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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION TWO

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| THE PEOPLE,<br>Plaintiff and Respondent,<br>v.<br>DURELLE CRAWFORD,<br>Defendant and Appellant. | A108538<br><br>(Alameda County<br>Super. Ct. No. C142465A) |

Durelle Crawford appeals on several grounds from his convictions for voluntary manslaughter and attempted voluntary manslaughter, each with an enhancement for being armed with a firearm, and for one count of unlawful firearm activity, for which he received a total sentence of 13 years. We affirm Crawford's convictions.

## BACKGROUND

On March 11, 2002, an information was filed in Alameda County Superior Court charging Durelle Crawford with one count for the murder of Antron Crawford (no relation to defendant)[1] in violation of Penal Code section 187, subdivision (a),[2] one count for the attempted murder of Vedontay Underwood in violation of section 187, subdivision (a), and one count for unlawful firearm activity based on Durelle's

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[1] For clarity's sake, we will refer to defendant Durelle Crawford as Durelle and Antron Crawford as Antron for the remainder of this opinion.

[2] All statutory references herein are to the Penal Code unless otherwise indicated.

possession of a firearm while a ward of the juvenile court, in violation of section 12021, subdivision (e).[3] The information alleged that the murder and attempted murder were serious and violent felonies within the meaning of sections 1192.7, subdivision (c)(8) and 667.5, subdivision (c)(8), and subject to various enhancements regarding the discharge, use of, or arming with a firearm.

At trial, the parties did not dispute that one of the victims Antron, 20 years old, had been in a relationship with C.P., who had given birth to their son, five months old at the time of Antron's death. C.P. had broken up with Antron and started seeing Durelle, a neighbor of hers in Oakland who sometimes sold drugs out of C.P.'s house. C.P. lived with her baby, her mother and her mother's boyfriend, whose grandson, Marques G., also frequented the neighborhood.

On July 31, 2001, Antron, accompanied by Underwood and others, visited C.P. and their son at her house. After a very brief visit, Antron left the house and went over to Durelle, who was standing outside with Marques G. and others. He began punching and kicking Durelle, and Underwood joined in the assault. It was interrupted by officers passing by the scene.

The parties also did not dispute that Durelle immediately went to Alameda to see Terrance T., known as Mikey, a long-time friend and heroin addict who was hiding in Alameda after jumping bail, with whom Durelle discussed the fight. The parties did not dispute that the next day, August 1, 2001, Durelle, although he owned cars himself, borrowed a girlfriend's car and had the windows tinted; that he, Marques G. and Mikey went together in the car to Antron and Underwood's neighborhood and found them together outside; that the car stopped, its passenger door opened, and Mikey fired a MAC-style automatic weapon numerous times; that a .380 pistol was also fired from the car at that time; and that Antron was killed and Underwood wounded. Durelle's girlfriend also testified that he returned the car to her and told her to have the car painted.

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[3] The information also charged Marques G. as a co-defendant, but the two were tried separately.

The parties also stipulated that Durelle previously had been adjudged a ward of the juvenile court for assault with a firearm. Durelle testified at trial that he had shot a stepcousin in 1996, when Durelle was 15 years old, because he thought his stepcousin was going to "beat my ass or something."

The parties disagreed at trial over several key points regarding Durelle's actions, knowledge, and intent prior to and during the attack. The prosecution argued that Durelle and Mikey had planned to kill Antron and Underwood in revenge for their humiliating beating of Durelle the day before, and that Durelle fired the .380 pistol at Antron, but missed. It presented numerous witnesses in support of its contentions, including a woman who saw a part of the shooting from her home, and preliminary hearing testimony from Underwood, who was deceased at the time of the trial from an unrelated incident. Both are discussed further, *post*.

C.P.'s aunt, who was staying in the house where C.P. lived, testified that the occupants of the house learned that Antron was outside the night of Durelle's beating. She testified that she saw Durelle in the house with a gun in his hand, and that Durelle said that he would shoot Antron if Antron entered the house. She testified that she did not like Durelle seeing C.P.

C.P. testified that she never saw Durelle with a gun, and did not remember him making such a statement that night. She also testified that Durelle denied having anything to do with the shooting at first, but that he said the day before his arrest that he was sorry that he had anything to do with it and said something about asking God for forgiveness.

A former cellmate of Durelle's, George B., testified that Durelle had told him different versions of what happened, including that he, Durelle, had been one of the shooters. Durelle denied he had told George B. this, and the prosecution acknowledged in rebuttal closing argument that the cellmate's credibility was suspect.

Durelle's defense consisted principally of his own testimony. He contended that he had sworn off having or using guns after he had shot his stepcousin some years ago; had sought out Antron and Underwood solely to recover an expensive gold chain that

Antron had taken from him during their fight the previous day, and to resolve the dispute between them so that they would not beat him again. Durelle stated he had borrowed, tinted and driven his girlfriend's car to Antron and Underwood's neighborhood to avoid being recognized and attacked on sight; had not known or discussed with Mikey what Mikey intended to do with the two guns Mikey brought into the car, thinking he brought them for self-defense if necessary; had only driven the car; had been surprised when Mikey had started shooting; had been told by Mikey afterwards that Mikey thought he had seen someone reach for something like a gun; and saw Marques G. fire the .380 pistol, but only into the air. Durelle also testified that he had smoked three to four marijuana "blunts" by the time he headed over to Antron and Underwood's neighborhood, and that Mikey had snorted liquid heroin as they drove.

The parties also disagreed about the circumstances surrounding three different pre-trial statements Durelle had given to authorities over the course of approximately two years. In his first statement, given in October 2001, Durelle denied any involvement in the shootings. In his second statement, given in January 2002, he stated among other things that he was the driver and that Mikey, who wore a ski mask, had said that he wanted to "down one of them fools," which was slang for "kill somebody." In his third statement, given more than a year later, Durelle stated that he had driven the car, but that the plan was to recover his gold chain, that Mikey had brought along guns "in case something happens," and that he did not have knowledge of Mikey's intent to shoot beforehand.

The prosecution contended that the changes in Durelle's statements tracked his growing knowledge of the facts and law that could implicate him in the shootings. Durelle testified that he had lied in his first statement, and had lied in his second statement in the face of coercive tactics by the interrogating police, but that he had told the truth in his third statement.

The trial and closing arguments occurred over 11 days from May 18 to June 9, 2004. Durelle states that the jury then deliberated for 23 hours over six court days. It also was in recess for 12 days in the middle of its deliberations to accommodate certain

juror schedules as well. The jury reached a verdict, which turned out to be guilty, on count 3, regarding whether Durelle was armed with a firearm, before its recess, which the court sealed. The jury indicated when it recessed that it was deadlocked on counts 1 and 2, regarding the shootings of Antron and Underwood. It reached verdicts on these counts on the second day after its return from the recess, finding Durelle not guilty of murder and attempted murder, but guilty of the voluntary manslaughter of Antron and the attempted voluntary manslaughter of Underwood. The jury found true the enhancements alleging that Durelle was armed with a firearm, but found not true that Durelle had discharged or made personal use of a firearm.

