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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. TONY EUGENE ARMSTER et al., Defendants and Appellants.	E038151 (Super.Ct.No. RIF108728) O P I N I O N

APPEAL from the Superior Court of Riverside County. Vilia G. Sherman, Judge. Affirmed with directions.

Christine Vento, under appointment by the Court of Appeal, for Defendant and Appellant Tony Eugene Armster.

Corinne S. Shulman, under appointment by the Court of Appeal, for Defendant and Appellant Manuel Varela.

Sharon M. Jones, under appointment by the Court of Appeal, for Defendant and Appellant Reina Delores Reyes.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Pamela Ratner Sobeck, Supervising Deputy Attorney General, and Ronald A. Jakob, Deputy Attorney General, for Plaintiff and Respondent.

I. INTRODUCTION

In a third amended information, Tony Armster, Manuel Varela, and Reina Reyes were charged with one count of conspiracy to commit murder (Pen. Code, § 182, subd. (a)(1);[1] count 1), five counts of willful, deliberate, and premeditated attempted murder (§§ 664, 187, subd. (a); counts 2-6), one count of assault with a firearm (§ 245, subd. (a)(2); count 7), and one count of discharging a firearm at an inhabited dwelling (§ 246; count 8). Reyes was also charged with one count of making criminal threats. (§ 422; count 9.) As to Armster and Varela, various firearm enhancements within the meaning of sections 12022.53, subdivisions (c) and (d) and 12022.5, subdivision (a) were alleged in counts 1 through 8.[2] As to Reyes, it was alleged a principal was armed with a firearm in counts 1 through 6 and 8, within the meaning of section 12022, subdivision (a)(1).

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[1] All further statutory references are to the Penal Code unless otherwise indicated.

[2] Specifically, in counts 1 through 6 it was alleged that Armster and Varela personally discharged a firearm causing great bodily injury (§ 12022.53, subd. (d)); in counts 2 through 6, that they personally discharged a firearm (§ 12022.53, subd. (c)) and personally used a firearm (§ 12022.5, subd. (a)); in count 7, that they personally used a firearm (§ 12022.5, subd. (a)(1)); and, finally, in count 8, that they personally discharged a firearm causing great bodily injury (§ 12022.53, subd.(d)), personally discharged a firearm (§ 12022.53, subd. (c)), and personally used a firearm (§§ 667, 1192.7, subd. (c)(8)).

All of the charges stemmed from a March 4, 2003, drive-by shooting at a home in Moreno Valley. The home belonged to the Salazar family, including 20-year-old Justin Salazar, his younger brother Jeramie Salazar, and their parents, Ronald and Christina Salazar. The four members of the Salazar family and two other persons, namely, Denise Yrigoyen, and her boyfriend, Michael Rodarte, were in the Salazar house at the time of the shooting. Michael suffered a bullet wound to his chest, but survived. All three defendants were passengers in a white Ford Taurus. The driver of the Taurus was Donzelle Benton. After the Taurus drove by the Salazar house several times, five or more shots were fired from the passenger side of the Taurus at the Salazar house. Benton was originally charged with defendants, but entered into a plea agreement before trial and testified for the prosecution.

The third amended information charged defendants with conspiracy to murder Justin Salazar (count 1), the willful, deliberate, and premeditated attempted murders of Justin Salazar (count 2), Jeramie Salazar (count 3), Christina Salazar (count 4), Ronald Salazar (count 5), and Michael Rodarte (count 6). Although Denise was present in the Salazar house at the time of the shooting, defendants were not charged with attempting to murder Denise. They were, however, charged with assaulting Denise with a firearm (count 7), and with shooting at an inhabited dwelling (count 8). Only Reyes was charged with making criminal threats to Justin Salazar (count 9).

The parties stipulated to two juries, one for Armster and Varela and a separate jury for Reyes. Armster and Varela were found guilty as charged, and all firearm allegations were found true. Reyes was found guilty as charged on counts 1, 2, and 6 through 9, but

not guilty on counts 3 and 4. A mistrial was declared on count 5 and count 5 was dismissed after Reyes's jury was unable to reach a verdict. The Reyes jury found the firearm allegations true on counts 1, 2, 6, and 8. Armster and Varela were each sentenced to 235 years to life, plus five years in state prison.[3] Reyes was sentenced to 39 years to life, plus 12 years 8 months.[4]

Defendants appeal, with each joining the others' contentions. Defendants first contend there is insufficient evidence of intent to kill to support their conspiracy to commit murder and attempted murder convictions, and insufficient evidence to support any of their attempted murder convictions under a kill zone theory. We find sufficient evidence of intent to kill to support each defendant's convictions in counts 1 through 6. Second, defendants contend the prosecutor improperly vouched for the credibility of prosecution witness Benton in several respects. We find no improper vouching.

Third, fourth and fifth, defendants raise claims of instructional error. Specifically, they contend the trial court erroneously: (1) failed to instruct sua sponte on the lesser

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[3] Armster's and Varela's sentences consisted of 25 years to life on count 1 (the conspiracy to commit murder), consecutive life terms on counts 2 through 6 (the premeditated, attempted murders), plus 25 years to life for each of the seven personal discharge enhancements (on counts 1 through 6 and 8), plus five years on count 8 (shooting at an inhabited dwelling). Additional terms were imposed but stayed on count 7 (assault with a firearm) and the remaining firearm enhancements on all counts.

[4] Reyes's sentence consisted of 25 years to life on count 1, plus two consecutive life terms on counts 2 and 6, with minimum parole eligibility periods (MPEDs) of seven years on counts 2 and 6, plus one year on count 7, plus the upper term of seven years on count 8, plus eight months on count 9, plus one year for each armed enhancement in counts 1, 2, 6, and 8.

included offense of attempted voluntary manslaughter based on heat of passion in counts 2 through 6, the premeditated, attempted murder counts; (2) refused to instruct on the lesser related offenses of assault with a firearm and shooting at an occupied dwelling in counts 2 through 6; and (3) failed to instruct on the *Dewberry*[5] principle on the premeditated, attempted murder counts. We find no instructional error. There was no evidence that any defendant acted in the heat of passion in counts 2 through 6; the trial court had no duty to instruct on any lesser related offenses; and the juries were properly instructed on the *Dewberry* principle in counts 2 through 6.

Sixth, Varela and Armster claim that the section 12022.53, subdivisions (c) and (d) enhancements were erroneously imposed on count 1, the conspiracy count, because conspiracy is not a crime listed in section 12022.53. We reject this contention, because section 12022.53 enhancements apply to felonies punishable by life in prison, which includes conspiracy to commit murder.

Defendants also raise several claims of sentencing error. First, they claim their separate 25-year-to-life sentences on count 1 for conspiracy to commit murder should have been stayed in view of their separate consecutive straight-life sentences for the attempted murder of Justin in count 2. We agree with this contention, because the evidence showed that defendants' intent and objective in counts 1 and 2 were the same, namely, the murder of Justin. There was no evidence that defendants harbored a different and broader objective, other than the murder of Justin, in count 1.

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[5] *People v. Dewberry* (1959) 51 Cal.2d 548.

Reyes further claims that her consecutive sentence on count 7 (assault with a firearm) should have been stayed in view of her consecutive sentence on count 8 (shooting an inhabited dwelling). Lastly, defendants claim the trial court abused its discretion in imposing consecutive sentences on all counts, and their consecutive sentences and Reyes's upper term sentence on count 8 violate their right to a jury trial under *Blakely*.[6] We find each of these claims without merit.

Accordingly, we modify the judgments to stay defendants' sentences and enhancements on count 1, the conspiracy to commit murder count. In all other respects, we affirm the judgments.

II. FACTS AND PROCEDURAL HISTORY

A. *Prosecution Evidence Presented to Both Juries*

1. Relationship of Parties, Victims, and Witnesses

On March 4, 2003, Justin, then age 20, lived in a house on Briana Street in Moreno Valley with his parents, Ronald and Christina, and his younger brother, Jeramie. Denise and her boyfriend Michael were friends with Jeramie and lived across the street from the Salazars.

Roque Viernes, Jr. was defendant Reyes's boyfriend. On March 4, 2003, Roque was 19 years old, and Reyes was 18 years old. Since April 2002, Reyes and Roque had been living with Roque's parents in a house on Sun Valley Road in Moreno Valley. The Viernes house was approximately a five-minute walk and a two-minute drive from the

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[6] *Blakely v. Washington* (2004) 542 U.S. 296 [124 S.Ct. 2531, 159 L.Ed.2d 403].

Salazar house. Roque and Justin were good friends, and had known each other since middle school.

Defendants Varela and Reyes are brother and sister. Donzelle Benton lived with his aunt, Joe Ann Sanford-Keough, and Varela in Perris. Defendant Armster was the boyfriend of Benton's cousin.

