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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE ALBERTO AVILA et al.,

Defendants and Appellants.

B219748

(Los Angeles County
Super. Ct. No. VA 102440)

APPEALS from judgments of the Superior Court of Los Angeles County.
Dewey L. Falcone, Judge. Reversed in part; affirmed in part.

Jennifer A. Mannix, under appointment by the Court of Appeal, for
Defendant and Appellant Jose Alberto Avila.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant
and Appellant Jonathan Avila.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant
Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Lance E.
Winters and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant brothers Jose Avila and Jonathan Avila timely appealed from their convictions on several counts. Jose was convicted of first degree murder on count 1 and assault with a deadly weapon on counts 7 (a car) and 8 (a knife). The jury acquitted Jose on counts 3 and 4 (attempted murder) and count 6 (assault with a deadly weapon, a car). The jury found gang and personal deadly weapon use allegations were true. The court found Jose had suffered five prior prison terms. The court sentenced Jose to a total of 36 years to life. Jonathan was convicted of first degree murder on count 1, attempted murder on counts 3 and 4, and assault with a deadly weapon (a knife) on count 8. The jury found the attempted murders were not willful, deliberate and premeditated. The jury found the gang, deadly weapon and great bodily injury allegations were true. The court sentenced Jonathan to a total of 81 years to life. The convictions all stemmed from a fight between defendants and six teenagers. Defendants raise several claims mainly of insufficient evidence and instructional errors. We reverse Jose's murder conviction on count 1 and remand for retrial on the premeditation and deliberation element (or resentencing as second degree murder); in all other respects, the judgments are affirmed.

FACTUAL BACKGROUND

I. Prosecution Case

A. The Fight

On September 1, 2007, at about 11:30 p.m., Jonathan Sedano, Fernando Gutierrez, Fernando Hernandez, Miguel Lorenzana, Hernan Partida and Manuel Pasqual were at a party on Deeble Street in South Gate. The teenagers had graduated from high school in 2007 and played football together. Pasqual had driven the teenagers to the party in his white Impala.

About 30 minutes to an hour later, the police shut down the party, and the host asked everyone to leave. The teenagers went to Pasqual's car which was parked in front of the house. Pasqual was sitting in the driver's seat, and everyone else was standing

outside the car. The teenagers were talking about how to get home or what they were going to do next. Andy Reyes was talking to the teenagers with his back to the street.

Sedano was not drunk; he had one drink at the party. None of the teenagers had a weapon or was a member of a gang.

Cesar Cabrera, who was at the corner of Deeble and Southern, saw a brown two-door car drive up; Jose and Jonathan were in the brown car. The car turned onto Deeble, and Jose, the driver, yelled out, “Compton Varrio Tortilla Flats, and this is our neighborhood.” Cabrera had seen that gang’s graffiti in the area. The car stopped in the middle of the street near the teenagers.

Lorenzana saw Jonathan exit the car. Sedano heard Jonathan ask, “Where’s the party at?” Sedano did not say anything in response. Lorenzana did not hear Sedano respond to Jonathan; before Sedano had a chance to say anything, Jonathan threw a punch. Hernandez and Partida heard Jonathan ask where the party was at and then hit Sedano. Hernandez stated he heard Sedano say something to the effect that they did not know where the party was at. At the preliminary hearing, Hernandez stated he heard Sedano say, “Hit up somebody else.” Partida heard Sedano respond by saying, “Who are you.”

Sedano turned around and saw Jonathan swinging his fist at him. Jonathan punched the left side of Sedano’s head. Sedano and Partida recognized Jonathan from school. Sedano swung at Jonathan, and Jonathan “whip[ped] out,” a knife and swung it at Sedano. The knife was curved and had a five or six inch long blade. Hernandez saw Jonathan pull a knife and stab Sedano in the stomach. Gutierrez helped Sedano fight Jonathan. Jonathan walked toward Hernandez carrying the knife. Hernandez backed away. Jonathan then approached Hernandez’s friends.

Jose exited his car and said, “You mess with my homie?” Jose claimed his gang by saying, “T Flats.” Jose lifted his shirt, revealing gang tattoos on his stomach. Jose also had a tattoo on the back of his head. Jose approached Gutierrez and Hernandez in an

aggressive manner. Reyes saw Jose swinging at Gutierrez. Hernandez, Gutierrez and Sedano fought with Jose.

Cabrera saw Jose approach the teenagers, he did not see Jonathan. Cabrera approached Jose and told Jose that he should leave the teenagers alone as they were younger than him (Jose).

Hernandez and Cabrera heard Jose say, “Bring my heat, bring my heat”; they understood Jose to be referring to a gun. Partida heard Jose tell Jonathan to get Jose’s gun. Partida believed that at that point, Jonathan and Jose were outnumbered and losing badly. Reyes heard Jose yell, “You know what? Get the gun.” Jonathan stabbed Cabrera in the neck.

Jonathan ran to the passenger door of Jose’s car. Pasqual went to the car, pushed Jonathan away from it, and closed the door. Pasqual had his hand on the car door. Jonathan stabbed Pasqual three times in the stomach.

Partida held Jonathan in a “bear hug,” with Jonathan’s back to Partida’s chest. Partida held Jonathan’s wrist of the hand with the knife. Jonathan, who resisted “a little,” looked like he was “in a panic mode.” Jonathan said, “I’m sorry” several times. Partida told Jonathan, “You messed up” or “What’s done is done.” Lorenzana saw Jonathan bleeding and believed Jonathan had cut himself.

Pasqual walked to his Impala and fell. Partida saw Pasqual fall down, let Jonathan go, and ran toward Pasqual. The teenagers turned their attention to Pasqual.

Jose and Jonathan ran to their car. Sedano and his friends surrounded the car and punched at Jose and Jonathan while they were seated in the car. Hernandez punched Jonathan a few times. Jonathan took the knife and stabbed upwards, stabbing Hernandez through his right arm. Cabrera put his hand on the gear box, which was on the steering column, so Jose and Jonathan could not leave. Jonathan tried to stab Cabrera’s hand. Cabrera let go, and Jose put the car in gear.

B. After The Fight

Jose drove the car forward at Hernandez, who had to move to avoid being hit. Jose put the car in reverse, and Sedano and Reyes had to move out of the way so they would not be hit by the car. Lorenzana pushed Sedano out of the way and had to move so they would not be hit.

Jose then drove the car forward. Partida pulled up Pasqual, who was on the ground near the driver's door of the Impala. Partida noticed lights and heard an engine revving and the sound of a tire "peel." The car moved toward Partida and Pasqual and would have hit them if Partida had not moved. Jose collided with the Impala, near the driver's side door. Jose drove away.