On November 9, 2004, the court sentenced Durelle to 11 years for voluntary manslaughter, one year for attempted voluntary manslaughter, eight concurrent months for possession of a firearm while a ward of the juvenile court, and an additional year for the arming enhancements, for a total of 13 years. Durelle subsequently filed a timely notice of appeal.

## DISCUSSION

Durelle urges reversal of his convictions because of a number of court errors in instructing the jury, the jury improperly considered an extraneous factor in its deliberations, and the prosecutor committed an act of misconduct. We find no merit in his claims.

### I. *The Trial Court's Attempted Voluntary Manslaughter Instruction to the Jury is Not a Ground for Reversal*

The trial court initially instructed the jury regarding voluntary manslaughter, but not regarding attempted voluntary manslaughter. On the fourth day of deliberations, the jury requested a written statement on the law regarding attempted voluntary manslaughter. The court responded in writing by directing the jury to the voluntary manslaughter instruction, CALJIC No. 8.40, which had already been given to them. It stated in relevant part that "[e]very person who unlawfully kills another human being

[without malice aforethought but] either with an intent to kill, *or with conscious disregard for human life,* is guilty of voluntary manslaughter . . . ." (Italics added.)[4]

The court also responded to the jury's request by attaching certain instructions regarding "attempt," including a copy of CALJIC No. 6.00, which stated in relevant part: "An attempt to commit a crime consists of two elements, namely, *a specific intent to commit the crime*, and a direct but ineffectual act done toward its commission. [¶] . . . acts of a person who intends to commit a crime will constitute an attempt where those acts clearly indicate *a certain, unambiguous intent to commit that specific crime.*" (Italics added.)

The court did not provide a specially written instruction for attempted voluntary manslaughter. The court reviewed its response to the jury beforehand with counsel, who made no objection.

The parties do not dispute that the court properly instructed the jury regarding voluntary manslaughter and attempt by giving them CALJIC Nos. 8.40 and 6.00 respectively. The parties also do not dispute that, pursuant to *People v. Montes* (2003) 112 Cal.App.4th 1543, 1546-1552, a person may not be convicted of *attempted* voluntary manslaughter unless the person is found to have acted with the specific intent to kill, and cannot be convicted if the person acted only "in conscious disregard for life."[5]

Durelle argues that the trial court committed federal constitutional error by failing to properly instruct the jury that it could convict Durelle of the attempted voluntary manslaughter of Underwood only if it found that Durelle specifically intended to kill Underwood. In a related argument, Durelle contends that the court also erred by failing to instruct the jury that Durelle could only be convicted of aiding and abetting attempted

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[4] CALJIC No. 8.40 also stated that one of the elements to be proved was that "[t]he perpetrator of the killing either intended to kill the alleged victim, or acted in conscious disregard for life[.]"

[5] The trial occurred after the issuance of *People v. Montes, supra,* 112 Cal.App.4th 1543, but apparently before the issuance of standard jury instructions for attempted voluntary manslaughter reflecting the law stated in that decision.

voluntary manslaughter if it found that the shooter harbored a specific intent to kill Underwood. We find no basis for reversal.

Durelle first argues that the trial court's attempted voluntary manslaughter instruction was "erroneous" because of the court's reference to CALJIC No. 8.40, which included the "conscious disregard" language in its explanation of voluntary manslaughter. As a result, Durelle contends, "the court effectively instructed the jury that this lower intent level could support an attempted voluntary manslaughter conviction." We disagree. Unlike the two cases Durelle relies on for this argument, the court's instruction neither expressly stated that *attempted* voluntary manslaughter included acts in "conscious disregard for life," as was the case in *People v. Montes, supra,* 112 Cal.App.4th at pages 1546-1547, nor did it constitute separate, "contradictory, and partially inaccurate, instructions regarding the element of specific intent to kill," as was the case in *People v. Lee* (1987) 43 Cal.3d 666, 668, 669-670 (*Lee*) (involving instructions relating to attempted murder). The instructions as given here were correct statements of law on voluntary manslaughter and attempt. The court did not expressly instruct that "attempted voluntary manslaughter" could be found on the basis of "conscious disregard," nor did it misinstruct regarding "specific intent." To the contrary, the court instructed the jury that an element of "attempt" was the "specific intent to commit the crime." Therefore, we reject this contention.

Durelle also contends that the court's references to CALJIC Nos. 6.00 and 8.40 "at least confused the jury" and were "at best ambiguous." Essentially, he argues that it was reasonably likely that jurors thought they should convict him of attempted voluntary manslaughter if they found that he had acted in conscious disregard for life because, although CALJIC No. 6.00 requires a finding of a "specific intent to commit *the crime*" (italics added), CALJIC No. 8.40, regarding voluntary manslaughter, refers to the "conscious disregard for human life" standard. We agree that the trial court erred by providing ambiguous instructions that were reasonably likely to lead to the jury's

misinterpretation of the law regarding attempted voluntary manslaughter, but conclude that the court's error was harmless.[6]

**1. *The Trial Court's Instructional Error***

In considering whether error has occurred, we must determine whether there was a "reasonable likelihood" that the jury applied the court's instructions as Durelle asserts it did. (*People v. Kelly* (1992) 1 Cal.4th 495, 525; *People v. Haskett* (1990) 52 Cal.3d 210, 230-231 [*Haskett* applying the "reasonable likelihood" standard to determine whether an instruction was ambiguous and subject to erroneous interpretation].) " 'In addressing this question, we consider the specific language under challenge and, if necessary, the charge in its entirety. [Citation.] Finally, we determine whether the instruction, so understood, states the applicable law correctly.' " (*People v. Kelly, supra,* at p. 525.)

Implied malice standards erroneously given in attempted murder cases closely parallel the "conscious disregard for human life" standard given in this case. Our Supreme Court has stated, " 'as to the crime of attempt to commit murder, where a specific intent to kill is absolutely required, reliance upon any definition of murder based upon implied malice is logically impossible, for implied malice cannot coexist with express malice. With this fundamental concept to be reckoned with, instructions on the crime of attempt to commit murder, necessarily, when they define the underlying crime of murder, must be limited only to that kind of murder where a *specific* intent to kill or, in other words, *express* malice, is one of the elements." (*Lee, supra,* 43 Cal.3d at pp. 670-671, quoting *People v. Santascoy* (1984) 153 Cal.App.3d 909, 914.) Therefore, "implied malice instructions should never be given in relation to an attempted murder charge." (*Lee,* at p. 670.)

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[6] Arguably, Durelle has waived his right to make this "ambiguous instruction" argument on appeal. " '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. Guiuan* (1998) 18 Cal.4th 558, 570, quoting *People v. Andrews* (1989) 49 Cal.3d 200, 218.) Respondent has not raised the issue of waiver, however, so we address the merits of Durelle's contentions without determining whether waiver has occurred here.