2. Events Preceding the Shooting

On March 4, 2003, Roque and Reyes had an argument at Roque's house. Later that day, Roque went to the Salazar house. There, Christina told Roque that, according to her husband Ronald, Reyes had been cheating on Roque. Then Justin came home and, according to Roque, confirmed that Reyes had been cheating and advised Roque to break up with Reyes.[7] Justin denied telling Roque to break up with Reyes. Instead, he said he told Roque to "do whatever you have to do to make your situation right."

Roque returned home, where he continued arguing with Reyes. He told Reyes that Justin said she had been cheating on him, he was breaking up with her, and she had to move out of his house. Reyes "didn't like it" and "didn't want to take it." Roque called Justin to help him move Reyes's belongings out of his house, and to tell Reyes he knew she had been having an affair. Reyes wanted Justin to come over so she could confront him.

[7] Several months earlier, Justin told Roque he had a videotape that would prove Reyes was having an affair, but Justin never gave Roque the videotape.

Justin came over to Roque's house, and Reyes began arguing with Justin. Justin told Reyes her relationship with Roque was over because she had cheated on him.[8] Reyes denied cheating on Roque. She called Justin a "fat mother-fucker" and "a liar," and called Justin and his father Ronald "some lying mother-fuckers." According to Roque, Reyes was acting "[k]ind of like violent" and "crazy." She started "jumping in [Justin's] face," swung her arms at him, and was yelling, "Hit me, hit me."

Eventually, Reyes became frustrated and walked away from Justin. She returned a few minutes later, holding a phone to her ear. She smiled and told Justin, "'*I'm going to fucking kill you, got a bullet with your name on it, and I'm going to call my brother to come shoot your house*.'" (Italics added.) She appeared angry and "dead serious." Justin said, "You know where I'm at" and went home.

After Justin left Roque's house, Roque again told Reyes to leave his house. Reyes left, returned about 10 minutes later, and continued arguing with Roque. At this point, Reyes angrily told Roque that she was going to stab Justin "in his fat heart." Reyes made another phone call and left the house. Roque did not know whom Reyes called.

In the meantime, Justin returned home, told his parents that Reyes had threatened his life, and called 911 to report the threat. Then, Roque called Justin and told him about Reyes's latest threat to stab Justin in his "fat heart." Roque sounded very frightened. At

[8] Justin testified that, after Reyes started swearing at him and denied cheating on Roque, he said to her, "That's what this is all about? About what? I don't even know what to tell you."

this point, Ronald and Christina were at home, and Jeramie, Michael, and Denise had arrived at the Salazar home for dinner.

3. Benton's Testimony

Benton testified that Reyes called Sanford-Keough's house and spoke with Varela on March 4. Benton and Armster were present when Reyes called. Varela then asked Benton to give him a ride to Moreno Valley, explaining there was an emergency involving Reyes, and they needed to pick up Reyes at Roque's house. Within several minutes of Reyes's call, Benton drove to Roque's house in Benton's white "police issue" Ford Taurus. Armster sat in the front passenger seat and Varela sat in the backseat. On the way, Varela angrily said, "'I'm going to F him up if he put his hands on my sister.'" Benton did not know and did not ask Varela who he was talking about.

When Benton, Armster, and Varela arrived at Roque's house, Reyes came outside with some other people, who appeared to be Roque's parents. She was angry, and spoke with Armster and Varela. Someone said to Reyes, "please don't go do this." The conversation lasted approximately one minute, then defendants and Benton got into the Taurus. Benton drove, with Armster in the front passenger seat, Varela in the right rear passenger seat, and Reyes in the left rear passenger seat.

Reyes and Varela directed Benton to Briana Street. On the way, Reyes and Varela talked with each other. They were both angry, and said they were "looking for two guys." Either Varela or Reyes instructed Benton to drive slowly up and down Briana Street several times, as they looked for the Salazar house. Varela indicated he wanted to

go to the door and talk to the people in the house, but Reyes told him not to because the people had guns.

After driving by the Salazar house several times, Benton drove back toward Roque's house on Sun Valley Road. But instead of stopping at Roque's house, Armster directed Benton to drive to his friend's house, explaining he needed to pick up something and wanted to be prepared. Benton, Varela, and Reyes stayed in the car while Armster went into his friend's house for a few minutes. When he returned, Armster said, "mine has three" and something to the effect of "it's a throw-away."

Varela then asked Benton to drive back to Briana Street one more time. On the way, Varela told Reyes, "'We can do this later. We can come back.'" But Reyes replied, "'No, I want to do it'" and "'I want them to feel it.'" Varela said, "'[Benton] won't let us shoot out of his car.'" Then, shortly before the shooting, either Reyes or Varela said, "'Are you ready?'"

Benton heard shots coming from the rear passenger side of the car, where Varela was sitting. Then he saw a flash from Armster's gun. After that, the shots "ran together." As the shots were being fired, Benton slowed the car to a near stop in front of the Salazar house. All three defendants yelled, "'Don't stop. Drive, drive, drive.'" Benton quickly sped away, spinning his tires. Benton said he did not know there was going to be a shooting, but he had "bad feelings that something bad was going to happen."

4. Events at the Salazar House

After Justin returned home and called 911 to report Reyes's threat, Ronald was in Jeramie's upstairs bedroom, watching the street. The Taurus drove by the house several times. All of the lights in the house were on. The occupants of the Taurus leaned over and looked at the house. After the Taurus left, Justin, Jeramie, and Michael went outside for a couple of minutes, but came back inside after Ronald told them to come in. Ronald turned off the light in Jeramie's room.

Later, Benton, Armster, Varela, and Reyes returned in the Taurus. At this point, Ronald was still looking out the upstairs window, with the lights turned off. The other lights in the house were still on. Denise was looking out the living room window next to the front door. Justin and Michael were standing inside the closed front door. Christina was in the kitchen calling 911. Jeramie was either in the living room or in the kitchen with Christina.

Christina heard a "flurry" of gunfire with no less than five shots. Ronald observed four or five rapid-fire shots from the rear seat and one louder shot with a bigger flash from the right front passenger seat. Armster looked up at the upstairs window, and Ronald backed away from the window. No more shots were fired.

The front profile of the Salazar house was small. There was a garage in the front, facing the street. The front door and one living room window were to the right of the garage. Four upstairs bedroom windows also faced the street. There were blinds on all of the windows and the kitchen was in the back of the house. There was a security door in front of the front door.

One of the bullets pierced the security door and front door and struck Michael in the chest. Another bullet lodged in the living room windowsill above where Denise was standing. No one other than Michael was hit. After Michael fell to the ground, Justin and Denise dragged him into the kitchen. Michael removed his shirt and blood began "pouring" out of the bullet wound. Michael said "he couldn't breathe and he was afraid he was going to die." Justin told the 911 operator to hurry because the situation had become chaotic. Everyone huddled together on the kitchen floor. Paramedics and sheriff's deputies arrived, and Michael was taken to the hospital.

Michael had severe pain for two weeks. At the time of trial, two years after the shooting, the bullet was still in Michael's body. He continued to experience "real bad chest pains" in cold weather.

5. Events Following the Shooting

Following the shooting, Reyes told Benton where to drive. As they drove away from the Salazar house, Armster and Varela threw their guns out of the Taurus windows. A sheriff's helicopter illuminated and circled the Taurus as it was heading southbound on Perris Boulevard. Benton pulled over and everyone got out of the car. Reyes told Armster and Varela to urinate on their hands to wash away any gunpowder. Varela was unable to urinate, so Armster urinated on Varela's hands. A few minutes later, sheriff's deputies arrived and arrested Benton, Armster, Varela, and Reyes. The arrests took place between three and five miles from the Salazar house.

Armster's and Varela's hands were tested for gunshot residue (GSR). Several highly specific particles of GSR were found on Varela's left hand. No GSR was found

on Varela's right hand or on either of Armster's hands. Steven Dowell, a GSR analyst, testified that the application of urine can remove GSR. He also said the absence of GSR is an "inconclusive finding" since certain firearms or the circumstances of a particular discharge may not result in any GSR.

The investigation of the crime scene showed that approximately five shots were fired at the Salazar house. A bullet hole in the security door and front door corresponded with the bullet that struck Michael. There were also several bullet holes in the eaves on the front of the house and in the front windowsill above where Denise was standing in the living room. Four expended shell casings were found in the street in front of the house. There were three .22-caliber casings and one .380-caliber casing.

Detective Gregory Bonaime found a Jennings .22-caliber semiautomatic handgun in the roadway at Indian and Iris Streets across from a Moreno Valley elementary school. The gun was wet from fog and rain. Test fires from the Jennings handgun produced chamber marks which corresponded with those on the three .22-caliber casings found in front of the Salazar house. No .380-caliber weapon was ever found.

