impeachment.

To the extent Aguila is arguing defense counsel was ineffective because he failed to object to Moran's testimony that Mike Aguila told him that he (Mike Aguila) had given Aguila and his brother permission to drive the tan sedan on the night in question, it appears that if an objection had been made on this specific ground, the trial court probably should have sustained the objection.

However, the fact defense counsel failed to make a meritorious objection does not establish that he was ineffective. As stated above, to establish ineffective assistance of

counsel, Aguila must demonstrate counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, and there is a reasonable probability that if defense counsel had objected Aguila would have obtained a more favorable result. (*People v. Dennis, supra*, 17 Cal.4th at pp. 540–541.) Aguila cannot prevail on either prong of this analysis.

This first prong of the analysis requires Aguila to demonstrate defense counsel's performance fell below an objective standard of reasonableness. Where, as here, there is no explanation for defense counsel's failure to object, Aguila must demonstrate there is no satisfactory explanation for the failure to do so. (*People v. Cudjo, supra*, 6 Cal.4th at p. 623.) Aguila did not attempt to make such a showing in his brief. Keeping in mind that making objections is a matter of trial tactics that we should generally not second-guess (*People v. Lanphear, supra*, 26 Cal.3d at pp. 828–829), it appears there is a satisfactory explanation for the failure to object. The critical part of Moran's testimony was his proper impeachment of Mike Aguila's trial testimony that on the day after the shooting Mike Aguila told Moran that Aguila and his brother were not home the previous evening. Moran's testimony that the two had left in the tan sedan was not as significant. Defense counsel could reasonably have determined that an objection to that limited aspect of Moran's testimony would have emphasized the damaging portion of the testimony and, therefore, the better choice was to not object at all.

The same reasoning also demonstrates why Aguila cannot meet his burden on the second prong of the ineffective assistance of counsel analysis. In this prong, Aguila is required to demonstrate that had defense counsel objected it is reasonably probable he would have obtained a more favorable result at trial. Once again, Aguila has not explained in his brief why exclusion of Moran's testimony that Mike Aguila told him Aguila and his brother left in the tan sedan would lead to a reasonable probability of a better result for Aguila. The omission is likely because no such possibility exists. Mike Aguila testified at trial that Aguila and his brother used the tan sedan, although only

Aguila's brother was supposed to drive the vehicle. Moran testified that Mike Aguila told him the morning after the shooting that Aguila and his brother were not home that night, leading to the inference that the two left the house in the tan sedan. Moreover, whether the two left in the tan sedan or some other vehicle was not a critical aspect of the case. It was undisputed that a vehicle was used to drive the perpetrator to and from Mendoza's residence. The issue was the identity of the perpetrator. The critical evidence in the case was Mendoza's positive identification of Aguila as the perpetrator.

It is true that Mendoza identified the vehicle in which the perpetrator arrived as a brown sedan, but he did not identify the vehicle as belonging to Aguila or Mike Aguila. Mike Aguila's testimony that Aguila and his brother had access to a tan sedan adequately corroborated this portion of Mendoza's testimony.

We recognize that Moran's testimony that Mike Aguila told him that Aguila and his brother left in the tan sedan on the night in question also corroborated Mendoza's testimony. However, since Mike Aguila testified that Aguila and his brother had access to the tan sedan, the corroboration provided by Moran's testimony was only slight at best.

We conclude it is not reasonably probable that Aguila would have obtained a better result had the trial court excluded Moran's testimony on this topic after a timely objection. Accordingly, Aguila cannot establish either prong of the ineffective assistance of counsel analysis, and we reject his claim.

### ***Unlawful Search***

Aguila argues defense counsel should have moved to suppress the text messages recovered from his phone as an unlawful warrantless search. He cites *Riley v. California* (2014) \_\_\_ U.S. \_\_\_ [134 S.Ct. 2473] as authority for his argument. The United States Supreme Court held in *Riley* that generally police must secure a warrant before conducting a search of a cell phone. (*Id.* at pp. \_\_\_ [134 S.Ct. at pp. 2485, 2493–2494].)

However, *Riley* was decided on June 25, 2014. This case was tried in 2013. Prior to *Riley*, binding California Supreme Court precedent held that a warrant was not

required to search a cell phone seized during a defendant's lawful arrest. (*People v. Diaz* (2011) 51 Cal.4th 84, 88, 93.) Therefore, at the time of trial, had defense counsel objected to the text messages on Fourth Amendment grounds, the trial court would have overruled the objection. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) Once again, defense counsel is not ineffective for failing to make a meritless objection. (*Thompson, supra*, 49 Cal.4th at p. 122.)

### ***Sentencing***

Aguila asserts the trial court improperly sentenced him to a term of seven years to life on each count of attempted murder. The argument is largely one of semantics, but the People concede that technically the trial court erred.

Section 664, subdivision (a), prescribes the sentence for attempted murder that is “willful, deliberate, and premeditated murder” as “imprisonment in the state prison for life with the possibility of parole.” Section 3046, subdivision (a), provides that a prisoner sentenced to life in prison shall not be eligible for parole for the longer of seven years or the term prescribed by any other provision of law (e.g., § 12022.53, subd. (d), which provides for a minimum term of 25 years before a prisoner is eligible for parole). The parties agree that no other provision of law is applicable in this case and, therefore, Aguila must serve a minimum of seven years before he is eligible for parole on each attempted murder count.<sup>3</sup> Hence, the seven year to life sentence imposed by the trial court.

Aguila argues, and the People concede, the correct sentence is life in prison with the possibility of parole, and the trial court erred in imposing a seven year to life sentence. (*People v. Favor* (2012) 54 Cal.4th 868, 875 [sentence for a defendant convicted of attempted willful, deliberate, and premeditated murder is life with the

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<sup>3</sup> For the purposes of this argument we are ignoring the two section 12022.53, subdivision (d) enhancements.

possibility of parole].) While the error is relatively insignificant, we will remand the matter to the trial court to prepare a corrected sentencing minute order as well as a corrected abstract of judgment to accurately reflect the statutory language for the two attempted murder counts.

**DISPOSITION**

The judgment is affirmed, but the matter is remanded to the trial court to prepare a corrected sentencing minute order and a corrected abstract of judgment that will reflect the statutory sentence for the attempted murder counts.

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KANE, J.

WE CONCUR:

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LEVY, Acting P.J.

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SMITH, J.