We follow the reasoning of this case law in the present case.[7] The trial court, by referring to the standard instruction regarding attempt, CALJIC No. 6.00, informed the jurors that attempted voluntary manslaughter required a specific intent to commit the crime. However, it is reasonably likely that the court's reference at the same time to CALJIC No. 8.40, the voluntary manslaughter instruction, without clarifying that the "conscious disregard for human life" standard contained therein did not apply to attempted voluntary manslaughter, left jurors with a mistaken impression about the standards they were to apply. Therefore, we conclude the trial court erred in its instructions.

***2. The Trial Court's Error was Harmless***

We must next determine whether or not the trial court's error requires reversal. We conclude that it does not because the error was harmless, whether analyzed under the federal or state standards. (*Lee, supra,* 43 Cal.3d at pp. 673-676 [applying the federal "harmless beyond a reasonable doubt" standard found in *Chapman v. California* (1967) 386 U.S. 18, 24];[8] *People v. Montes, supra,* 112 Cal.App.4th at p. 1552 [applying the

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[7] We follow the reasoning of *Lee, supra,* 43 Cal.3d at p. 670, in that we conclude that the "conscious disregard" language in CALJIC No. 8.40 should not have been included in any part of the court's attempted voluntary manslaughter instruction. It created an ambiguity that was reasonably likely to lead to the jury's misinterpretation of the instructions, even though the court's statements of law on their face were correct. As we have already discussed, however, the present case does not involve contradictory instructions, one of which was incorrect on its face, an important difference from *Lee*.

[8] A recent Ninth Circuit opinion, *Lara v. Ryan* (9th Cir. 2006) 455 F.3d 1080, held that *Chapman* harmless error analysis was inappropriate in a case involving contradictory attempted murder instructions, at least one of which was constitutionally invalid. (*Id*. at pp. 1084-1087.) The court stated that "[w]here it cannot be determined whether the jury convicted under a correct or erroneous legal theory, we must reverse unless we can determine with 'absolute certainty' that the jury convicted under the proper theory." (*Id*. at p. 1087.) The court also noted that "[i]nstructions containing omissions or incorrect descriptions of elements are considered trial errors, not structural errors[,]" and, accordingly, are subject to harmless error analysis. (*Id*. at p. 1086.) Without determining that we would otherwise follow *Lara* in the present case (see *People v. Williams*, 16 Cal.4th 153, 190 ["Decisions of lower federal courts interpreting federal law

state's "reasonable probability" standard found in *People v. Watson* (1956) 46 Cal.2d 818, 836-837].)

***a. There Was Overwhelming Evidence that Mikey Specifically Intended to Kill Underwood***

Although Durelle does not concede that the primary shooter, who he testified was Mikey, fired at Underwood with the intent to kill him, there was overwhelming evidence presented at trial that this was the case.

First, Underwood's testimony was that he saw a black car with tinted windows pull up about 20 feet from Antron and him, the passenger side door open, the passenger seat go up, and an arm with an automatic gun come out, with gloves over the shooters hands. As soon as Underwood saw the gun, he turned around and ran. He heard shots as soon as he turned around, about 15 or 16 in all. He stated that six bullets struck him, with one bullet hitting him in the shoulder and five others grazing his back.

Another witness viewed a part of the shooting from her home. She testified that she heard three shots being fired, then viewed a portion of the shooting from her front window. She saw a man, whom she identified from a photograph of Underwood, running across the street into her driveway. She saw another man dressed in black and wearing something like a ski mask and gloves standing in the open door of the passenger side of a

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are not binding on state courts"]), particularly in light of *Lee, supra,* 43 Cal.3d at pages 673-676 (see *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455), we conclude that the ambiguous instructions in the present case at most should be included within the category of "[i]nstructions containing omissions or incorrect descriptions of elements" subject to harmless error analysis under *Lara*. (See also *People v. Huggins* (2006) 38 Cal.4th 175, 211-212 [applying *Chapman* harmless error analysis to the court's misstating the law regarding "intent to kill" in a jury instruction regarding felony-murder special circumstance findings].) To the extent there may be a conflict between *Lara* and *Lee* regarding the standards of review for contradictory jury instructions, it is not relevant to this case. Even if we were to conclude that the court's attempted voluntary manslaughter instruction on its face misstated the element of "specific intent" by referring to "conscious disregard," it would at most constitute an incorrect description of that element, and we would still apply harmless error analysis. (*People v. Huggins, supra,* at pp. 211-212.)

black car across the street. The man fired three or four gunshots at a man lying on the ground before getting back into the car, which sped away.

Durelle, although he contested a number of things recounted by these eyewitnesses, conceded in his testimony at trial that shooting began very quickly after he had stopped their car, and that there were a lot of gunshots.

The police recovered 14 nine-millimeter bullet casings at the scene of the shooting, 12 fired from one weapon and two from a second weapon. Three bullet fragments and two slugs were also located at the scene. A partial bullet slug was found in the tire rim of a bicycle near Antron's body, and an additional bullet was recovered from Antron's body. Antron died from his wound.

Durelle contends that the evidence showed that the shooter did not fire with the intent to kill Antron and Underwood. He claims that Mikey lacked an intent to kill because, as Durelle testified, Mikey was "blazing all over the place," bullets were sprayed haphazardly around the area, and Mikey purportedly said he was high and could have been mistaken, but he thought one of them was reaching for a gun and was about to pull something out. None of these arguments are supported by other evidence. The barrage of gunshots supports a deadly intent rather than a lesser intent to frighten. A spray of bullets is logical because the targets moved, with Underwood running across the street and into a driveway. There was no evidence presented of weapons being found at the scene.

In short, the evidence indicates that the day after Antron and Underwood attacked Durelle, a man in a disguise left a car immediately after it pulled up near the two, and began shooting at them repeatedly, firing at Antron while he lay on the ground, killing him, and hunted Underwood as he ran away, striking him with bullets in his shoulder and back. We cannot think of more compelling evidence which would establish that the shooter intended to kill both Antron and Underwood short of his announcement that he

was going to do so.[9] In fact, Durelle told police Mikey had made such an announcement, as we discuss in the next section.

### *b. Durelle Acted and Made Statements Indicating His Intent to Kill Antron and Underwood*

There was a great deal of evidence that Durelle acted in a manner that was consistent with a specific intent to kill Antron and Underwood. Durelle cannot contest, for example, the numerous facts indicating that he intended to attack Antron and Underwood. After he was attacked by the two, Durelle immediately sought out Mikey and planned to go to High Street the very next day. Before going to High Street, he borrowed a girlfriend's car, and spent $150 to tint its windows, although he owned cars himself. He then traveled to High Street with two guns in the car, although he was aware that possession of a firearm violated the terms of his parole. Durelle's contentions that

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[9] Durelle contends that the present case resembles *People v. Ratliff* (1986) 41 Cal.3d 675, and *People v. Johnson* (1981) 30 Cal.3d 444, 449, in which prejudice was found when implied malice instructions were given for attempted murder cases involving close-range shootings. In each case, however, the court merely held that a shooting at close range under the circumstances of the case was not conclusive of that intent. (*People v. Ratliff, supra,* at pp. 695-696.) Neither case involved the extensive evidence here of an intent to kill.