B. *Prosecution Evidence Presented Only to the Reyes Jury*

Detective Bonaime interviewed Reyes after the shooting. Initially, Reyes denied threatening Justin and said she was at Roque's house at the time of the shooting. She later admitted she was involved in a confrontation with Justin and telling him, "'If I had a gun right now I would kill you.'"

Reyes denied going to the Salazar house on the night of the shooting. She said Benton, Armster, and Varela picked her up at Roque's house, then the four of them drove

south to Perris Boulevard where they were apprehended. Reyes said Benton was the driver, Armster was in the front passenger seat, Varela was in the right rear passenger seat, and she was in the left rear passenger seat.

Reyes described two black semi-automatic handguns, and said Varela threw both guns out the window on the way to Perris Boulevard. Reyes directed deputies to the location where the .22-caliber Jennings handgun was found. She said the second gun, which deputies were unable to locate, was larger than the Jennings.

C. *Defense Case*

1. Evidence Presented to Both Juries

Armster testified in his own defense. On March 4, 2003, he ate dinner at Sanford-Keough's house, and was standing on the porch smoking a cigarette when Varela arrived. Varela told him they had to pick up his sister, Reyes, because she had been in a fight with her boyfriend and had threatened to kill herself.

Benton drove Varela and Armster to Moreno Valley in the Taurus. Armster was in the right front passenger seat and Varela was in the rear backseat. There were no weapons in the car. Varela was very upset and said that if anyone put his hands on his sister he would "kick his ass." When they arrived at Roque's house, Reyes came outside and spoke to Varela and two older adults on the front porch. Reyes was upset and crying. Someone said, "'You don't have to leave.'" Benton, Armster, Varela, and Reyes then got into the Taurus, with Reyes in the left rear passenger seat, Varela in the right rear passenger seat, and Armster in the front passenger seat.

Benton drove to Briana Street in Moreno Valley, while Varela and Reyes talked in the backseat. They drove up and down Briana Street a couple of times. Varela said he wanted to go up to the door and talk to the father and son. However, someone said, "'No, don't go up because they might have guns.'" Varela replied, "'Well, that's not what I'm here for. I want to talk to them, so I'm not worried about that.'" Varela and Reyes continued to talk or argue as Benton drove by the house two or three more times.

According to Armster, the last time they slowed in front of the house on Briana Street, an unidentified Hispanic male ran toward their car with a chrome gun, and fired it three times. Everyone yelled, "'Go, go, go, drive, drive, drive,'" as Benton sped away with tires screeching. Varela was angry, and asked Reyes what was going on. Armster denied retrieving a gun from a house and denied having a gun. He did not see Varela fire a weapon, but he saw something black on Varela's lap, which may have been a gun. He did not see anyone throw any weapons out of the car.

After the car was illuminated by the helicopter, Armster and Varela told Benton to pull over. Armster denied he and Varela urinated on their hands. He told detectives he did not know anything about a shooting, and he denied he was at a house on Briana Street. When asked what had happened, he told the detectives, "'You've got to do what you've got to do.'" Armster testified he meant to say he had to get a hold of his parents and the detectives would have to contact his attorney.

Neither Varela nor Reyes testified. Nor did Reyes present any evidence in her defense.

2. Testimony Presented Only to the Armster/Varela Jury

Armster denied he tried to intimidate Benton, or told Benton what to say before he spoke with his aunt, Sanford-Keough, or the district attorney's office. Armster also denied ever being in the same holding cell as Benton. Armster testified he did not "really" talk about the shooting with Sanford-Keough when she asked him whether he was one of the shooters. Instead, he would "go around" her questions.

Varela presented evidence that, when interviewed by Detective Todd Grimm, Ronald indicated he heard three shots fired from the front passenger side of the Taurus. When interviewed by Deputy Daniel Decker, Denise indicated she was looking at the car through some blinds when she saw the flash of a muzzle from a gun, heard three gunshots, dropped to the floor, and heard Michael say he had been shot. Denise said the bullets came from the right front passenger side of the car where a bald male was seated.

D. *Rebuttal*

1. Testimony Presented to Both Juries

Benton's aunt, Sanford-Keough, testified as a rebuttal witness for the prosecution. According to Sanford-Keough, Armster was her daughter's boyfriend, and Armster and Varela lived with her at the time of the shooting. Benton, Armster, and Varela left the house together on March 4, 2003, approximately 10 minutes after Reyes called. Later that night, she discovered the four of them had been arrested.

During the two-year period between the arrests and the trial, Sanford-Keough spoke with Armster 40 or 50 times. When she asked him what happened on the night of March 4, he did not "admit to shooting anything. He just said he did his part. He wasn't

alone." However, he admitted he was "involved" eight or ten times. Several times, Sanford-Keough told Armster that Benton had spoken with people in the district attorney's office, and he should do the same.

Benton reaffirmed that he saw Armster fire a shot out the front window of his car and he heard, but did not see, shots being fired from the rear of the car, from where Varela was sitting. Benton did not see any Hispanic man crouching or running near the car. He reiterated that Armster directed them to a friend's house after picking up Reyes and prior to the shooting. Benton stopped for the helicopter without anyone telling him to pull over. He did not hear Varela talk about a father and son. The "two guys" Varela and Reyes were looking for were not a father and son.

At the request of his wife and children, Benton decided to talk to representatives of the district attorney's office. Benton pleaded guilty to every count that was charged against him in exchange for a sentence of 22 years 4 months, and his agreement to testify truthfully against defendants. He had not been sentenced as of the time of trial.

Deputy Lance Colmer interviewed Armster following his arrest. Armster told Colmer that he rode in the car from Perris to Moreno Valley. They stopped at a residence on Sun Valley Road, drove around the block a few times, and ended up on Perris Boulevard. When the deputy mentioned the shooting, Armster said he had no idea what the deputy was talking about. Armster appeared angry and frustrated, and was defensive. He did not mention he saw a Hispanic man with a gun or a black object on Varela's lap.

2. Testimony Presented Only to the Armster/Varela Jury

Benton was in protective custody for a year and a half. He was in the same holding cell as Varela and Armster a few times before he was placed in protective custody. When he was in the general jail population, Varela told him that "if anything was ever said by anybody that the paper would be put out and they would be taken care of." When Varela said this, Benton felt threatened. After Benton went to the district attorney's office, Armster and Varela often called him a "'[s]nitch'" and "'F-ing B[itch].'" At the time of trial, Benton still felt threatened.

III. DISCUSSION

A. *Substantial Evidence Supports the Conspiracy and Attempted Murder Convictions*

Armster contends that insufficient evidence supports his conspiracy and attempted murder convictions because, he argues, there was no evidence he intended to kill Justin or anyone else in the Salazar house. He separately contends there is insufficient evidence that he concurrently intended to kill anyone in the Salazar house under the kill zone doctrine. Varela and Reyes join these contentions.

We conclude that substantial evidence supports each defendant's conspiracy and attempted murder convictions. The evidence showed that defendants conspired to murder Justin, and specifically intended to kill Justin. The evidence also showed that, in order to kill Justin, defendants concurrently intended to kill anyone who was in the Salazar house *and* who either was or may have been in the line of the shots fired at the house. These persons included Jeramie, Ronald, Christina, Michael and Denise.

1. Background

All three defendants were convicted of conspiracy to commit murder in count 1. Reyes was convicted of attempting to murder Justin (count 2) and Michael (count 6). Armster and Varela were convicted of attempting to murder Justin (count 2), Jeramie (count 3), Christina (count 4), Ronald (count 5) and Michael (count 6.) None of the defendants were charged with attempting to murder Denise. Instead, they were each charged and convicted of assaulting Denise with a firearm (count 7), and of shooting at an occupied dwelling (count 8). Reyes was also charged and convicted of making criminal threats to Justin (count 9).

2. Standard of Review

"'"When the sufficiency of the evidence is challenged on appeal, the court must review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt."'" (*People v. Hill* (1998) 17 Cal.4th 800, 848-849.) We must presume in support of the judgment the existence of every fact the trier of fact could have reasonably deduced from the evidence. (*People v. Kraft* (2000) 23 Cal.4th 978, 1053.) The same standard of review applies when a conviction rests primarily on circumstantial evidence. (*People v. Perez* (1992) 2 Cal.4th 1117, 1124.)

"'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]'" (*People v.*

Thomas (1992) 2 Cal.4th 489, 514.) Reversal is warranted only where it clearly appears that "upon no hypothesis whatever is there sufficient substantial evidence" to support the conviction. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

3. Applicable Law

(a) *Conspiracy*

"A conviction of conspiracy requires proof that the defendant and another person had the specific intent to agree or conspire to commit an offense, as well as the specific intent to commit the elements of that offense, together with proof of the commission of an overt act 'by one or more of the parties to such agreement' in furtherance of the conspiracy." (*People v. Morante* (1999) 20 Cal.4th 403, 416.) Conspiracy to commit murder requires proof that the defendant was "one of the participants who harbored the specific intent to kill." (*People v. Petznick* (2003) 114 Cal.App.4th 663, 680-681.)