Reyes heard Cabrera say, "They stabbed me too." Gutierrez, Sedano and Hernandez ran after the car. Hernandez was able to get a partial license plate number; he gave the number to the police later.

Sedano fell down on some grass. Sedano lifted up his shirt and saw he had been stabbed on the left side, above his waist and below his chest. Sedano was able to stick about two or three inches of two of his fingers in the wound.

Partida and another man put Pasqual in the Impala to drive him to the hospital; they stopped near an auto parts store when they saw a police officer. The officer called for an ambulance.

A man with a hat put Sedano in his car and drove Sedano to the hospital where Sedano had surgery and stayed for two and a half days. While at the hospital, Sedano gave the police a description of the assailants. Hernandez went to the hospital and received shots and stitches. At the time of trial, Cabrera had a scar on his neck from his wound, one of his nerves was damaged and part of his back was still numb.

Pasqual died as a result of multiple sharp force injuries, which included: (1) a wound to the lower chest which was 15/16 of an inch in length and 4 and a half inches deep, penetrating his left lung and heart; (2) a wound to the lower chest which was 1/38 inches in length and 9/16 of an inch deep; (3) a wound to the lower chest which was 3/16

of an inch long and 1/8 of an inch deep; (4) a defensive wound to the right middle finger on the palm side of his hand which was 1/4 of an inch in length and 1/16 of an inch deep; and (5) a defensive wound to the left thumb.

C. The Investigation

Deputy sheriffs collected damaged car parts and blood evidence from the crime scene. Detective Steve Lankford interviewed some of the witnesses, and based on the partial license plate number, descriptions of the suspects and the car, Lankford determined Jose was a possible suspect. On September 2, Lankford went to Jose's address, where a brown Buick Regal was parked. Car parts recovered from the crime scene matched the Buick. DNA evidence showed that blood stains found in the Buick matched blood belonging to some of the teenagers.

Jose and Jonathan fled to Mexico where they were detained in December, deported to the United States, and taken into custody by the Sheriff's Department.

D. Gang Evidence

Los Angeles County Sheriff Detective Paul Merino had been part of a gang unit for nine years. Merino was part of a task force that focused on the Compton Varrio Tortilla Flats (Tortilla Flats) gang and had testified as an expert about that gang.

At the time of the instant crimes, there were about 500 documented members and 200 non-documented members of Tortilla Flats. Documented members had been interviewed by officers in the field and included in a gang database. Increasingly, gang members disavow gang membership and do not get gang tattoos or have shaved heads because of state laws with enhanced penalties for gang crimes.

Merino noted Tortilla Flats had several cliques and described its territory and rivals; Merino had identified Tortilla Flats members in South Gate.

Murder, shootings, extortion, narcotics sales, vehicle thefts and firearms possession were the primary activities of Tortilla Flats and "every gang -- criminal gang."

Merino had investigated those types of crimes involving Tortilla Flats; over the past two years, Merino had investigated three or four murders committed by Tortilla Flats members. Certified court records showed that two Tortilla Flats members (Erick Yanez and Jesus Gallardo) had been convicted of robbery and possession of a firearm respectively.

Merino described how a person would join the gang and what “wannabes” and “associates” were.

“Respect” was important to Tortilla Flats members; respect was “everything” to a gang. Tortilla Flats “lives off” respect and puts fear in the neighborhood. With respect and fear, no one would testify against the gang or turn on them. If a gang member is disrespected, he would retaliate with violence. A gang would lose respect if its members did not stand up for themselves. Individuals expect other members to stand up for them.

Given a hypothetical based on the facts of this case, Merino opined that such acts of violence benefitted or promoted Tortilla Flats. Announcing the name of the gang while driving to the crime scene and then repeatedly announcing the gang during the fight would promote the gang by showing they stabbed and killed somebody; it would create fear in the streets. In Merino’s opinion, someone who was driving around yelling out their gang name was looking for a confrontation. Gang members typically announce who they are or ask, “Where you from?” to see if anyone is going to challenge them.

Merino had investigated “a lot” of crimes in which Tortilla Flats members had committed crimes against non-gang members. Non-gang members were easy targets who did not have weapons to retaliate. It was common for a Tortilla Flats member to commit a crime with someone who was not a known gang member. Merino knew Jose was a member of Tortilla Flats.

II. Defense Case

A. Jonathan's Defense

Jonathan testified in his own defense. On the day of the crimes, Jonathan was at a family party in Whittier. Jonathan had a knife and cell phone. Jonathan found out about the party on Deeble from a friend named "George." Jonathan convinced Jose to drive him to the party on the condition Jonathan would find his own way home.

Jonathan gave Jose directions to the party. When they arrived, Jonathan saw a lot of people outside a house and noticed a lot of traffic in the street. Jonathan believed the party was over and exited the car to see if there might be another party. Jonathan approached Sedano, who was with a group of about six people. Jonathan asked Sedano, "Do you know where the next party is at?"

Sedano, responded, "Who the fuck are you?" Sedano had a "rude, aggressive attitude." Jonathan felt threatened by the way Sedano "came at" him and believed Sedano, who was bigger, was going to punch him so he punched Sedano. Sedano started hitting Jonathan. Jonathan saw two people coming toward him. Jonathan felt like six people were hitting him; he was hit "a lot." Jonathan "balled up" and started walking back to the car and said, "Stop, stop. That's it."

Jonathan pulled out his knife, thinking that if he showed it, then the other people would "back off." Jonathan showed the knife to Sedano. Initially, Jonathan did not open the knife. After "they" kept on approaching, Jonathan opened the knife. Jonathan covered his face with his left arm and swung the knife with his right arm.

Jonathan made his way to the car. Jonathan heard Jose say something about his gang. Jonathan did not hear Jose say anything about a gun. Jonathan noticed his attackers back away. Jonathan ran to the car. When Jonathan got to the door, someone pushed him. Jonathan noticed other people approaching, pulled out the knife and started swinging it. Someone wrapped up Jonathan from behind. Jonathan saw blood and said, "I'm sorry for what happened."

Jonathan fled the scene for his own safety and left the country because he was scared. Jonathan threw the knife away as he left the scene.

Jonathan did not consider himself a gang member at the time; he knew Jose was a gang member. Jose was 11 years older. Jose put a tattoo on Jonathan's back while they were in Mexico.

Jonathan did not call 9-1-1 on his cell phone; he "must have dropped it" and did not have it. After Jonathan and Jose left the scene, Jonathan did not call the police to tell them he "got jumped by a bunch of guys."

Jonathan usually carried a knife for protection; he used the knife for work. Jonathan had no reason to carry the knife with him to the family party.

As Jonathan and Jose drove to the party, Jose did not yell out his gang's name.

Jonathan was not going to walk away from Sedano, who had given him a "mouthful of attitude." Jonathan started the fight; he hit Sedano first. Sedano had insulted Jonathan.