Even if assuming for the sake of argument that the jury considered Antron to be the primary target here (Underwood also had attacked Durelle the day before), this case is far more analogous in its facts to the "kill zone" cases discussed in *People v. Bland* (2002) 28 Cal.4th 313, 330-331. That court stated: "[C]onsider 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. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death. The defendant's intent need not be transferred from A to B, because although the defendant's goal was to kill A, his intent to kill B was also direct; it was concurrent with his intent to kill A." (*Id*. at p. 330.)

these actions were taken in anticipatory self-defense as part of a plan to attempt to recover his gold chain are incredible in light of the evidence surrounding the shootings already described above. There is no indication in the record that the jury believed these contentions; to the contrary, as discussed in the next section, the jury undoubtedly rejected a key part of Durelle's story, regarding the weapons that were brought in the car.

There was other evidence pointing to Durelle's culpability. Although he claimed he was surprised by the shooting, he did not claim to do anything to interrupt it or to attempt to aid the dying Antron; instead, he fled the scene. He then sought to conceal his participation in the shooting by, according to his girlfriend's testimony, instructing her to have her car painted, which she did. According to C.P., he later indicated that he regretted his involvement in the shooting and said something about asking God for forgiveness. In his first statement to police, he concealed his involvement by denying that he had been present at the shooting.

Furthermore, as we have already discussed, Durelle gave an incriminating statement to authorities in January 2002. A few months after the shooting, while he was still at the Santa Rita jail, Durelle approached jail officials and asked to speak to an investigator about the shootings. Durelle contended that he wanted to "straighten out the lies" he had previously told the investigator. In the course of his subsequent interview, Durelle stated, among other things, that he drove the car to the shooting, that Mikey said he wanted to "down one of them fools," which Durelle said was slang for "kill somebody," and that after they drove around for about 15 minutes, "Mikey just wanted to kill anybody. Goin' 'Fuck it, if we can't find them, we just kill anybody.' " They drove to High Street to look for Antron and his friends and found them. Marques G. opened the passenger door and Mikey got out from the back seat and started shooting. Durelle saw Mikey shoot his gun "hella times," saw the last bullet fired at Antron strike him in his back, and drove the car away. When asked about his intent, Durelle stated, "My intent was . . . to . . . not back down from his challenge. Mikey's tryin' to put me in, not to be a punk. You know what I'm saying? I was mad at the time or whatever, but . . . ."

Thus, Durelle, after seeking out the investigators to give another statement, essentially confessed to assisting Mikey in a plan to kill Antron and Underwood.

Durelle contends that his interviewers coerced him into telling lies in his January 2002 statement by making false promises to let him go, and causing him to believe that he would remain in jail the rest of his life if he did not follow their instructions about what to say. He argues that the jury's request for a readback of the interviewing sergeant's testimony about discussions before and after the taped portion of Durelle's statement indicates that the jury did not accept his statement at face value. However, as Durelle also notes, the jury made numerous requests in the course of their deliberations, showing a commendable diligence. The jury's request for a readback could have been for a variety of reasons, and proves nothing by itself.

***c. The Jury Rejected Durelle's Primary Defense***

As Durelle states in his opening brief to this court, his "primary defense was that he drove to High Street [where Antron and Underwood were located] to retrieve his necklace, that he thought that [Mikey] brought the guns for self-defense, and that he never intended to kill anyone." In other words, Durelle contended that he knew nothing about, and had nothing to do with, any plans to shoot Antron and Underwood. The record indicates that the jury rejected this defense, and instead embraced the theory that Durelle, while not the shooter, acted with the shooter to kill Antron and Underwood.

Specifically, the jury's determination that Durelle was guilty of count 3, which alleged that Durelle had unlawfully *owned, possessed, and had custody and control* of a handgun, establishes that the jury believed Durelle acted in conjunction with the shooter. The court instructed the jury pursuant to CALJIC No. 12.44 that there are two kinds of possession, actual and constructive, and that constructive possession "does not require actual possession, but does require that a person knowingly exercise control over or the right to control a thing, either directly or through another person or persons." The court also instructed the jury that "[o]ne person may have possession alone, or two or more persons together may share actual or constructive possession." On June 16, 2004, just before the 12-day recess in jury deliberations, the jury announced that it was deadlocked

on counts 1 and 2, but that it had reached a unanimous verdict on count 3, which the court ordered sealed. The jury's verdict stated that Durelle was guilty in that he "did unlawfully *own, possess, and have custody and control* of a . . . handgun." (Italics added.) This verdict can only mean that the jury rejected Durelle's story that he had nothing to do with the firearms that were used in the shooting and, instead, found that Durelle owned and exercised control over these weapons. Given the overwhelming evidence that the shooter, undisputed between the parties to be Mikey, acted with the intent to kill Underwood, and that Durelle took actions consistent with this same intent, we have no doubt that the jury found Durelle had the specific intent to kill Underwood in the course of finding him guilty of attempted voluntary manslaughter.

***d. Durelle's Other Arguments Lack Merit***

Durelle makes numerous other arguments as to why the court's error was prejudicial, which are not persuasive in the face of the evidence and the jury's guilty verdict on count 3. For example, Durelle contends that his intent was a key issue at trial. While this is correct, there is no question, as indicated by the guilty verdict on count 3, that the jury rejected his contention that he had nothing to do with the shootings.

Durelle further argues that the jury, which focused on the aiding and abetting issue in some of its queries to the court, demonstrated certain "qualms" about the evidence by its questions, and was confused by the court's response to one such query. The jury asked the court to define "criminal purpose" as the term is used in CALJIC No. 3.14, regarding the criminal intent necessary to make one an accomplice. The court incorrectly stated that the instruction referred to the perpetrator's "unlawful purpose," but not the "criminal purpose" when in fact the instruction referred to both. The jury's questions to the court, rather than showing any "qualms" about finding Durelle guilty of at least attempted voluntary manslaughter, were consistent with the great diligence displayed by this jury throughout its deliberations. We fail to see how the court's oversight in responding to the jury's question about "criminal purpose" altered the jury's deliberations in a prejudicial manner, particularly in light of the evidence discussed herein.

Durelle also contends that two instructions, one regarding the concurrence of act and specific intent and the other regarding voluntary intoxication, which did not identify attempted voluntary manslaughter as one of the specific intent crimes listed therein, "further emphasized that the jury could convict [defendant] of attempted voluntary manslaughter without finding an intent to kill." Durelle further argues that the jury's questions touching on issues of intent show they were manifestly confused about the type of intent required, and that the jury's lengthy deliberations indicate that the case was close and hinged on the question of intent.[10] Durelle also contends that the jury's acquittal of Durelle for the "specific intent" crimes of murder and attempted murder suggest it did not think he acted with specific intent to kill.