It is not necessary to show that the conspirators met and actually agreed to commit the offense which was the object of the conspiracy. Instead, the agreement or unlawful design of conspiracy may be proved by circumstantial evidence. (*People v. Zamora* (1976) 18 Cal.3d 538, 559.) "The circumstances from which a conspiratorial agreement may be inferred include 'the conduct of defendants in mutually carrying out a common illegal purpose, the nature of the act done, the relationship of the parties [and] the interests of the alleged conspirators . . . .'" (*People v. Superior Court (Quinteros)* (1993) 13 Cal.App.4th 12, 20-21.)

(b) *Attempted Murder*

"Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing." (*People v. Lee* (2003) 31 Cal.4th 613, 623.) "Intent to unlawfully kill and express malice are, in essence, 'one and the same.' . . . Express malice requires a showing that the assailant '"'either desire[s] the result [i.e., death] or know[s], to a substantial certainty, that the result will occur.' . . . ."'" (*People v. Smith* (2005) 37 Cal.4th 733, 739, citations omitted.)

Intent to kill is rarely proved by direct evidence; rather, it must usually be inferred from circumstantial evidence. (*People v. Ramos* (2004) 121 Cal.App.4th 1194, 1207-1208.) Indeed, "One who intentionally attempts to kill another does not often declare his state of mind either before, at, or after the moment he shoots. Absent such direct evidence, the intent obviously must be derived from all the circumstances of the attempt, including the putative killer's actions and words. . . ." (*People v. Lashley* (1991) 1 Cal.App.4th 938, 945-946.)

Furthermore, "[t]o be guilty of attempted murder, the defendant must intend to kill the alleged victim, not someone else." (*People v. Bland* (2002) 28 Cal.4th 313, 328.) Where, however, the defendant intends to kill one victim (the primary victim), and the "means employed" in attempting to kill the primary victim "create a zone of harm around that victim, the factfinder can reasonably infer that the defendant intended [to kill] all who are in the anticipated zone." (*Id*. at pp. 329-330.) The defendant's intent to kill others in the anticipated zone of harm or kill zone is *concurrent with* his intent to kill the

primary victim. A concurrent intent to kill everyone within an anticipated "kill zone" may be inferred from "'the nature and scope of the attack.'" (*Ibid.*)[9]

For example, "'an assailant who places a bomb on a commercial airplane intending to harm a primary target on board ensures by this method of attack that all passengers will be killed. Similarly, consider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a "kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim.'" (*People v. Bland, supra,* 28 Cal.4th at pp. 329-330.)

In *People v. Vang* (2001) 87 Cal.App.4th 554, two defendants shot multiple rounds at two occupied dwellings, using "high-powered, wall-piercing weapons." (*Id.* at pp. 557-558, 564.) Multiple attempted murder convictions were affirmed against both defendants -- one for each person in the two dwellings -- even though the defendants may have intended to target only one person in each dwelling and could not see and were not

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9 In accordance with this principle, the jury was given CALJIC No. 8.66.1, which stated: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. [This zone of risk is termed the 'kill zone.'] The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a ['kill zone'] [zone of risk] is an issue to be decided by you."

even necessarily aware of how many other people were in each dwelling. (*Id*. at p. 564.) The court said, "The jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." (*Id*. at pp. 563-564.)

4. Analysis and Conclusions

Here, substantial, circumstantial evidence showed that all three defendants agreed to kill Justin and specifically intended to kill Justin. The evidence also showed that all three defendants concurrently intended to kill anyone who either was or may have been in the line of fire of the bullets defendants fired at the front door and front window area of the Salazar house. These persons included Jeramie, Ronald, Christina, Michael, and Denise.

First, Reyes told Justin she had a bullet with his name on it, and she was going to call her brother, Varela, and "shoot up" Justin's house. She also told Justin that he and his father, Ronald, were "lying mother-fuckers," indicating she knew or at least believed that Justin and Ronald had accused her of cheating on Roque. Then, after Reyes called Varela in Perris, Benton drove Armster and Varela to Moreno Valley, and Reyes met with Armster and Varela outside Roque's house. Immediately thereafter, all three defendants got into Benton's Taurus, and Benton drove defendants to Briana Street and the Salazar house.

Benton drove defendants by the Salazar house several times. Varela was already armed. Armster stopped at a friend's house and obtained a "throw away" handgun. Then defendants returned to the Salazar house. From the passenger side of the Taurus, Armster and Varela simultaneously opened fire on the front door and front living room window area of the house. Together, they fired five or more shots. One bullet pierced the front door, and others struck the top front windowsill and eaves of the house.

Based on this evidence, the juries could have reasonably inferred that Reyes told Armster and Varela she wanted to kill Justin by "shooting up" the Salazar house, and kill anyone else who might get in the way. The juries could have also reasonably inferred that Armster and Varela shared Reyes's specific intent to kill Justin, and her concurrent intent to kill anyone else in the Salazar house, based on their conversations with Reyes and their actions of firing five or more shots at the front of the Salazar house.

Varela argues that only three of the six people in the Salazar house at the time of the shooting, namely, Justin, Michael, and Denise, were in the kill zone, that is, near the front door where the shots were fired. The other three, he argues, were not in the kill zone. Ronald was upstairs looking out Jeramie's bedroom window, and Christina and Jeramie were in the kitchen. Valera reasons that here, unlike in *Vang*, there was no hail of bullets, no evidence of the use of a high velocity weapon, and "no evidence that shots were indiscriminately fired at the entire residence, which might arguably make the entire residence and all persons located therein with[in] a kill zone."

We disagree with Varela's view of the evidence and the kill zone doctrine. Defendants' act of firing five or more shots at the Salazar house showed they harbored a

specific intent to kill Justin, and a concurrent, specific intent to kill anyone else who *might have been* in their line of fire. In *Vang*, the court concluded that "[t]he jury drew a reasonable inference, in light of the placement of the shots, the number of shots, and the use of high-powered, wall-piercing weapons, that defendants harbored a specific intent to kill every living being within the residences they shot up. . . . The fact they could not see all of their victims did not somehow negate their express malice or intent to kill as to those victims who were present and in harm's way, but fortuitously were not killed." (*People v. Vang, supra,* 87 Cal.App.4th at pp. 563-564.)

Here, too, the juries drew a reasonable inference, in light of the number of shots fired at the house, and the use of at least one weapon strong enough to pierce a security door and front door, that defendants intended to kill everyone who *might have been* in their line of fire. This includes all six persons who were in the house. The fact that Ronald, Christina, and Jeramie were not in the immediate area where the defendants' bullets happened to land, or that defendants could not see and did not know that six persons were in the house, does not negate their express malice and intent to kill everyone who *might have been* in their line of fire. Defendants' actions evidenced an intent to kill everyone who was in the house.

In sum, substantial evidence supports defendants' convictions for conspiracy in count 1, because the evidence showed that all three defendants conspired to kill Justin and specifically intended to kill Justin. Substantial evidence also supports defendants' convictions for attempted murder in counts 2 through 6, because the evidence showed that all three defendants specifically intended to kill Justin, and concurrently intended to

kill everyone else who was in the Salazar house and who either was or may have been in the way of the bullets defendants fired at the house.

B. *The Prosecutor Did Not Improperly Vouch for the Credibility of Witness Benton*

Armster contends the prosecutor vouched for the credibility of Benton during her rebuttal case, by eliciting testimony from Benton that the judge, not the prosecutor, was the final arbiter of whether he had testified truthfully at trial. This, Armster argues, suggested that the judge or the prosecutor had taken steps outside the record to assure Benton's truthfulness.

Armster also claims the prosecutor vouched for Benton's credibility during her opening statement, and again during her rebuttal argument, by making statements suggesting she was personally assuring the jury of Benton's credibility. Varela and Reyes join these claims without further argument. We conclude that no improper vouching occurred.[10]

1. Applicable Law

A prosecutor is not permitted to vouch for the credibility of a witness based on her personal experiences or beliefs, or on other evidence outside the record. (*People v. Frye*

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[10] As a preliminary matter, the Attorney General argues defendants have waived or forfeited their improper vouching claims, because none of them objected to or sought curative admonitions regarding any of the prosecutor's statements in the trial court. (See, e.g., *People v. Visciotti* (1992) 2 Cal.4th 1, 79 [failure to object and request admonition precludes review of improper vouching claim on appeal, where admonition could have cured any harm].) In anticipation of this argument, defendants alternatively argue that their trial counsel were ineffective in failing to object and request admonitions. Notwithstanding whether defendants have failed to preserve their improper vouching claims for appeal, we find the claims without merit.