Jonathan's agreement with Jose was that Jose was going to drop him off at the party if Jonathan had a ride home; Jonathan knew he had a ride home because his friend George had agreed to take him home. There was no need for Jose to wait around because Jonathan had a ride home. The front passenger door of the Buick was left open. Jonathan agreed that whoever left the door open was going to return soon and had exited the car in a hurry. Jonathan did not intend to go back to the car.

Jonathan knew that stabbing a person in the stomach could kill that person and that waving a knife during a fight was dangerous.

Jonathan did not realize he had stabbed Sedano; Jonathan stabbed Pasqual by accident; Jonathan did not remember stabbing Cabrera.

The day after the fight, Jonathan went to a nephew's birthday party in Yucaipa. Jonathan told Maricela, his godmother, who had cleaned his knife wound, that he had been in a fight. Jonathan said a "gang of football players" had attacked him; he denied telling Maricela that one of the players had stabbed him.

B. Jose's Defense

Jose, who testified in his own defense, was a member of Tortilla Flats and had been convicted of multiple theft offenses, false imprisonment and possession of a firearm.

At about 6 p.m., on September 1, Jose was at a party at his aunt's house in Whittier. Jose drank about 12 beers at the party and half a bottle of hard liquor. Jose had been drinking since 9 or 10 in the morning. After Jonathan asked him several times for a ride to a party, Jose finally agreed to take him.

Jose drove to South Gate. As he approached the party, Jose passed by a group of people on a corner and yelled his gang name out of his window and "'What's the Compton life like?'" Jose was drunk and being a "smartass." Jose did not intend to intimidate the people on the corner.

As Jose drove up Deeble, he saw a lot of people in the street. Jose parked behind a white Impala. Jose asked Jonathan if he was going to be all right. Jonathan responded, "'Yeah, I'm going to be cool.'" Jose gave Jonathan \$20. Jonathan exited the car. Jose backed up in order to drive around the Impala.

Jose saw Jonathan fighting "one-on-one" with a guy. A second person joined the fight against Jonathan. Jose jumped out of his car, took off his shirt, and said, "T Flats" or "Compton T Flats." Jose intended to fight with the guys and help out Jonathan. Jonathan was losing the fight and had "balled up." Jose took off his shirt and shouted out his gang name in order to intimidate everyone there and make them back up.

Jose walked to the trunk of his car. There were two or three guys there. One of them told Jose, "'Hey the problem ain't with you.'" Jose responded, "'What the [are you] fucking with me? . . . That's my brother.'" The guy said, "'Just get out of here.'" Jose and the guy cursed at each other. The guy approached Jose, and they started fighting. Jose could not remember who struck the first blow. Two other people also fought with Jose. Someone kicked Jose.

Jose yelled to Jonathan to "get the heat." Jose yelled loudly because he wanted to scare everyone. Jose knew how to get himself out of sticky situations and how to

intimidate the people. Jose said to “get the heat” in order to intimidate the people he was fighting with and to make them back off. There was no gun in Jose’s car. The guys backed off, and Jose ran to his car.

Jose did not see Jonathan with a knife, did not see him stab anybody and did not know Jonathan had a knife. Jose had never seen Jonathan carry a knife and did not know that Jonathan carried a knife for protection.

When Jose entered the car, a guy reached in and tried to choke Jose. Jose pushed him off and tried to start the car. Jose turned the car on and was trying to put it into gear to drive away. The same guy reached in, and Jose fought with him. The guy let go, and Jose accelerated and put the car in reverse. Jose struck a light pole. Jose could not see because the guy’s arm was blocking his vision.

Jose put the car in drive. Jose saw two guys by the trunk of the Impala. Jose did not try to hit them; he pulled to the left to avoid hitting them. Jose hit the door of the Impala. Jose did not see anyone jump out of the way. Jose drove away.

Jose left for Mexico because he found out the police were looking for him. Jose did not call the police because he did not know what had happened and wanted to get his facts straight. Jose was confused about what had happened and was still confused about the whole situation at the time of trial.

Jose was not acting as a representative of Tortilla Flats at any point that evening.

C. Defense Gang Expert

Dr. James Vigil was a professor at the University of California, Irvine who taught on the subject of gangs and urban youth. Dr. Vigil had developed a theoretical model explaining why youth join gangs. Gang members do leave gangs. Gangs engage in intimidation tactics usually directed at rival gangs, but sometimes at the general public.

Vigil was familiar with Tortilla Flats. The primary activities of Tortilla Flats are drug sales and intimidation of other gangs in order to protect drug trafficking “turf.” Types of intimidation used included verbal threats, showing of weapons, putting up

graffiti, and committing murder, attempted murder, robbery, carjacking, possession of a firearm, theft, and other offenses involving force or violence.

Hypothetically, if a gang member went to a party, got involved in a fight, and while getting beat up, took off his shirt and displayed gang tattoos on his chest, that gang member was not necessarily acting in association with his gang. Hypothetically, if a gang member was acting in self defense, he might throw out his gang sign in an effort to keep his aggressor away.

III. Rebuttal

Maricela Pelayo was Jonathan's godmother; Jose and Jonathan were her nephews. On September 2, Pelayo was at a lake in Yucaipa for a family picnic; Jonathan and Jose were there. Later on, at Pelayo's house, she noticed a cut on Jonathan's arm. Pelayo cleaned the cut. Jonathan told Pelayo that someone had stabbed him. Jonathan said he went to a party and football players were there, he got into a fight with them, and one of the players had a knife and stabbed him. Jonathan never said he stabbed himself.

DISCUSSION

I. Sufficiency of the Evidence

A. Standard of Review

Appellants raise several claims of insufficient evidence to support their convictions. "The standard of review is well established. The appellate court "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence -- that is, evidence which is reasonable, credible, and of solid value -- such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." The focus of the substantial evidence test is on the whole record of evidence presented to the trier of fact, rather than on "isolated bits of evidence.'" The standard of review is the same in cases in which the People rely primarily upon circumstantial evidence. "Although it is the duty of the jury to acquit a

defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. "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." "Circumstantial evidence may be sufficient to connect a defendant with the crime and to prove his guilt beyond a reasonable doubt." (Citations & italics omitted.) (*People v. Bradford* (1997) 15 Cal.4th 1229, 1329.) This standard also applies to gang enhancement findings. (*People v. Villalobos* (2006) 145 Cal.App.4th 310, 321-322.)

B. Premeditation and Deliberation (Jonathan)

Jonathan contends there was insufficient evidence his killing of Pasqual was premeditated and deliberate. "A verdict of deliberate and premeditated first degree murder requires more than a showing of intent to kill. 'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance." (Citation omitted.) (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.)