The jury did indicate on June 16 that it was deadlocked on counts 1 and 2, and its questions to the court indicated that it was engaged in a careful analysis of the law and the evidence. However, Durelle ignores the fact that the jury determined not only whether Durelle was guilty of a crime, but also whether he was guilty of murder or voluntary manslaughter regarding Antron's death, and attempted murder or attempted voluntary manslaughter regarding Underwood's death. While the jury asked a number of

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[10] Durelle points to a number of jury questions, such as the jury's question about the interaction of CALJIC Nos. 4.21.1 and 4.21.2 (both regarding voluntary intoxication): "Whether a defendant is guilty as an aider and abettor—guilty of murder or attempted murder only, as in 4.21.1, or is this statement more general than 4.21.1[.]"

Durelle also notes that the jury asked: "(1) Re 4.21.1 and 3.01 [defining aiding and abetting] [¶] If the voluntary intoxication of the shooter demotes the crime from murder to manslaughter, does it also demote the crime when considering aiding and abetting? Or, is it only the mental state of the aider and abettor that is an issue? [¶] (2) Re 8.42 [explaining sudden quarrel or heat of passion and provocation] and 3.01 [¶] If heat of passion of the shooter demotes the crime from murder to manslaughter, does it also demote the crime when considering aiding and abetting?"

Durelle also refers to the following jury question: "Please help us to understand how these two points are consistent with each other: [¶] 3.14 [regarding the criminal intent necessary to make one an accomplice] 'An aider and abettor will share the perpetrator's specific intent when he knows the full extent of the perpetrator's criminal purpose . . .' and [¶] 8.31 [regarding second degree murder] know of 'the danger to, and with conscious disregard for human life.' "

questions about various points of law, including attempted voluntary manslaughter and certain aspects of intent and aiding and abetting, its very last question, on the day it reached its verdict, referred to CALJIC No. 8.31, a second degree murder instruction, indicating that the jury was contemplating that charge up to the very end of its deliberations.

Regarding the jury's 23 hours of deliberations over six days, this is not necessarily an extraordinarily lengthy period of time after 11 days of trial and closing arguments over numerous highly contested issues, and which deliberations included a 12-day recess in the middle. Regardless, the record, including the various jury questions, verdicts and period of deadlock, indicates that the jury took great care to examine the evidence and the law before reaching its verdicts in the face of the party's debate over numerous facts and charges, but it does not demonstrate that the jury would have found Durelle not guilty of attempted voluntary manslaughter if the court had not erred in its instructions. (See e.g., *People v. Avena* (1996) 13 Cal.4th 394, 435-436 [rejecting the assumption that lengthy penalty deliberations indicated that the jury had difficulty reaching a decision]; *People v. Brown* (1985) 40 Cal.3d 512, 535 [rejecting the argument that the jury's lengthy deliberations indicated prejudice and noting "the jury may simply have sifted the evidence with special care"].)[11]

Furthermore, the jury's acquittal of Durelle of attempted murder and murder does *not* indicate it found he did not have a specific intent to kill. To the contrary, the jury, as it was instructed pursuant to CALJIC Nos. 8.10, 8.11, 8.30 and 8.31, could have found him guilty of second degree murder under an implied malice theory. (See *People v. Swain* (1996) 12 Cal.4th 593, 599, 602-603 [second degree murder does not require a finding of a specific intent to kill].)

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[11] Durelle cites *People v. Cardenas* (1982) 31 Cal.3d 897, 907, which noted that a jury's 12 hours of deliberation in a case in which "[t]he prosecution's case . . . was not overwhelming" was a "graphic demonstration of the closeness of [the] case." Here, however, the prosecution presented a strong case of defendant's culpability in a crime, and the length of the trial merited considerable deliberations by a very diligent jury.

Notably, the arguments made by trial counsel did not in any way support a finding of guilt based on a "conscious disregard for human life." To the contrary, the prosecution's only theory was that Durelle and Mikey intended to kill Antron and Underwood. Durelle's counsel, in arguing that Durelle was at most guilty of manslaughter, summarized the prosecution's case as a "retaliation killing." In closing argument, defense counsel also clarified the need to find an intent to kill under aiding and abetting law, stating: "The prosecutor has the burden of proving that this was a revenge killing and that Durelle is guilty either directly as the shooter . . . or that he's an aider and abettor which means that he assisted the person who did the killing *with the knowledge that he was going to do the killing and with intent that he do the killing. And if he didn't have knowledge nor intent that the killing be done, then he is not an aider and abettor, he is not guilty.*" (Italics added.)

Most significantly, none of the jury's questions or the court's responses take away from the great significance of the jury's June 16 verdict that Durelle "did unlawfully own, possess, and have custody and control of a . . . handgun." Although the jury's guilty verdict on count 3 does not by itself establish that the jury found Durelle acted with a specific intent to kill, it shows conclusively that the jury rejected Durelle's primary defense and found that he had participated in plans to shoot Antron and Underwood.[12] Again, this determination, combined with the overwhelming evidence that the shooter acted with a specific intent to kill and that Durelle took actions and made statements consistent with that intent, lead us to conclude that the jury necessarily convicted Durelle of attempted voluntary manslaughter because it believed that he had intended to kill Underwood.

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[12] Also, consistent with this verdict, the jury ultimately found that Durelle was "armed" with a firearm within the meaning of section 12022, subdivision (a)(1), as charged in counts 1 and 2.

Furthermore, as our review indicates, and as Durelle concedes, he did not seriously contest the prosecution's version of the relevant events.[13] No one argued that Durelle acted with conscious disregard for human life in his actions toward Underwood. Moreover, the prosecution argued repeatedly that Durelle acted with the specific intent to kill. Durelle's counsel maintained that Durelle's testimony, in which he indicated that he did not have antagonistic intentions towards Antron or Underwood, was the truth, and that the prosecution had not proven its case beyond a reasonable doubt. He also emphasized repeatedly that the jury had to decide that Durelle intended to kill in order to find him guilty of manslaughter. For example, his counsel stated:

"[I]f Durelle is culpable, if he's guilty of anything, it's of manslaughter. If he's guilty of anything it's of *intentional manslaughter*, and I intend to show how the evidence proves that, that he acted in a rage, that he acted in a heat of passion, caused by having the bejesus beaten out of him, as the prosecutor says, in front of his own neighborhood . . . ." (Italics added.)

Durelle's counsel argued elsewhere to the jury that "the classic manslaughter is a mutual combat, one person gets so mad during the mutual combat he kills the other person intentionally," that "voluntary manslaughter is an intentional killing," and that "you have to decide whether [Durelle] had such knowledge that the killing was going to happen or—and with such knowledge that he intended that the killing happen, and if he didn't, if it hasn't been proven to you, it's your duty to find him not guilty."[14] Counsel's emphasis on the specific intent to kill is further support for finding harmless error here.