(1998) 18 Cal.4th 894, 971.) Improper vouching generally "'"involves an attempt to bolster a witness by reference to facts outside the record."'" (*People v. Huggins* (2006) 38 Cal.4th 175, 206.) Thus, it is improper vouching for a prosecutor to offer the impression that the prosecutor or the government has taken steps, outside the record, to compel, assure, or guarantee a witness's truthfulness at trial. (*People v. Frye*, *supra*, at p. 971; *United States v. Brown* (9th Cir. 1983) 720 F.2d 1059, 1073-1074.)

2. The Judge as the Final Arbiter of Benton's Truthfulness

We first address Armster's claim that the prosecutor improperly vouched for the credibility of Benton during her rebuttal case, when she established that the judge, rather than she, was the final arbiter of Benton's truthfulness pursuant to the terms of Benton's plea agreement. In order to place this evidence in context, we briefly recount the defense evidence that preceded it.

(a) *Background*

Armster testified in his own defense, and Armster's version of events suggested that Benton was not credible. Thus, the prosecutor recalled Benton during her rebuttal case. In her direct examination of Benton, the prosecutor established that, unlike Armster, Benton did not see a Hispanic man run toward the Taurus and fire shots. Nor did he hear anyone in the Taurus mention seeing such a man. Benton also contradicted other aspects of Armster's testimony.

The prosecutor also asked Benton why he had decided to talk to or cooperate with the district attorney's office. Benton responded that his wife and children had asked him to, and he denied that anyone had threatened or coerced him into talking to the district

attorney's office. Next, the prosecutor showed Benton a copy of his plea agreement, and established that he had not been forced or coerced into signing it. The prosecutor also established that, pursuant to the agreement, Benton pleaded guilty to unspecified charges in exchange for a 22-year 4-month prison sentence.

In cross-examining Benton on behalf of Armster, Attorney Bruce Karey attacked Benton's credibility by showing he had avoided "three or four different life sentences" by entering into the plea agreement. Karey also showed that Benton had not been entirely truthful with deputies following his arrest. Karey then established that Benton had not been sentenced as of the time of trial, and suggested his plea agreement gave him a motive to testify, not truthfully, but to what the prosecutor wanted him to say. Karey asked Benton, "*The deal that you've made with the People is not complete until you've been sentenced?*" (Italics added.) Benton answered, "I guess so. I guess that's correct." Karey then asked, "*If you did not testify in this trial, you would not get the deal you made. Is that your understanding?*" (Italics added.) Benton answered, "Correct."

In the prosecutor's redirect examination of Benton, the following colloquy took place:

"[Prosecutor:] "And so that we're clear, that No. 11 said -- it says a judge of the Superior Court shall be the final arbiter. It's not me, right? It's your understanding that I'm not [the one] to make the final determination about the quality of your testimony; is that right?

"[Benton:] Okay. That's what it says.

"[Prosecutor:] And it's not anybody in my office who was the final arbiter as to the truthfulness of your testimony, and you initialed that part that said it's a judge of the Superior Court, right?

"[Benton:] Correct."

Benton's plea agreement was later admitted into evidence on the prosecution's motion, and without objection. Then, in closing argument, the prosecutor said, "*And so that we're clear and so that you recall that [Benton] was clear, there was nothing that the district attorney did. It is up to the judge. She is the final arbiter . . . .*" (Italics added.)

(b) *Analysis*

Armster argues that, by pointing out to the jury that the judge was the final arbiter of whether Benton testified truthfully, the prosecutor improperly "implied that the government had taken steps to assure the veracity of witness Benton's testimony." (Underlining omitted.) More specifically, Armster argues, "[t]he clause in the plea agreement whereby a trial judge was the arbiter of whether Benton was being truthful [1] indicated to the jury that the government had taken steps to compel [Benton] to be truthful . . . [2] implied that the government had taken steps to assure the veracity of Benton's testimony . . . and [3] portrayed the prosecutor with the assistance of a judge as the guarantor of Benton's truthfulness." We disagree.

Nothing in Benton's plea agreement or the fact the judge was the "final arbiter" of Benton's truthfulness at trial implied or suggested that the judge, the prosecutor, or

anyone else had taken steps, either on or off the record, to compel, assure, or guarantee Benton's truthfulness.

Furthermore, the prosecutor had a duty to disclose to the jury anything her office had done to induce Benton to testify, including the existence of his plea agreement. (*People v. Frye, supra,* 18 Cal.4th at p. 971 and cases cited.) And, although the prosecutor was not necessarily required to present a verbatim recitation of the terms of the plea agreement (see *ibid.*), her rebuttal point that the judge, not she, was the final arbiter of Benton's truthfulness was a fair response to Attorney Karey's point, made in cross-examining Benton, that Benton "would not get the deal [he] made" unless he testified truthfully. This point suggested that the prosecutor would determine Benton's truthfulness, and Benton had a motive, based on his plea agreement, to testify to what the prosecutor wanted him to say. The prosecutor's rebuttal point that the judge was the final arbiter of Benton's truthfulness was a proper response to these suggestions.

Armster's reliance on *United States v. Brown, supra,* 720 F.2d. 1059 and *United States v. Roberts* (9th Cir. 1980) 618 F.2d 530 is misplaced. Both cases stand for the proposition that it is impermissible vouching for a prosecutor to imply that the government has taken steps outside the record to assure the veracity of its witnesses. Both cases are distinguishable from the present case, because both cases involved improper vouching based on evidence outside the record. (*United States v. Brown, supra,* at pp. 1069-1073 [prosecution presented evidence that witnesses could be believed because their plea agreements required them to submit to polygraph tests]; *United States v. Roberts, supra,* at pp. 535-536 [prosecution argued that witness could be believed

because police detective, who did not testify but was present in court, was there to assure he carried out his plea agreement and testified truthfully].)

Here, in contrast, the prosecutor did not tie Benton's credibility to any evidence outside the record. She did not suggest that Benton should be believed because the judge was the final arbiter of his truthfulness for purposes of his plea agreement. Nor did she suggest that she or the judge had any means of verifying Benton's truthfulness. Thus, the evidence that the judge, and not the prosecutor, was the final arbiter of Benton's truthfulness did not constitute improper vouching.

3. The Opening Statement and Rebuttal Argument Remarks

In her opening statement to the jury, the prosecutor said, "You're going to find, I think, that [Benton] is a very open and honest and meek individual." And in closing argument, the prosecutor, referring to Benton, said, "And he stood up and he said, 'This is what I know,' and he did so as best he could." Armster argues that, by making these remarks, the prosecutor personally assured the jury of Benton's credibility. We disagree.

Neither of the prosecutor's remarks personally assured the jury that Benton would be or was a credible witness, or constituted impermissible vouching. The opening remark told the jurors what the prosecutor believed they would find based on their own assessment of Benton and his testimony -- that is, that Benton was "open and honest" and credible. The rebuttal remark expressed the prosecutor's view of what the evidence had shown -- that is, that Benton had testified truthfully. As such, both remarks were permissible. (See. e.g., *People v. Ward* (2005) 36 Cal.4th 186, 216.)

Regarding the "I think" reference in the opening remark, Armster points to *United States v. Weatherspoon* (9th Cir. 2005) 410 F.3d 1142, 1147, footnote 3, where the court said, "In drawing the line between acceptable statements grounded on inferences from the evidence and unacceptable statements representing an improper suggestion of personal opinion, [courts] have been especially sensitive to the form of prosecutorial statements -- so that use of the prefatory phrase 'I submit' has been preferred to the use of 'I think,' in part because the latter is more *likely* to lead the jury to give undue credit to the statement that follows . . . ." (Italics added.)

Here, however, the prosecutor's use of "I think" in her opening remark, when considered in context, was not at all likely to cause the jury to give undue credit to the remark or construe it as a personal assurance of Benton's credibility. Instead, the jury must have understood the remark as telling the jurors what the prosecutor thought they would conclude based on their assessment of Benton and his testimony -- that is, that Benton was credible. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1001 [where claim is based on comments made by prosecutor before the jury, question is whether there is a reasonable likelihood the jury construed or applied the complained-of remarks in an objectionable fashion].)

C. *There Was No Evidence to Support Instructions on the Lesser Included Offense of Attempted Voluntary Manslaughter in Counts 2 Through 6*

Varela and Reyes contend the trial court erroneously failed to instruct their juries sua sponte in counts 2 through 6, on the lesser included offense of attempted voluntary manslaughter based on a sudden quarrel or heat of passion. Armster joins this contention

without additional argument. We conclude there was no evidence whatsoever to support instructions on attempted voluntary manslaughter based on heat of passion. Thus, the trial court did not err in failing to give such instructions sua sponte.