"Evidence concerning planning, motive, and manner of killing are pertinent to this determination, but these factors are not exclusive nor are they invariably determinative." (*People v. Marks* (2003) 31 Cal.4th 197, 230.) Jonathan posits that at most the evidence showed a spontaneous act as there was no evidence of planning or a preexisting motive.

"The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . .'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

Jonathan admitted he started the fight by hitting Sedano. When Sedano, later joined by others, started hitting Jonathan, Jonathan pulled out his knife and showed it to

the teenagers in order to get them to “back off.” When that did not work, Jonathan opened the knife and swung it at the teenagers with whom he was fighting. Jonathan stabbed Sedano on the left side; the wound was two or three inches deep. After that and after Jose yelled at Jonathan to get the gun, Jonathan ran back to Jose’s car. At some point, Jonathan stabbed Cabrera, who had tried to get Jose to stop fighting, in the neck. When Jonathan got to the car, Pasqual pushed Jonathan away from the car and closed the passenger door, which had been left open. When Pasqual had his hand on the car door, Jonathan stabbed Pasqual three times in the stomach; one of the wounds was four and a half inches deep and penetrated Pasqual’s left lung and heart; Pasqual also had defensive wounds. Pasqual died as a result of his injuries.

In other words, the encounter started out with words between Jonathan and Sedano. Jonathan escalated the encounter to a physical assault by hitting Sedano. After Jonathan was being hit by at least two of the teenagers, Jonathan again escalated the encounter by taking out his knife, at first just displaying it, and then opening it and “swinging” it and then using it to stab Sedano and Cabrera. Thus, though occurring over a short period of time, the events showed Jonathan had time to plan to and did use his knife -- twice before he stabbed Pasqual a number of times indicating the stabbing was not accidental. Afterwards, Jonathan stabbed Hernandez (and tried to stab Cabrera) when Hernandez (and others) were hitting the brothers when they finally got into the car.

Even though Jonathan denied hearing his brother call for him to get the gun, a reasonable juror could infer Jonathan ran to the car in response to Jose’s request. There was a reasonable inference that at the time Jonathan stabbed Pasqual, Jonathan’s motive was that he was trying to escape. Also, the manner of stabbing, including the nature and number of Pasqual’s wounds, show an intent to kill as according to witnesses, Jonathan thrust the knife rather than just swinging it. (See *People v. Pride* (1992) 3 Cal.4th 195, 247-248.)

Jonathan claims that the stabbing was a spontaneous reaction to the fight and that the fact he was running away from the fight shows the stabbing of Pasqual was not

premeditated. Those claims are simply alternate views of the evidence and do not show the evidence was insufficient. (See *People v. Earp* (1999) 20 Cal.4th 826, 887-889 & fn. 10.)

Thus, substantial evidence supports Jonathan's conviction for first degree murder.

C. Premeditation and Deliberation (Jose)

As Jose was not the person who stabbed Pasqual, he was convicted of first degree murder based on two theories -- (1) aiding and abetting and (2) natural and probable consequences; his conviction can be upheld if substantial evidence supports either theory. (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1129.) Jose contends there was insufficient evidence under either theory to support his conviction.

“A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.” (*People v. Hill* (1998) 17 Cal.4th 800, 851.) “[T]he test is whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures.” (Citations & internal quotation marks omitted.) (*People v. Booth* (1996) 48 Cal.App.4th 1247, 1255.)

“It is settled that if a defendant's liability for an offense is predicated upon the theory that he or she aided and abetted the perpetrator, the defendant's intent to encourage or facilitate the actions of the perpetrator “must be formed prior to or during ‘commission’ of that offense.” However, ‘it is essential to distinguish the act and intent that constitute “aiding and abetting” the commission of a crime, from conduct that will incur the lesser liability of an “accessory” to the crime -- defined as conduct by one who, “after a felony has been committed, . . . aids a principal in such felony”’ In this respect, not only must the subjective intent to encourage or facilitate the actions of the perpetrator be formed prior to or during the commission of the offense, if there is no

participation in the planning, the aider and abettor must take affirmative action at the time the offense is committed. ‘To be an abettor the accused must have instigated or advised the commission of the crime or been present for the purpose of assisting in its commission.’” (Citations & italics omitted.) (*People v. Joiner* (2000) 84 Cal.App.4th 946, 967.)

“‘Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of the judgment.’ [¶] . . . [I]n general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. However, ‘[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.’” (Citations omitted.) (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

Jose contends there was insufficient evidence he intended to aid and abet a premeditated murder, arguing there was no evidence he drove his brother to the party to get into an altercation, intended for someone to be killed, knew of or encouraged his brother’s use of the knife, knew any of the men at the party or planned an attack. Jose further asserts that the prosecutor did not prove he knew his brother possessed, or used, a knife and that intending to get into a fight is not the same as an intention to kill. In addition, Jose posits that calling for his brother to get a gun shows he did know about the knife.

However, Jose’s intent to aid and abet a premeditated murder is supported by reasonable inferences. Jose, who was not just present at the scene, admitted he got out of the car to aid Jonathan in the fight as Jonathan was getting hit by several men. Jose stated he took his shirt off to show his gang tattoos and called out his gang’s name in order to intimidate the teenagers. Even though Jose testified he did not see his brother with a knife or know his brother usually carried a knife, his credibility was for the jury to decide. Jonathan stabbed Cabrera, who had been fighting with Jose. When the brothers

were in the car, Jonathan stabbed Hernandez through the arm and tried to stab Cabrera when Cabrera put his hand on the gear box, which was on the steering column, calling into question Jose's claim he did not know Jonathan was using a knife. A reasonable juror could infer that Jose knew his brother usually carried a knife and saw Jonathan swinging the knife during the fight.

A reasonable juror could infer Jose's calling out to Jonathan to get the gun indicated an intent to kill those fighting the brothers. Jose states no gun was produced, but his car was not discovered until the next day, it was not searched at the scene. In addition, several of the teenagers testified that Jose drove the car at them (and they had to move to avoid being hit) when he left, again demonstrating a possible intent to kill.

Though the brothers did not converse during the fight, Jose was present during the commission of the stabbing of Pasqual, there was a reasonable inference Jose saw Jonathan thrusting his knife, Jose aided and abetted Jonathan by distracting some of the men who were hitting Jonathan. In addition, Jose demonstrated an intent to kill by calling for Jonathan to get the gun and by driving his car at some of the teenagers when he and Jonathan fled the scene together in Jose's car and subsequently left the country for Mexico.