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[13] Durelle argues in his opening brief that his "presence at the scene, as well as much of his conduct before and after the shooting, were undisputed; his primary defense was that he drove to High Street to retrieve his necklace, that he thought that [Mikey] brought the guns for self-defense, and that he never intended to kill anyone."

[14] Counsel did state that "second degree murder is intentional doing of an act from which death or serious bodily injury can be reasonably foreseen such as spraying bullets around the neighborhood with malice. [¶] And manslaughter is the same as second degree murder without malice." However, counsel's reference to the need to find an intent to kill herein quoted followed very soon thereafter.

(See *Lee, supra,* 43 Cal.3d at pp. 677-678 [citing both counsel's references to the specific intent to kill as one reason for finding harmless error].)

Finally, Durelle's contentions, in light of the overall evidence, were incredible. They would have required the jury to believe that the day after Antron and Underwood attacked him, Durelle, although he merely sought recovery of his necklace and peaceful relations, and had a number of cars of his own, drove up to Antron and Underwood unannounced in a girlfriend's car accompanied by two gun-toting friends, obscured behind windows he had tinted that morning; that Mikey just happened to bring along the guns, including a MAC-style automatic weapon; that he, Durelle, who had sworn off guns after being declared a ward of the court for assault with a firearm some years before, knowingly drove with the guns in the car in violation of his parole without asking about, or noticing what was being done with them; that as soon as Durelle drove up to the victims, Mikey just happened to don a disguise and shoot the MAC-style automatic weapon numerous times in Antron and Underwood's direction; that Antron just happened to be killed and Underwood shot a number of times while running away; and that Durelle's incriminating statements to police, which he made upon his own initiative, were coerced lies. Given the overwhelming evidence of Durelle's intent to kill and the incredible nature of his account, the jury could have had no reasonable doubt that Durelle intended to kill Underwood. (Cf. *Lee, supra,* 43 Cal.3d at pp. 678-679 [quoting the appellate court that " 'what we have here is a single story as to the objective facts, but a dispute over what this proves about . . . defendant's internal thoughts,' " and concluding, based upon the facts of the shooting, that " 'no reasonable juror, properly instructed on the issue of intent, could have entertained a reasonable doubt' " that defendant had a specific intent to kill].)[15]

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[15] We note that the court in *Lee, supra,* 43 Cal.3d at page 678, quoting the appellate court, pointed out that " '[t]his is not a case presenting a significant conflict in the evidence—where the prosecution puts forth one set of witnesses conveying one impression of what happened and the defense counters with another set of witnesses telling a very different story. So we do not have to decide whether a reasonable juror

In short, "there is no reasonable or plausible basis for finding that the instructional error affected the jury's verdict." (*People v. Flood* (1998) 18 Cal.4th 470, 505 [reviewing the implications of the jury's verdict and the uncontested evidence in the course of finding that an erroneous jury instruction was harmless error under the *Chapman* standard].)[16] For all of the reasons stated herein, we find beyond a reasonable doubt that the trial court's instructional error regarding attempted voluntary manslaughter did not contribute to the jury's verdict and, therefore, was harmless. (See *Huggins, supra,* 38 Cal.4th at pp. 211-212; *People v. Flood, supra,* 18 Cal.4th at pp. 502-503; *Lee, supra,* 43 Cal.3d at pp. 673-679.) We find the error harmless under the state's "reasonable probability" standard as well. (See *People v. Montes, supra,* 112 Cal.App.4th at p. 1552.)

### II. *The Trial Court Did Not Improperly Instruct the Jury Regarding a Theory of Accomplice Liability*

Durelle next argues that the trial court committed federal constitutional error by improperly offering the jury a new and factually inapplicable theory that permitted the jury to convict Durelle on the basis of natural and probable consequences doctrine, and did not comply with its procedural and substantive duties under section 1138. Durelle's argument misstates the relevant events. We find that the court's actions were proper under the circumstances, and that any purported instructional error was harmless.

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could give credence to the defendant's version of what he did and said as it bears on the issue of intent in preference to the prosecution's version.' " Here, Durelle did testify, and told a story line that was in some ways different from that told by the prosecution, such as that he was seeking to recover a necklace taken from him the day before. Nonetheless, the parties agreed on a single story about most of the key events, as discussed herein.

[16] Even considering the standard for *Chapman* review of instructional errors involving the court's omission of an element of a crime altogether, there was not sufficient evidence to rationally lead to a contrary finding with respect to the element of specific intent, as indicated herein. (See *Neder v. United States* (1999) 527 U.S. 1, 19 [instructing, when an element is omitted from instructions, that the appellate court should ask "whether the record contains evidence that could rationally lead to a contrary finding with respect to the omitted element"].)

### *A. The Court's Responses to the Jury's Requests*

During voir dire, the prosecution, in discussing the law of aiding and abetting, gave the jury the example of Bonnie and Clyde robbing banks and sometimes shooting or killing people, as portrayed in the 1960's film about the two. The prosecution asked the jury if anyone would have a problem, under the theory of aiding and abetting, convicting Bonnie and Clyde's getaway driver of robbery or murder.

Later, during its deliberations, the jury sent a note to the court as follows:

"Re CALJIC 3.01:

"For the bank robber question: (as asked in jury selection)

"If the driver knows they are off to rob a bank—we understand he's guilty of bank robbery.

"If someone is shot in the commission of the robbery, under what circumstances is the driver guilty of aiding and abetting the shooting? (Example: driver knows there are guns in the car.)

"Possibly related question: re 1. 'with knowledge of the unlawful purpose of . . .' What does it mean that it says 'the.' Don't most people have multiple purposes when they are doing something? (Skip this one if irrelevant.)"

The trial court discussed the jury's query about the bank robbery with counsel. It explained that it had not given the jury CALJIC No. 3.02, regarding liability for natural and probable consequences, which had been requested by Durelle but not the prosecution, because the prosecution had not proceeded on a theory that there was a predicate crime as required by the doctrine, and did not argue the theory to the jury. In light of the jury's question, the trial court decided to respond to the bank robber query as follows, which response it first reviewed with counsel:

"You have submitted an inquiry which refers to the 'bank robber question' posited during jury selection. I shall answer the question as it relates to the question you submitted, but be advised that the factors in that question are distinct and distinguishable from the facts in this case.

"The jury has asked whether the driver of a vehicle used to transport the individuals intending to commit a robbery is guilty of aiding and abetting a shooting, should the shooting occur during the commission of the robbery. It is understood that the driver was aware that the coparticipants intended to commit the robbery.

"Under this set of facts, the driver is guilty of aiding and abetting the shooting if the shooting was a natural and probable consequence of the commission of the crime of robbery.