None of the defendants requested attempted voluntary manslaughter instructions in the trial court. Nevertheless, a trial court has a duty to instruct sua sponte on all lesser included offenses where there is substantial evidence that the lesser included offense, but not the greater, was committed. (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) A killing "upon a sudden quarrel or heat of passion" can negate the malice element of murder, and reduce the offense of murder to voluntary manslaughter. (*People v. Lee* (1999) 20 Cal.4th 47, 58-59; § 192, subd. (a).)

The factor that distinguishes the "heat of passion" form of voluntary manslaughter from murder is provocation. "The provocation . . . must be caused by the victim [citation], or be conduct reasonably believed by the defendant to have been engaged in by the victim." (*People v. Lee*, *supra*, 20 Cal.4th at p. 59.) The provocation must also "cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citations.] 'Heat of passion arises when "at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."' [Citation.]" (*Ibid.*)

Furthermore, where "'sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary

manslaughter . . . .'" (*People v. Breverman, supra*, 19 Cal.4th at p. 163.) "Heat of passion may not be based upon revenge." (*People v. Burnett* (1993) 12 Cal.App.4th 469, 478.) "[R]evenge does not qualify as a passion that will reduce a killing to manslaughter." (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.)

Here, there was no evidence that any of the defendants were reasonably provoked into attempting to kill Justin or anyone else in the Salazar house. Furthermore, it is specious to argue there was any such evidence. Defendants' belief that Justin had falsely claimed that Reyes had cheated on Roque and was responsible for Roque breaking up with Reyes was wholly insufficient, as a matter of law, to provoke a reasonable person of average disposition into attempting to kill Justin or anyone else in the Salazar house. Defendants clearly acted out of calculated revenge, rather than the heat of passion without due deliberation or reflection.

Furthermore, even if defendants had been adequately or reasonably provoked, a significant amount of time passed between the time they learned of Justin's cheating accusation and the time they shot at the Salazar house. After Reyes learned of Justin's accusation, she called Varela, who then spoke to Armster and Benton about driving from Perris to Moreno Valley to meet Reyes at Roque's house. Even by the time Armster, Varela, and Benton had reached Roque's house and met with Reyes, Reyes, Armster, and Varela had had sufficient time to reflect on their actions and cool off. And, after leaving Roque's house, Armster, Varela, Reyes, and Benton drove by the Salazar house several times, headed back toward Roque's house, went to a friend's house where Armster retrieved a gun, then went back to the Salazar house where they finally fired as many as

five shots at the house. By the time defendants shot at the Salazar house, they had had more than sufficient time to reflect on their actions.

Varela further contends this court should reduce his attempted murder convictions to attempted voluntary manslaughter because, he argues, there is no evidence he is guilty of attempted murder, only attempted voluntary manslaughter. Armster and Reyes join this contention without further argument. We reject this contention because, as discussed, there is no evidence that any of the defendants committed attempted voluntary manslaughter in counts 2 through 6, but not attempted murder.

D. *The Trial Court Properly Refused to Instruct on Two "Lesser Related" Offenses in Counts 2 Through 6*

At trial, Reyes's counsel requested, but the trial court refused to give, instructions on the "lesser related" offenses of assault with a deadly weapon (§ 245, subd. (a)(1)), and discharge of a firearm at an inhabited dwelling (§ 246), on the attempted murder charges in counts 2 through 6. On this appeal, Reyes contends the court's refusal to give these lesser related offense instructions violated her Sixth and Fourteenth Amendment rights to a jury trial and due process, including her right to present a defense. She argues the instructions were "intrinsic to [her] defense" because there was evidence from which her jury could have reasonably concluded that, although she wanted to frighten Justin by having her brother Varela "'shoot up his house,'" she did not harbor an intent to kill

Justin or any member of his family. Armster and Varela join this contention without further argument.[11]

We reject the contention as to all defendants. In *People v. Birks* (1998) 19 Cal.4th 108, the state Supreme Court held that trial courts do not have a duty to instruct on lesser related offenses without the prosecutor's permission. A rule requiring instructions on lesser related offenses, the court said, "gives the defendant a superior trial right to seek and obtain conviction for a lesser uncharged offense whose elements the prosecution has neither pled nor sought to prove." (*Id.* at pp. 112-113.) The court also observed that, in *Hopkins v. Reeves* (1998) 524 U.S. 88, 96-97 [118 S.Ct. 1895, 141 L.Ed.2d 76], the United States Supreme Court said it had "never suggested" that defendants are entitled to instructions on lesser related offenses under the federal Constitution. (*People v. Birks*, *supra*, at p. 124.) We are bound by the decision in *Birks*. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455; *People v. Martinez* (2002) 95 Cal.App.4th 581, 586.) Reyes's contention is in direct conflict with *Birks*, even though she characterizes her proffered lesser related offense instructions as defenses.

E. *The Juries Were Adequately Instructed on the Dewberry Principle*

Reyes contends the trial court prejudicially erred in failing to instruct her jury sua sponte on the *Dewberry* principle in relation to the premeditated attempted murder

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[11] As noted, of the five attempted murder charges in counts 2 through 6, Reyes was found guilty only on counts 2 *and* 6. Armster and Varela were found guilty on all five counts of attempted murder.

charges in counts 2 through 6. Armster and Varela join this contention without further argument.

The *Dewberry* principle holds that, where the evidence is sufficient to support a finding of guilt of a charged offense (here, premeditated attempted murder) and a lesser included offense (here, attempted murder without premeditation), the trial court must instruct the jury, sua sponte, that if it has a reasonable doubt which crime the defendant committed, it must give the defendant the benefit of the doubt and find him guilty of the lesser crime, provided it is convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime. (*People v. Dewberry*, *supra*, 51 Cal.2d at pp. 555-556; accord, *People v. Musselwhite* (1998) 17 Cal.4th 1216, 1262.)

Here, although CALJIC No. 17.10[12] was not given, the juries were given CALJIC No. 8.67. This instruction specifically instructed the juries that the People had the burden of proving the truth of the willful, deliberate, and premeditated allegations in counts 2 through 6, and if the juries had a reasonable doubt whether the allegations were true, it had to find them not true. (CALJIC No. 8.67.) Thus, CALJIC No. 8.67 satisfied the trial court's duty to instruct on the *Dewberry* principle in relation to the premeditated attempted murder charges.

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[12] CALJIC No. 17.10 states, in pertinent part: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him] [her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime."

F. *The Section 12022.53 Enhancements Were Properly Imposed on Count 1*

Valera contends his section 12022.53, subdivisions (c) and (d) enhancement on his conspiracy conviction in count 1 must be stricken, because section 12022.53 applies only to crimes that are listed in section 12022.53, subdivision (a), and conspiracy is not one of the listed crimes. Armster joins this claim without further argument. The claim does not apply to Reyes, because she was not charged with any section 12022.53 enhancements.

Valera misreads section 12022.53, subdivision (a). The statute provides that it applies to, among other crimes, "[a]ny felony punishable by death or imprisonment in the state prison for life." (§ 12022.53, subd. (a)(17).) Conspiracy to commit murder is a crime punishable by death or imprisonment in the state prison for life. More specifically, the punishment for conspiracy to commit murder is "that prescribed for murder in the first degree." (§ 182, subd. (a).) First degree murder is punishable "by death, imprisonment in the state prison for life without the possibility of parole, or imprisonment in the state prison for a term of 25 years to life." (§ 190, subd. (a).) The phrase, "imprisonment in the state prison for life" encompasses a 25-year-to-life term. (See *People v. Lopez* (2005) 34 Cal.4th 1002, 1007 and cases cited.)

G. *Section 654 Issues*

Varela and Reyes contend that the imposition of consecutive sentences on their conspiracy and attempted murder convictions violate section 654. Thus, they argue, either their conspiracy or attempted murder sentences must be stayed. Armster joins this contention, without further argument. Reyes further contends that her consecutive

sentence for assaulting Denise with a firearm in count 7 should be stayed, in light of her separate sentence for shooting at an occupied dwelling in count 8.

As pertinent here, all three defendants received 25-year-to-life sentences for their conspiracy convictions in count 1, and consecutive life sentences, with MPEDs of seven years each, for their respective attempted murder convictions (counts 2 and 6 for Reyes, counts 2 through 6 for Armster and Varela). Reyes was also sentenced to one year for assaulting Denise with a firearm (count 7), plus seven years for shooting at an inhabited dwelling (count 8). In contrast, Armster and Varela received three-year, stayed sentences for assaulting Denise with a firearm (count 7), and the midterm of five years for shooting at an inhabited dwelling (count 8).