Hence, as substantial evidence supports Jose's conviction for first degree murder as an aider and abettor, we need not consider whether there was substantial evidence under the natural and probable consequence doctrine.¹

D. Assault With A Deadly Weapon

Jose was convicted on count 8 of assault with a deadly weapon as an aider and abettor in Jonathan's stabbing of Hernandez. An assault is defined as "the general intent

¹ As Jose acknowledges his contention that the natural and probable consequences doctrine should be repudiated has been rejected by the California Supreme Court (see *People v. Prettyman* (1996) 14 Cal.4th 248, 260) and that this court is bound by that ruling. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

to wilfully commit an act the direct, natural and probable consequences of which if successfully completed would be the injury to another.” (*People v. Rocha* (1971) 3 Cal.3d 893, 899.)

Jose asserts there was insufficient evidence to support his conviction on this count because when Jonathan was fighting with and stabbed Hernandez on the passenger side of the car, Jose was fighting with another person on the driver’s side of the car, he was not involved in his brother’s fight though he might have been aware of it, and there was no evidence he said anything to Jonathan or encouraged Jonathan’s use of the knife or helped Jonathan in any way.

As with the murder count, there was evidence supporting a reasonable inference that Jose knew Jonathan had and was using a knife during the fight and that the natural and probable consequence of using a knife during a fight was that someone would be injured. As a matter of fact, Jonathan tried to stab Cabrera when Cabrera had his hand on the gear box on the steering column when Jose was sitting in the driver’s seat. Jose was aiding and abetting Jonathan in the fight with the teenagers. At the time Jonathan stabbed Hernandez, the brothers were trying to flee the scene.

Thus, substantial evidence support Jose’s conviction for assault with a deadly weapon.

E. Primary Activities (Jonathan and Jose)

Appellants contend the gang enhancements must be stricken as there was insufficient evidence of the primary activities of the Tortilla Flats gang.

“To trigger the gang statute’s sentence-enhancement provision [Pen Code, §² 186.22, subd. (b)], the trier of fact must find that one of the alleged criminal street gang’s primary activities is the commission of one or more of certain crimes listed in the gang statute.” (*People v. Sengpadychith* (2001) 26 Cal.4th 316, 322.) “[E]vidence of either

² Unless otherwise noted, all statutory references are to the Penal Code.

past or present criminal acts listed in subdivision (e) of section 186.22 is admissible to establish the statutorily required primary activities of the alleged criminal street gang. Would such evidence alone be sufficient to prove the group's primary activities? Not necessarily. The phrase 'primary activities,' as used in the gang statute, implies that the commission of one or more of the statutorily enumerated crimes is one of the group's 'chief' or 'principal' occupations. That definition would necessarily exclude the occasional commission of those crimes by the group's members." (Citation omitted.) (*Id.*, at p. 323.)

"Sufficient proof of the gang's primary activities might consist of evidence that the group's members consistently and repeatedly have committed criminal activity listed in the gang statute. Also sufficient might be expert testimony, as occurred in [*People v. Gardeley* (1996) 14 Cal.4th 605]. There, a police gang expert testified that the gang of which defendant Gardeley had for nine years been a member was primarily engaged in the sale of narcotics and witness intimidation, both statutorily enumerated felonies. (See § 186.22, subd. (e)(4) & (8).) The gang expert based his opinion on conversations he had with Gardeley and fellow gang members, and on 'his personal investigations of hundreds of crimes committed by gang members,' together with information from colleagues in his own police department and other law enforcement agencies." (Emphasis deleted.) (*People v. Sengpadychith, supra*, 26 Cal.4th at p. 324.)

In particular, citing *In re Alexander L.* (2007) 149 Cal.App.4th 605, 611-614, appellants complain the prosecutor did not elicit the specific circumstances of the gang's crimes or when they had occurred from Merino and Merino did not explain how he had investigated the crimes he described and did not directly state the crimes were the primary activities of Tortilla Flats.

However, in *People v. Martinez* (2008) 158 Cal.App.4th 1324, 1330, the court distinguished *Alexander L.* Similar to appellants, the defendant had argued the expert's testimony was insufficient because it lacked foundation. (*Ibid.*) The court reasoned:

"But *Alexander L.* is different because there the expert never specifically testified about

the primary activities of the gang. He merely stated ‘he “kn[e]w” that the gang had been involved in certain crimes. . . . He did not directly testify that criminal activities constituted [the gang’s] primary activities.’ Here, on the other hand, Schulze had both training and experience as a gang expert. He specifically testified as to King Kobras’s primary activity. His eight years dealing with the gang, including investigations and personal conversations with members, and reviews of reports suffices to establish the foundation for his testimony.” (Citation omitted.) (*Ibid.*)

Merino, the People’s gang expert, laid a similar foundation for his opinion; he described his training and experience in a gang unit and his familiarity with Tortilla Flats in particular. On direct examination, Merino testified that Tortilla Flats engaged in murder, shootings, extortion, narcotics sales, vehicle thefts and firearms possession. Merino had investigated those types of crimes involving Tortilla Flats. On cross-examination, he expressly stated those activities were the primary activities of Tortilla Flats and “every gang -- criminal gang.”

Merino testified he had been with the gang unit for nine years, received gang training at the academy, and during the six years he worked in the jails, he had “interviewed more than 500 inmates, gang members and talked to them about the different crimes that they commit, how they commit them, learning about the different gangs.” Merino had talked to gang members on the street and recently been part of a federal task force focusing on Tortilla Flats; he had investigated gang-related shootings and narcotic sales and had previously testified in court as an expert about Tortilla Flats. Over the past two years, Merino had investigated three or four murders committed by Tortilla Flats members.

Besides Merino’s testimony and the circumstances of the instant case, certified court records showed that two Tortilla Flats members (Erick Yanez and Jesus Gallardo) had been convicted of robbery and possession of a firearm respectively.

Moreover, the testimony of Dr. James Vigil, the defense gang expert, corroborates Merino. Dr. Vigil testified the primary activities of Tortilla Flats were drug sales, an

enumerated felony (§ 186.22, subd. (e)(4)), and intimidation of other gangs in order to protect drug trafficking “turf.” Subsequently, Dr. Vigil clarified that the types of intimidation used included verbal threats, showing of weapons, putting up graffiti, and committing murder, attempted murder, robbery, carjacking, possession of a firearm, theft, and other offenses involving force or violence. The jury could reasonably infer from Dr. Vigil’s testimony one of the primary activities of Tortilla Flats was intimidation that the gang engaged in the types of intimidation Dr. Vigil described, activities most of which are enumerated felonies in section 186.22, subdivision (e).

Accordingly, there was substantial evidence that the primary activities of Tortilla Flats were the commission of enumerated crimes.

II. Alleged Instructional Errors

A. Malice

Appellants contend the court erred by giving CALJIC No. 1.22 because it improperly defined malice. Appellants further contend the prosecutor committed misconduct during closing argument by defining malice as merely intent to do something wrong to a person.