"In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

Defense counsel objected to the instruction. Citing, among other cases, *People v. Prettyman* (1996) 14 Cal.4th 248, counsel noted that the trial court must identify and describe target crimes in a natural and probable consequences instruction. The court responded: ". . . I concur with you completely and I believe those cases apply if I were to give the 3.02 and neglect to identify a target crime. I am specifically not doing that. I am responding solely to the jury's question pointing out that their question is inapposite to the facts in the case, however, answering their question as to what the law is as to the theory involved. Your objection is noted, but I believe that my response is the correct one."

On the morning of the next day of deliberation,[17] the jury requested a meeting in chambers with the judge to discuss the deliberation process. The court, with counsel's consent, asked the jury if it preferred a meeting with the entire jury or just the foreperson. The jury responded that the court should meet with the foreperson, and the court did so

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[17] Twelve calendar days actually passed between the day the court provided its response and the next day of deliberation, which occurred after the jury's recess.

with counsel for the parties present. The foreperson sought the court's advice on what the jury could do to reach a decision on the first two counts, regarding the shooting of Antron and Underwood. This led to the following exchange:

"THE FOREPERSON: One thing that would definitely be of assistance is we would like to return back to the example that came up during jury selection that we already asked you about one time, the bank robber. We would like to talk about the bank robber and the issue of malice. That's one thing.

"But back to the process just for a second . . .

"THE COURT: May I interject?

"THE FOREPERSON: Sure.

"THE COURT: And perhaps—I'm going to ask specifically that you not use the analogy of the bank robber in your deliberations because that is so factually inapposite, not relevant, nonrelevant to the facts of this case that it may in fact be confusing.

"THE FOREPERSON: Gee, we found it helpful.

"THE COURT: I know you did, and that's the problem. I wanted to make it very clear by the response that I filed that it was not on point."

After reviewing the question that had been raised on the felony murder rule, the court told the foreperson: "I believe that the reference to the bank robbery which was presented during voir dire . . . was solely directed toward the issue of aiding and abetting." The foreperson responded, "Right. That's the limited way we used it, I believe. We tried. You wrote—as you said a second ago you sort of paraphrased the law a little bit, you filled in a few of the gaps in that statement. We read it over and over and found it to be helpful."

After pointing out that the robbery example involved the commission of a felony, the court continued: "In this particular instance part of the evidence that was presented, if the jury so finds it, was that the attempt to go over there may have in fact been to retrieve the chain or to confront which may not fact [*sic*] not have been a criminal act. So therefore in the bank robbery there was definitely an intent to commit a criminal act. In this particular action there may not have been an intent to commit a criminal act on the

part of any of the participants in the car that drove over, and for that reason the analogy should not be used. That was why I prefaced it that it should not be applied, that analysis should not be applied. It was solely to the issue of aiding and abetting."

After further discussion in chambers, the trial court instructed the foreperson to return to the jury and "explain the substance of our conversation and any additional questions that you will formulate and present."

***B. The Court's Response Was Within Its Discretion***

The court's response to the jury's bank robber query was within its discretion, particularly given that the jury's query indicated that it already was considering a scenario that was inapposite to the present case.

A court's obligation to respond to jury questions during deliberation is governed by section 1138, which states in relevant part: "After the jury have retired for deliberation, . . . if they desire to be informed on any point of law arising in the case, . . . the information required must be given . . . ." (§ 1138.) According to our Supreme Court, this language "imposes on the court the 'primary duty to help the jury understand the legal principles it is asked to apply.' " (*People v. Cleveland* (2004) 32 Cal.4th 704, 755, quoting *People v. Beardslee* (1991) 53 Cal.3d 68, 97.) "Where the original instructions are themselves full and complete, the court has discretion under section 1138 to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citation.] Indeed, comments diverging from the standard are often risky. [Citation.] The trial court [may be] understandably reluctant to strike out on its own. But a court must do more than figuratively throw up its hands and tell the jury it cannot help. It must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given." (*People v. Beardslee, supra*, at p. 97.)

Furthermore, "[t]he general rule is that in a criminal case the trial court must instruct on the 'principles of law relevant to the issues raised by the evidence [citations] and has the correlative duty "to refrain from instructing on principles of law which not only are irrelevant to the issues raised by the evidence but also have the effect of

confusing the jury or relieving it from making findings on relevant issues." [Citation.]' [Citation.]" (*People v. Mobley* (1999) 72 Cal.App.4th 761, 781, quoting *People v. Saddler* (1979) 24 Cal.3d 671, 681.)

With these standards in mind, we analyze the court's actions here. The trial court was confronted with a query indicating that the jury was considering an inapposite bank robber scenario. The court appropriately responded that the facts of that scenario were "distinct and distinguishable" from those before the jury, and in its discretion decided to explain why by outlining the law that applied there, which was not a part of its instructions in the present case. The court pointed out that the driver of the robbers' car could be guilty of aiding and abetting the shooting if the shooting was a natural and probable consequence of the commission of the crime of robbery, and explained the natural and probable consequence doctrine. While the court used certain language that normally is found in a jury instruction (i.e., "you must apply an objective test . . ."), it made clear that the bank robber scenario was based on inapposite facts, and that the law it was citing related *only* to the bank robber analogy, *not* the present case. Contrary to Durelle's characterization, the court did not instruct the jury to apply the natural and probable consequences doctrine to this case. Rather, the court referred to that doctrine as part of its explanation of why the scenario should *not* be analogized to the present case.

Notably, Durelle does not contend that the court's statement of the law was itself incorrect. We are again presented with an argument that in effect contends that the court unnecessarily confused the jury in the course of correctly stating certain legal principles. We disagree that the court did so. Although generally, a court should not instruct on inapposite legal principles (*People v. Mobley, supra,* 72 Cal.App.4th at p. 781), the court response here was reasonable in light of the dilemma confronting it. The bell having already been rung (the jury's contemplation of an inapposite scenario), the court determined that the best way to guide the jury away from its reverberating sound included explaining the law that applied to the bank robber scenario. The court had the discretion to do so.

### *C. Any Error Was Harmless*

Assuming for the sake of argument that the court erred by explaining the natural and probable consequences theory to the jury, this "error" was harmless, whether analyzed under the federal "harmless beyond a reasonable doubt" or the state "reasonable probability" standard. (See *Chapman v. California, supra,* 386 U.S. at p. 24 [federal]; *People v. Watson, supra,* 46 Cal.2d at p. 836 [state].)

Although not raised by the parties, the record indicates that the court's written response successfully diverted the jury from the inapposite bank robber scenario. When the foreperson subsequently met with the court and counsel in chambers, he stated that "we would like to *return back* to the example . . . , the bank robber. We would like to talk about the bank robber . . . ." (Italics added.) When the court again indicated that the bank robber scenario was inapposite, the foreperson said, "[g]ee, we found it helpful," and later indicated that "we used it" in a limited way relating to the issue of aiding and abetting. The foreperson then stated that the court's previous response "sort of paraphrased the law a little bit, you filled in a few of the gaps in that statement. We read it over and over and found it to be helpful." Read together, these remarks indicate that the jury had considered the scenario in its deliberations *before* receiving the court's response, had reviewed the court's response repeatedly and found it helpful, and had stopped talking about the bank robber scenario and wanted to return back to it, a request that the court properly denied. In other words, the record makes it self-evident that any "error" by the court was harmless.