We agree that defendants' 25-year-to-life sentences on count 1 (conspiracy to commit murder) should have been stayed in view of their separate life sentences on count 2 (attempted murder of Justin). We disagree, however, that Reyes's sentence on count 7 should have been stayed in view of her separate sentence on count 8.

1. Overview of Section 654

Section 654, subdivision (a) provides, in pertinent part, that "[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision. . . ."

"Section 654 precludes multiple punishments for a single act or indivisible course of conduct. [Citation.]" (*People v. Hester* (2000) 22 Cal.4th 290, 294.) "The purpose of section 654 is to prevent multiple punishment for a single act or omission [or indivisible

course of conduct], even though that act or omission [or indivisible course of conduct] violates more than one statute and thus constitutes more than one crime. . . ." (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1135; *People v. Harrison* (1989) 48 Cal.3d 321, 335.) Section 654 is intended to ensure that a defendant's punishment is "commensurate with his culpability." (*People v. Perez* (1979) 23 Cal.3d 545, 551.)

"It is defendant's intent and objective, not the temporal proximity of his offenses, which determine whether the transaction is indivisible." (*People v. Harrison, supra,* 48 Cal.3d at p. 335.) If the defendant's crimes "were merely incidental to, or were the means of accomplishing or facilitating one objective, [the] defendant may be found to have harbored a single intent and therefore may be punished only once." (*Ibid.*, citing *Neal v. State of California* (1960) 55 Cal.2d 11, 19.) Multiple punishment is proper, however, where the defendant entertained multiple criminal objectives which were independent of each other. (*People v. Harrison, supra*, at p. 335, citing *People v. Beamon* (1973) 8 Cal.3d 625, 639.)

2. Analysis

(a) *Defendants' Separate Sentences on Count 1 Violate Section 654*

Section 654 prohibits separate punishment for both conspiracy to commit murder and the substantive offense of murder, where the sole object of the conspiracy was to commit murder. (*People v. Moringlane* (1982) 127 Cal.App.3d 811, 819, disapproved on another ground in *People v. Jones* (1991) 53 Cal.3d 1115, 1144-1145; see also *People v. Hernandez* (2003) 30 Cal.4th 835, 866 and *People v. Lawley* (2002) 27 Cal.4th 102, 171-172.) Where, however, a conspiracy has "broader or different objectives" than the

commission of the substantive offense, separate punishment for the conspiracy is not prohibited. (*People v. Ramirez* (1987) 189 Cal.App.3d 603, 615-616.)

Reyes and Varela argue that their intent and objective in conspiring to commit murder (count 1) and in attempting to murder Justin (count 2) was the same, namely, the murder of Justin. Thus, they argue, their consecutive sentences on count 1 violate section 654, in light of their separate sentences on count 2. The Attorney General argues that the conspiracy to commit murder charge in count 1 had a broader and different objective than the murder of Justin or anyone else. This broader and different objective was "to criminally terrorize and intimidate anyone from interfering in Reyes's relationships in the future. By making an example of Justin, [defendants] were committing an act of street terrorism substantially similar to that typically committed by gang members to coerce 'respect' from others."

We agree with Reyes and Varela, and disagree with the Attorney General. There was no evidence that any of the defendants committed "an act of street terrorism similar to that typically committed by gang members to coerce 'respect' from others." Indeed, there was no expert testimony concerning what types of acts are "typically" committed by criminal street gangs or for what purposes. (See *People v. Gardeley* (1996) 14 Cal.4th 605, 617-626.) Thus, even when the evidence is viewed in the light most favorable to the judgment, there is no evidence that defendants' conspiracy to commit murder in count 1 had a broader and different objective than the murder of Justin.

However, to the extent defendants argue that any of their sentences on counts 2 through 6 should have been stayed based on their separate sentences on any of their *other*

attempted murder convictions, they disregard the rule that section 654 does not apply to "'crimes of violence against multiple victims.'" (*People v. King* (1993) 5 Cal.4th 59, 78.) Here, there were separate victims in each of counts 2 through 6, namely, Justin Salazar (count 2), Jeramie Salazar (count 3), Christina Salazar (count 4), Ronald Salazar (count 5), and Michael Rodarte (count 6). Thus, separate sentences were properly imposed on counts 2 through 6.

(b) *Reyes's Separate Sentences on Counts 7 and 8 Did Not Violate Section 654*

Reyes argues she had a single intent and objective, that of "shooting up the Salazar residence," in assaulting Denise with a firearm (count 7) and in shooting at an inhabited dwelling, the Salazar house (count 8). She also argues that each of the six victims of count 8 was also a victim of either (1) count 7, namely, Denise or (2) the attempted murders in counts 2 through 6. Thus, she argues, there were no "leftover victims" to support her separate sentence for assaulting Denise with a firearm.

We disagree with Reyes's analysis. As Reyes acknowledges, all six occupants of the house were victims of section 246. But Reyes, unlike Armster and Varela, was not convicted of nor separately punished for attempting to murder Jeramie, Christina, or Ronald in counts 3, 4, and 5. Nor was she convicted of any other crimes involving these three victims. Thus, here, Jeramie, Christina, and Ronald were all "leftover" victims of *Reyes's* section 246. (*People v. Garcia* (1995) 32 Cal.App.4th 1756, 1780-1785 [separate punishment for shooting at occupied vehicle and assault did not violate section 654 where each crime involved at least one different victim].) Thus, the trial court

properly refused to stay Reyes's sentence on count 7, and properly stayed Armster's and Varela's sentences on count 7.

H. *Upper Term and Consecutive Sentences*

In her opening brief, Reyes claimed the trial court's imposition of the aggravated sentence on count 8 and consecutive sentences on counts 1, 2, 6, 7, 8, and 9 violate her right to a jury trial under *Blakely*, because the sentences were not based on facts found true by a jury beyond a reasonable doubt. Armster and Varela joined these claims without further argument. They were each sentenced to consecutive terms on counts 1 through 6 and 8, but neither was sentenced to an aggravated term.

On January 5, 2007, we filed an unpublished opinion rejecting defendants' claims. Then, on January 22, the Supreme Court issued its decision in *Cunningham v. California* (2007) 549 U.S. ___ [127 S.Ct. 856, 860, 166 L.Ed.2d 856) (*Cunningham*), holding that the imposition of an upper term sentence under California's determinate sentencing law (DSL), based on a judge's factual findings, violates a defendant's federal constitutional right to a jury trial. The high court further held that the middle term is the maximum sentence a judge may impose under the DSL -- without the benefit of facts reflected in the jury's verdict -- that is, facts found true by the jury beyond a reasonable doubt -- or admitted by the defendant.

On January 31, Reyes petitioned this court for a rehearing on her sentencing issues based on *Cunningham*. She argued that the rule of *Cunningham* applies not only to upper term sentences but also to consecutive sentences that are imposed based on a judge's findings of fact. We granted the petition solely as to the issues raised in the petition,

namely, the effect of the *Cunningham* decision on the trial court's imposition of the upper term and consecutive sentences. We requested and received a response from the People. Varela and Armster joined the petition without further argument.

The People argue that defendants have forfeited their *Blakely/Cunningham* claims because they failed to object to their respective upper term and consecutive sentences in the trial court on the grounds they were not based on findings by a jury beyond a reasonable doubt. (*People v. Hill* (2005) 131 Cal.App.4th 1089, 1103 [defendant forfeited *Blakely* claim for failing to raise it at post-*Blakely* sentencing hearing].) The People point out that *Blakely* was filed on June 24, 2004, well before defendants were sentenced in May and June 2005, and *Cunningham* merely extended the rule announced in *Blakely* and earlier in *Apprendi v. New Jersey* (2000) 530 U.S. 466 [120 S.Ct. 2348, 147 L.Ed.2d 435].

We disagree that defendants have forfeited their claims of sentencing error as set forth in the petition for rehearing. *Cunningham* was decided well after defendants were sentenced and was the first United States Supreme Court decision to apply the rule of *Apprendi* and *Blakely* to an upper term sentence imposed under the DSL. A defendant cannot waive or forfeit a legal claim that was not recognized at the time of his trial or sentencing. (*People v. Esquibel* (2006) 143 Cal.App.4th 645, 660.)

Alternatively, the People argue that the *Cunningham* error in sentencing Reyes to the upper term on count 8 was harmless beyond a reasonable doubt. They argue that any reasonable jury would have found at least one of the trial court's factors in aggravation true beyond a reasonable doubt. (*Washington v. Recuenco* (2006) ___ U.S. ___ [126

S.Ct. 2546, 165 L.Ed.2d 466]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) They further argue that, because a single aggravating circumstance is sufficient to *authorize* the imposition of the upper term under state law (*People v. Osband* (1996) 13 Cal.4th 622, 728-729), a determination that a jury would have found at least one aggravating circumstance true beyond a reasonable doubt necessarily renders a *Cunningham* error harmless beyond a reasonable doubt.