1. Background

a. Relevant Instructions

The court instructed the jurors with CALJIC No. 1.22 that: “The words ‘malice’ and ‘maliciously’ mean a wish to vex, annoy or injure another person, or an intent to do a wrongful act.”

The court also instructed with CALJIC No. 8.11 on “malice aforethought” that:

“Malice” may be either expressed or implied.

Malice is express when there is manifested an intention unlawfully to kill a human being.

Malice is implied when:

1. The killing resulted from an intentional act;
 2. The natural consequences of the act are dangerous to human life;
- and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

When it is shown that a killing resulted from the intentional doing of an act with express or implied malice, no other mental state need be shown to establish the mental state of malice aforethought.

The mental state constituting malice aforethought does not necessarily require any ill will or hatred of the person killed.

The word “aforethought” does not imply deliberation or the lapse of considerable time. It only means that the required mental state must precede rather than follow the act.

The instructions defining murder (CALJIC No. 8.10), deliberate and premeditated murder (CALJIC No. 8.20) and unpremeditated murder of the second degree (CALJIC No. 8.30) all state one of the necessary elements was that the killing was done with “malice aforethought.”

b. Argument

During closing argument, the prosecutor discussed the elements of murder, stating she had to prove that “the killing was done with malice aforethought.” The prosecutor then argued: “Malice means to annoy or injure or . . . an intent to do a wrongful act. You don’t have to hate the person who you have malice towards. You don’t have to have any feelings of ill will or dislike. It’s just an intent to do something wrong towards that person. That’s all it is.” Jonathan’s attorney objected, stating the prosecutor had misstated the law. The court overruled the objection, noting the prosecutor’s comments were “prefatory” and stated “we’ll make a correction if she doesn’t correct it.”

The prosecutor then stated, “It is an intent to do something wrong. [¶] Aforethought means that the intent to do something wrong has to happen before the killing and not after.” The prosecutor argued there were two forms of malice, express and implied, contained in CALJIC No. 8.11. The prosecutor explained express malice

meant a person had the specific intent to kill, which could be proved by direct evidence of a statement indicating an intent to kill or by the circumstances. The prosecutor argued the types of wounds inflicted on Pasqual showed an intent to kill. The prosecutor argued Jonathan's conduct of intentionally plunging a knife into Pasqual showed implied malice.

2. Instructional Error

It was error for the court to give CALJIC No. 1.22 in a murder case. (See *People v. Shade* (1986) 185 Cal.App.3d 711, 715; Use Note to CALJIC No. 1.22 (2008) p. 21.) In *Shade*, the court noted the error had been held harmless when the court also had instructed on the correct definition of malice aforethought embodied in CALJIC No. 8.11. (*People v. Shade, supra*, at p. 715 [listing cases so holding]; accord *People v. Chavez* (1951) 37 Cal.2d 656, 666-667.) Appellants argue that because the concept of due process has evolved, the error is not corrected by giving the latter instruction as CALJIC No. 1.22 lessened the prosecution's burden of proof on an essential element. (*People v. Flood* (1998) 18 Cal.4th 470, 491.) Appellants also posit it was federal constitutional error to give conflicting instructions on an essential element. (*People v. Lee* (1987) 43 Cal.3d 666, 673-674.) We disagree.

“Whether instructions are correct and adequate is determined by consideration of the entire charge to the jury.” (*People v. Holt* (1997) 15 Cal.4th 619, 677.) The jury was instructed with CALJIC No. 1.01 to consider the instructions as a whole, and we presume it followed the instructions. (*People v. Pinholster* (1992) 1 Cal.4th 865, 919 disapproved on another point in *People v. Williams* (2010) 49 Cal.4th 405, 459.)

In addition, appellants argue the prosecutor committed misconduct when she argued the improper definition of malice. (*People v. Hill, supra*, 17 Cal.4th at p. 829.) ““It is, of course, the general rule that a defendant cannot complain on appeal of misconduct by a prosecutor at trial unless in a timely fashion” -- and on the same ground -- “he made an assignment of misconduct and requested that the jury be admonished to

disregard the impropriety.””” (*People v. Berryman* (1993) 6 Cal.4th 1048, 1072 disapproved on another point in *People v. Hill, supra*, 17 Cal.4th at p. 823, fn. 1.)

Although Jonathan’s counsel noted the prosecutor had misstated the law by stating malice was an intent to do something wrong, his counsel did not claim the prosecutor had committed misconduct nor ask that the jury be admonished to disregard the impropriety. Moreover, “[w]hen, as here, the point focuses on comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion.” (*People v. Berryman, supra*, 6 Cal.4th at p. 1072.)

In the instant case, the prosecutor subsequently discussed malice aforethought, and the jury was instructed with CALJIC No. 8.11 on the correct definition of malice aforethought and with CALJIC No. 1.00 that if the attorneys said anything about the law that conflicted with the court’s instructions, the jurors were to follow the court’s instructions.

In reading the instructions as a whole, the jury must have applied CALJIC No. 8.11, specifically defining malice aforethought, to the murder charges. All the murder instructions (CALJIC Nos. 8.10, 8.20, 8.30) required the killing have been done with malice aforethought. The instructions defining manslaughter (CALJIC Nos. 8.37, 8.40 & 8.41) stated manslaughter was an unlawful killing “without malice aforethought.”

In addition the evidence indicated Jonathan harbored a conscious disregard for life as evidenced by his repeatedly stabbing several of the teenagers, was acting rationally and not acting out of the heat of passion or under an honest, but unreasonable, belief that it was necessary to defend himself from imminent peril to life or great bodily injury when he stabbed Pasqual, who was simply trying to prevent Jonathan from escaping. (See *People v. Shade, supra*, 185 Cal.App.3d at p. 715.) If the jury believed the stabbing was an accident or the result of the heat of passion, it would have convicted Jonathan of manslaughter. Thus, it is not reasonably probable that a more favorable result would

have been reached in the absence of the error in instructing with or arguing an incorrect definition of malice. (*Id.* at p. 716.)

B. CALJIC No. 3.00

CALJIC No. 3.00 provides in part: “Persons who are involved in committing or attempting to commit a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty.” Jose contends CALJIC No. 3.00 is constitutionally defective because it does not instruct that an aider and abettor can be guilty of a lesser crime than the perpetrator. (See *People v. Breverman* (1998) 19 Cal.4th 142, 155 [defendant has the right to have the jury instructed on every material issue].)

Jose complains that the instruction did not inform the jury that it had to judge his actions and mens rea separately from Jonathan’s and his degree of liability was dependent on that evaluation. Jose posits the instruction permitted the jury to conclude that his liability was necessarily determined by Jonathan’s and that the prosecutor exploited the error by emphasizing Jonathan and Jose were equally guilty.