As the People point out, in imposing the upper term on count 8 (shooting at an inhabited dwelling), the trial court said: "In my opinion, Ms. Reyes was the fulcrum of which the lever everybody else operated. She was the instigating factor and the leader of all of this. Without her, it wouldn't have happened. [¶] I realize she had no record, but I think she is going to get significantly less time than her male cohorts, which doesn't seem adequately just to me, since it was all her fault in the first place. I find this to be sufficiently aggravating a factor to impose the seven years, the aggravated term for the principal count."

Accordingly, the trial court clearly found that Reyes "induced others to participate in the commission of the crime or occupied a position of leadership or dominance of other participants in its commission," an aggravating circumstance under rule 4.421(a)(4) of the California Rules of Court.[13] The People argue that this particular finding was based on uncontested and overwhelming evidence. They note that Reyes insisted that Armster and Varela go through with the shooting despite their initial pleas to Reyes to

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[13] All further references to rules are to the California Rules of Court.

not "do this," and that Reyes further incited Armster and Varela by informing them that the people inside the Salazar house had guns.

First, we agree that a jury would have found beyond a reasonable doubt that Reyes occupied a position of leadership as it relates to the underlying conduct. The nature of her role was uncontested. Furthermore, the trial court was aware that Reyes was only 18 years old when the crimes were committed and, moreover, that she had no prior criminal record, the only factor in mitigation. (Rule 4.423(b)(1).) Nevertheless, the trial court clearly found that Reyes's lack of a prior record was substantially outweighed by just one factor in aggravation, namely, that she induced others to participate in the shooting and played a leadership role. (Rule 4.421(a)(4).) We therefore agree with the People that the *Cunningham* error was harmless beyond a reasonable doubt . (See *Neder v. United States* (1999) 527 U.S. 1, 18 [119 S.Ct. 1827, 144 L.Ed.2d 35 [failure to instruct on element of offense harmless beyond reasonable doubt where element supported by uncontroverted evidence at trial].)

Lastly, we reject all three defendants' claims that the imposition of consecutive sentences violated their right to a jury trial under *Cunningham*. As the Third District Court of Appeal recently observed in *People v. Hernandez* (2007) 147 Cal.App.4th 1266 (*Hernandez*), *Cunningham* did not address the constitutionality of concurrent or consecutive sentences under section 669. Thus, *People v. Black* (2005) 35 Cal.4th 1238, 1261 through 1264, which held that *Blakely* does not apply to the imposition of concurrent or consecutive sentences under section 669, remains good law on this point.

As articulated in *Hernandez*, a defendant is not entitled to have a jury determine the facts a court may rely upon in imposing a concurrent or consecutive term under the DSL because, unlike the DSL's statutory presumption in favor of the middle term (§ 1170, subd. (b)), there is no statutory presumption in favor of concurrent or consecutive sentencing under section 669. Instead, section 669 imposes an affirmative duty on a trial court to determine whether the terms of imprisonment for multiple offenses are to be served concurrently or consecutively. A defendant who commits multiple crimes is entitled to the trial court's exercise of this discretion, but he is not entitled to a statutory presumption in favor of concurrent sentencing. (*Hernandez, supra*, 147 Cal.App.4th at pp. 1270-1271.) This "'makes all the difference insofar as judicial impingement upon the traditional role of the jury is concerned.'" (*Id*. at p. 1271, quoting *Blakely, supra*, 542 U.S. at p. 309.)

I. *The Trial Court Did Not Abuse Its Discretion in Imposing the Upper or Consecutive Terms*

Reyes further contends the trial court abused its discretion in imposing consecutive terms on counts 1, 2, 6, 7, 8, and 9 and the upper term on count 8. Armster and Varela join these contentions without further argument. As noted, Armster and Varela were sentenced to consecutive terms on counts 1 through 6 and 8, but neither of them received any upper term sentences. We conclude that the trial court did not abuse its discretion in imposing any of the sentences.

"[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; § 669.)

The criteria affecting the trial court's decision to impose consecutive rather than concurrent sentences are set forth in rule 4.425. The rule states: "Any circumstances in aggravation or mitigation may be considered in deciding whether to impose consecutive rather than concurrent sentences, except (i) a fact used to impose the upper term, (ii) a fact used to otherwise enhance the defendant's prison sentence, and (iii) a fact that is an element of the crime shall not be used to impose consecutive sentences."

A trial court also has "considerable discretion" to impose an upper term sentence where "'after a consideration of all the relevant facts, the circumstances in aggravation outweigh the circumstances in mitigation.'" (*People v. Black, supra,* 35 Cal.4th at p. 1247; § 1170, subd. (b); rule 4.420(b).) In imposing an upper term sentence, the trial court may not consider any fact that is an essential element of the crime itself. (*People v. Black, supra,* at p. 1247.)

Examples of aggravating factors are listed in rule 4.421, and include facts relating to the crime and the defendant. Facts relating to the crime include whether "(1) The crime involved great violence, great bodily harm, threat of great bodily harm, or other acts disclosing a high degree of cruelty, viciousness, or callousness; [¶] . . . [¶] (3) The victim was particularly vulnerable; [¶] (4) The defendant induced others to participate in the commission of the crime or occupied a position of leadership or dominance of

other participants in its commission; [and] [¶] . . . [¶] (8) The manner in which the crime was carried out indicates planning, sophistication, or professionalism." (Rules 4.421(a), 4.408(a); *People v. Black, supra,* 35 Cal.4th at p. 1247.)

(a) *Reyes's Sentence*

At Reyes's sentencing hearing, defense counsel argued that the trial court should exercise its discretion to impose concurrent sentences, in light of Reyes's lack of criminal history, her age at the time of the crimes (she was only 18 years old), her willingness to accept responsibility for her actions, and the fact "there was no particularized intent or knowledge of the existence of the separate victims involved."

In imposing Reyes's sentence, the trial court noted that, although Reyes did not have a criminal record, she was "the instigating factor and the leader," and without her the crimes would not have occurred. The court also noted that the crimes were planned, Reyes had shown no remorse, and Reyes was going to receive a lighter sentence than Armster or Varela. In imposing the upper term on count 8, the court observed that the victim, Denise, was "a sitting duck, particularly vulnerable inside the house."

Reyes argues she should not be punished more severely because she was going to receive a lighter sentence than Armster or Varela, or because she was not personally armed and did not discharge a firearm. She argues the trial court's "attempt to make [her] sentence commensurate with that of her co-defendants was capricious and arbitrary." She also argues that Denise was "no more vulnerable than any other victim of a drive-by shooting."

Regardless of how Reyes characterizes the trial court's reasons for its sentencing choices, the court did not abuse its discretion in sentencing Reyes to consecutive terms on counts 1, 2, 6, 7, 8, and 9, or in imposing the upper term on count 8. As the trial court said, Denise was "particularly vulnerable inside the house." Denise did not know any of defendants, and was in no way involved in the argument with Justin at Roque's house, or the accusation that Reyes had cheated on Roque.

Additional factors in aggravation -- other than Denise's particular vulnerability -- support the trial court's imposition of consecutive sentences on counts 1, 2, 6, 7, 8, and 9. Each of these crimes involved great violence, great bodily harm, the threat of great bodily harm, and other acts disclosing a high degree of cruelty, viciousness, or callousness. (Rule 4.421(a)(1).) Reyes also induced Armster and Varela to participate in the crimes, and Reyes occupied a position of leadership or dominance. (Rule 4.421(a)(4).) Finally, the manner in which the crimes were carried out indicated "planning, sophistication, or professionalism." (Rule 4.421(a)(8).) As the trial court indicated, there were numerous circumstances in aggravation which outweighed the only circumstance in mitigation, Reyes's lack of a prior criminal record. (Rule 4.423(b)(1).)

(b) *Armster and Varela*

Armster and Varela have not offered any reason why the trial court abused its discretion in sentencing them to consecutive terms on counts 1, 2, 3, 4, 5, 6, and 8. Nor do we discern any reason. As discussed, each of these crimes involved great violence, great bodily harm, the threat of great bodily harm, and other acts disclosing a high degree of cruelty, viciousness, or callousness. (Rule 4.421(a)(1).) And, the manner in which

each crime was carried out indicated "planning, sophistication, or professionalism." (Rule 4.421(a)(8).) Each of these factors supported each consecutive term.

IV. DISPOSITION

The judgments are modified to stay each defendant's sentence and enhancements, if any, on count 1. The matter is remanded to the trial court with directions to amend each defendant's abstract of judgment to reflect this modification, and to forward amended copies of each abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgments are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

/s/ King
J.

We concur:

/s/ McKinster
Acting P.J.

/s/ Miller
J.