In *People v. McCoy* (2001) 25 Cal.4th 1111, 1122, the court concluded: “[W]hen a person, with the mental state for an aider and abettor, helps or induces another to kill, that person’s guilt is determined by the combined acts of all the participants as well as that person’s own mens rea. If that person’s mens rea is more culpable than another’s, that person’s guilt may be greater even if the other might be deemed the actual perpetrator.” The court also noted: “Absent some circumstance negating malice one cannot knowingly and intentionally help another commit an unlawful killing without acting with malice.” (*Id.* at p. 1123.)

Subsequently, in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164-1165, the court reasoned: “Though *McCoy* concluded that an aider and abettor could be guilty of a greater offense than the direct perpetrator, its reasoning leads inexorably to the

further conclusion that an aider and abettor's guilt may also be less than the perpetrator's, if the aider and abettor has a less culpable mental state."

The instruction at issue in *Samaniego* was CALCRIM No. 400 which provided that: "[a] person is equally guilty of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it." (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1165.) The court determined that CALCRIM No. 400 "while generally correct in all but the most exceptional circumstances, is misleading here and should have been modified." (*Ibid.*)

Although the court went on to discuss the propriety of giving the subject instruction, it determined the defendant had forfeited the issue, noting: "Generally, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."'" (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1163.) We conclude that Jose has forfeited this issue.

In *People v. Nero* (2010) 181 Cal.App.4th 504, the court found the trial court prejudicially misinstructed the jury by giving CALJIC No. 3.00 as it was confusing and should have been modified because the jury had asked if they could find a defendant, as an aider and abettor, guilty of a greater or lesser offense than the perpetrator, which the court opined essentially renewed the objection to the instruction. (*Id.* at pp. 517, fn. 13, 518, 513-520.) No such jury confusion is apparent in the instant case.

Moreover, CALJIC No. 3.01 explained that an aider and abetter had to know the unlawful purpose of the perpetrator, intend to encourage or facilitate the commission of the crime and by act or advice, aids or encourages the commission of the crime. Along with the need to prove malice aforethought pursuant to CALJIC Nos. 8.10 and 8.11 and the definition of first degree murder in CALJIC No. 8.20, the instructions essentially informed the jury that it had to find Jose knew Jonathan intended to commit first degree murder, intended to aid and abet that crime and did so. The jury was instructed with CALJIC No. 17.00 to decide each defendant's guilt separately. Therefore, it was not

reasonably likely it convicted Jose just based on Jonathan's guilt. (See *People v. Prettyman*, *supra*, 14 Cal.4th at p. 272.)

In *Samaniego*, in concluding the error was harmless beyond a reasonable doubt (i.e., the verdict would not have been different) because the jury necessarily resolved the issue of the aider and abettor's mental state under properly given instructions, the court noted: "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at pp. 1165-1166.) Thus, any error in CALJIC No. 3.00 as given was harmless.

C. CALJIC No. 3.02

The court gave CALJIC No. 3.02, which provided in part: "The crimes of murder and attempted murder were a natural and probable consequence of the commission of the crimes of assault with a deadly weapon." Jose contends that instruction was constitutionally defective because it did not tell the jury it had to determine that first degree murder, rather than murder, was the natural and probable consequence of assault with a deadly weapon, i.e., because the instruction did not tell the jury it could convict him of second degree murder if it had a reasonable doubt first degree murder was the natural and probable consequence of assault with a deadly weapon. We agree.

"A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime but also of any other crime the perpetrator actually commits that is a natural and probable consequence of the intended crime." (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1133.) "The factual determination whether a crime committed by the perpetrator was a reasonably foreseeable consequence of the crime or crimes originally contemplated is not founded on the aider and abettor's subjective view of what might occur. Rather, liability is based on an 'objective analysis of causation'; i.e., whether a reasonable person under like circumstances would recognize that the crime was a

reasonably foreseeable consequence of the act aided and abetted. The finding will depend on the circumstances surrounding the conduct of both the perpetrator and the aider and abettor.” (Citation omitted.) (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1587.)

“The fact the perpetrator cannot be found guilty of both a greater and a necessarily included offense should not preclude an aider and abettor from being found guilty of an uncharged, necessarily included offense when the lesser, but not the greater, offense is a reasonably foreseeable consequence of the crime originally aided and abetted. [¶] Therefore, in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence.” (Citations omitted.) (*People v. Woods, supra*, 8 Cal.App.4th at pp. 1587-1588.) The court opined that without an instruction on a lesser offense the jury “would be provided with an unwarranted all-or-nothing choice with respect to the aider and abettor” and might be reluctant to acquit the defendant of the greater crime if left without the alternative of a guilty verdict for the lesser crime. (*Id.* at p. 1589.)

In *Woods*, one defendant had been convicted of first degree murder as an aider and abettor of another defendant who after assaulting several victims had shot a witness. When the jury asked if the defendant could be found guilty of second degree murder when the actual perpetrator was determined to be guilty of first degree murder, the trial court answered, ““No.”” (*People v. Woods, supra*, 8 Cal.App.4th at p. 1579.) The appellate court reversed his conviction on the ground the jury might have found him guilty to avoid absolving him of any responsibility for the killing, despite evidence from which it could conclude that only second degree murder was a reasonably foreseeable consequence of the assaults. (*Id.* at pp. 1577-1578, 1595.)

In *People v. Hart* (2009) 176 Cal.App.4th 662, 673-674, the court reversed defendant Rayford’s conviction as an aider and abettor for premeditated and deliberate

attempted murder because: “The instructions did not fully inform the jury that, in order to find Rayford guilty of attempted premeditated murder as a natural and probable consequence of attempted robbery, it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery.” “Error in instructing the jury concerning lesser forms of culpability is reversible unless it can be shown that the jury properly resolved the question under the instructions, as given.” (*Id.* at p. 673.)

In the case at bar, the prosecutor argued both theories of murder, aider and abetter and natural consequences (but argued only that the jury had to find murder was the natural and probable consequence). Nothing indicates which theory the jury used to find Jose guilty of murder.

As in *Woods*, we conclude the evidence raised a question whether the first degree murder of Pasqual was a reasonably foreseeable consequence of the fight between defendants and the teenagers. However, the evidence established beyond question that the necessarily included offense of second degree murder (i.e., an intentional but unpremeditated killing or a killing resulting from conduct inherently dangerous to human life) was a reasonably foreseeable consequence. (*People v. Woods, supra*, 8 Cal.App.4th at p. 1578.)

In *People v. Concha* (2009) 47 Cal.4th 653, 666, the court concluded: “[I]t appears that the trial court did err when instructing on first degree murder, as opposed to attempted murder, by not providing an instruction that explained that for a defendant to be found guilty of first degree murder, he personally has to have acted willfully, deliberately, and with premeditation when he committed the attempted murder.” In reaching that conclusion the court noted. “[A] defendant charged with murder or attempted murder can be held vicariously liable for the actus reus of an accomplice, but, for murder, a defendant cannot be held vicariously liable for the mens rea of an accomplice. The same is not true for an attempted murder that is willful, deliberate, and premeditated. For such an attempted murder, although each defendant must have the

intent to kill, a defendant may be vicariously liable for the premeditated and deliberate component of the mens rea of an accomplice. (*Id.* at p. 665.) Thus, *People v. Cummins* (2005) 127 Cal.App.4th 667, 680, cited by respondent, in which the court held the trial court did not have to instruct on premeditated attempted murder is not apposite.

In *Hart*, the court compared the error there to the error in *Woods*, concluding: “Instead, [the instruction] merely failed to inform the jury that it could convict Rayford of a lesser crime than Hart’s crime under the natural and probable consequences doctrine. The result, however, is the same. The jury was left to its own devices without proper guidance concerning the law. Under the instructions given, the jury may have found Rayford guilty of attempted murder using the natural and probable consequences doctrine, an objective test, and then found the premeditation and deliberation element true using the only instruction given as to that element, which described a subjective test. Thus, the instructions on the natural and probable consequence doctrine and attempted murder were prejudicially deficient.” (*People v. Hart, supra*, 176 Cal.App.4th at p. 674.)

Accordingly, Jose’s first degree murder conviction must be reversed and remanded to the trial court for retrial. As did the jury in *Hart*, the jury here determined Jose committed murder under the instructions that were proper to that extent; thus the only remaining question is whether he is further guilty under the premeditation and deliberation element. (*People v. Hart, supra*, 176 Cal.App.4th at p. 674.)

III. Sanitization of Jonathan’s Prior

A. Background

Prior to Jonathan testifying, the parties discussed his prior conviction. The court noted Jonathan had a 2007 conviction for assault with a deadly weapon and indicated it was inclined to allow the prosecutor to “indicate that he’s been convicted of a felony involving force or violence and stop at that particular point in time.” Jonathan’s counsel stated he would prefer the prior conviction be referred to as a “generic felony” without reference to violence as violence was not relevant to credibility and sanitizing the prior

by referring to it as a “prior felony conviction” would allow the prosecutor to argue Jonathan’s credibility was suspect because he had a prior conviction. The prosecutor argued that the actual name of the prior crime was “very probative.” The court noted it was a “352 issue” and ruled either counsel could ask Jonathan if he had “sustained a conviction of a felony involving force or violence.” Subsequently, the court indicated the prosecutor could elicit that Jonathan suffered the prior conviction in 2007.

At the end of Jonathan’s direct examination, his counsel asked, “You had a felony conviction in 2007 for some type of assault; isn’t that true?” Jonathan replied, “Yes, I do.” On cross-examination, the first question the prosecutor asked was “Actually, that felony conviction from 2007 was a felony involving force or violence, isn’t that correct?” Jonathan replied, “Yes, it was.”

During questioning of Jonathan about his confrontation with Sedano, the prosecutor referred to Jonathan’s felony conviction for a crime involving force or violence. During closing, the prosecutor argued the main issue was the credibility of the prosecution and defense witnesses and one factor in assessing credibility was whether the witness had a prior felony conviction. The prosecutor noted the instant crimes took place on September 1, 2007, and Jonathan had a “2007 prior felony conviction involving force or violence.”

B. No Abuse of Discretion

Jonathan contends the court erred by refusing to sanitize his prior conviction and allowing the prosecutor to refer to it as a felony involving force or violence. Jonathan proposes that the similarity to the charged crimes and the temporal proximity created undue prejudice and caused the jury to view him as a person of evil character.

Sections 788 and 352 of the Evidence Code govern the admissibility of felony convictions for impeachment. (*People v. Mendoza* (2000) 78 Cal.App.4th 918, 925.) Evidence Code section 788 permits the prosecution to show a witness has been convicted of a felony to attack his credibility. Evidence Code section 352 gives the trial court broad

discretion in assessing whether concerns of undue prejudice, confusion or consumption of time outweigh the probative value of particular evidence. (*People v. Dyer* (1988) 45 Cal.3d 26, 73.)

When a discretionary power is statutorily vested in the trial court, its exercise of that discretion “must not be disturbed on appeal except on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.” (Italics omitted.) (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124.)

A court may sanitize a witness’s prior conviction by allowing the prosecutor to refer to it only in a general manner. The act of sanitizing the prior prevents specific information about the prior conviction from prejudicing the jury. Sanitizing allows some facts of a prior conviction to impeach the witness because to exclude completely a prior would give the witness a “false aura of veracity.” (*People v. Beagle* (1972) 6 Cal.3d 441, 453.)

The Supreme Court has established four factors that control the trial court’s determination of whether to sanitize a prior: (1) whether the prior conviction reflects adversely on an individual’s honesty or veracity; (2) the nearness or remoteness in time of the prior conviction; (3) whether the prior conviction is for the same or substantially similar conduct to the charged offense; and (4) what effect admission would have on a defendant witness’s decision to testify. (*People v. Beagle, supra*, 6 Cal.3d at p 453.) Courts do not need to follow the *Beagle* factors rigidly. (*People v. Mendoza, supra*, 78 Cal.App.4th at p. 925.)

Jonathan does not claim his prior conviction did not reflect on his honesty. The prior was from the same year as the charged crimes and thus was not remote. Jonathan testified. Thus, the only pertinent possibly favoring sanitization was whether the prior was for the same or substantially similar conduct to the charged offenses. The court eliminated the fact the prior was for assault with a deadly weapon. The charged offenses included murder and attempted murder, more serious crimes than an assault. Jonathan

posits referring to a felony of force or violence allowed the jury to speculate on those types of felonies rather than the complete range of felonies. However, Jonathan's counsel established Jonathan's prior conviction was for an assault. The prosecutor argued the prior only in the context of Jonathan's credibility. Jonathan has not shown the court abused its discretion by sanitizing the reference to the prior as a felony involving force and violence rather than sanitizing it to a generic felony.

DISPOSITION

The finding that Jose premeditated and deliberated with respect to the murder conviction on count 1 is reversed. If, after the filing of the remittitur in the trial court, the People do not bring Jose to retrial on the premeditation and deliberation element within the statutory time limits, the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of unpremeditated murder and shall resentence Jose accordingly. (*People v. Hart, supra*, 176 Cal.App.4th at p. 675.) In all other respects, the judgment as to each defendant is affirmed.

WOODS, Acting P. J.

We concur:

ZELON, J.

JACKSON, J.