Second, the court's subsequent oral instruction to the foreperson that the bank robber scenario should not be considered and to inform the jury of this cured any remaining confusion to which the court may have previously contributed.[18] While

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[18] Durelle argues that the trial court made an error that was structural by instructing the jury in the middle of its deliberations to apply a new theory of liability, and one which did not require jurors to reach unanimous agreement on the intent element of aiding and abetting voluntary manslaughter and attempted voluntary manslaughter. The record does not support Durelle's contention that the court instructed the jury to

Durelle makes much of the court's final comment to the foreperson that the bank robber scenario went "solely to the issue of aiding and abetting," argued that this "cemented its relevance" in the foreperson's mind, this comment did nothing to alter the court's instruction that the scenario did not apply to this case and should not be used. We also must presume that the foreperson related the instruction to the jury and that the jury followed it, as Durelle provides no evidence to the contrary. (*Romo v. Ford Motor Co*. (2002) 99 Cal.App.4th 1115, 1135 ["absent evidence to the contrary, a jury is presumed to follow the instructions of the trial court"], disapproved on other grounds as stated in *People v. Ault* (2004) 33 Cal.4th 1250, 1272.) It was only after the court's discussion with the foreperson that the jury overcame its apparent stalemate and returned with its verdicts. Thus, the record strongly indicates that the court took steps which remedied any "error" that it might have previously made in its written response to the jury.[19]

***D. The Court Did Not Commit Reversible Error by Instructing the Jury to Ignore the Bank Robber Scenario Via the Jury Foreperson***

Durelle also argues that the court violated section 1138[20] by meeting with just the jury foreperson and counsel in chambers, rather than providing any requested supplemental legal instructions to the entire jury in open court. This too is incorrect. By consenting to the trial court's discussion with the foreperson outside the presence of the remaining jurors, Durelle has forfeited his claim on appeal that the trial court's actions violated section 1138. (See *People v. Robinson* (2005) 37 Cal.4th 592, 634 ["any alleged

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apply any new theory of liability. At most, one could argue, incorrectly in our view, that the court unnecessarily provided inapposite law to the jury. Even if this were the case, such an "error" would be viewed under "harmless error" analysis. (See *People v. Saddler, supra,* 24 Cal.3d at pp. 683-684.)

[19] Thus, we also reject Durelle's argument that the court failed to meet its duty pursuant to section 1138 to clear up any instructional confusion expressed by the jury.

[20] Section 1138 states in relevant part: "After the jury have retired for deliberation . . . if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called."

impropriety or failure to comply with section 1138, is waived by defense counsel's failure to object"]; *People v. Roldan* (2005) 35 Cal.4th 646, 729-730 [counsel's silence regarding a court's response to a jury's note waives any objection under section 1138].)

Durelle argues that there "[n]o clear rule has emerged to define whether and when a [defendant's] failure to object forfeits a claim of error under [section 1138][,]" citing a discussion of cases finding no waiver in *People v. Frye* (1998) 18 Cal.4th 894, 1007. However, *Frye* preceded *People v. Robinson, supra,* 37 Cal.4th at page 634 and *People v. Roldan, supra*, 35 Cal.4th at pages 729-730. Moreover, the *Frye* court's discussion of waiver, rather than constituting a holding, was more in the nature of a summary of one party's argument; the court ultimately did not hold whether or not waiver had occurred in that case, instead determining the matter on the basis of whether or not prejudice had occurred. (*People v. Frye, supra,* at pp. 1007-1008.)[21]

Even assuming for the sake of argument Durelle did not forfeit his claim here, he was not prejudiced by any purported "error" by the court. A violation of section 1138 does not result in a reversal of a conviction unless prejudice can be shown. (*People v. Jenkins* (2000) 22 Cal.4th 900, 1027.) In light of the court's previous instruction that the bank robber scenario was inapposite to the case at hand, the foreperson's statements indicating that the jury had stopped using the scenario after receiving the court's previous written response, and the court's verbal instruction to the foreperson not to return to the scenario and to so inform the jury, any error was harmless under either the federal and state standards. (See *Chapman v. California, supra,* 386 U.S. at p. 24 [federal]; *People v. Watson, supra,* 46 Cal.2d at p. 836 [state].)

Durelle argues that we must find prejudice because we cannot know whether the jury foreperson accurately related the court's verbal instructions to the jury. Durelle

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[21] In any event, the *Frye* court explained a line of reasoning which rejected waiver for a violation of section 1138 because its purpose was to protect the right of the jury to be present for court instructions. (*People v. Frye, supra,* 18 Cal.4th at p. 1007.) Under this reasoning, we would not find error because the jury itself requested that the court meet with the foreperson alone.

ignores our duty to presume that the jury followed the court's instructions in the absence of evidence to the contrary. (*Romo v. Ford Motor Co.*, *supra*, 99 Cal.App.4th at p. 1135.) Regardless, as we have already discussed, the court's exchange with the foreperson was only one of a series of events which leads us to conclude that any error was harmless beyond a reasonable doubt.

### III. *There Was No Court Sanctioned Jury Misconduct*

When the foreperson met with the court and counsel in chambers on the morning of June 28, the jury's first day back from a 12-day break, the following exchange occurred:

"THE FOREPERSON: While we were out you didn't tell us not to watch the news, and so some other cases—

"THE COURT: I think it was understood that you wouldn't watch the news about this case, but I understand that your concern was—you're referring specifically, I assume, to the—

"THE FOREPERSON: Other hung juries.

"THE COURT: —the other hung jury that was hung in Hayward.

"THE FOREPERSON: It's given us another sho[t] of adrenaline to not be one in that situation.

"THE COURT: For the record, maybe we should—you did have discussions concerning the concept that a jury can be a hung jury on some of the similar issues that you were addressing, is that correct?

"THE FOREPERSON: We didn't really have any discussion about it. It's just—everybody—we were out awhile and I think we weren't planning not going into all this, and hopefully that's helped. So we'll see.

"THE COURT: If in fact something that the news—that you have witnessed on the news that you feel has inappropriately or in any way influenced your discussions in this matter, I am requesting—actually I guess I am ordering you as the foreperson of this jury to so report it to the court.

"THE FOREPERSON: Okay. I'll poll the team."

The counsel present did not comment or object. Nonetheless, Durelle now contends that this exchange revealed an error of constitutional proportions, in that the jury was motivated to reach a verdict based on "a wholly irrelevant fact—that a neighboring jury had hung" on similar issues, and that the court "neither inquired into the possible misconduct nor admonished the jury to disregard the extraneous information, effectively sanctioning the jury's improper consideration." Durelle's argument cannot be maintained. As Durelle concedes in his reply brief, he has forfeited his claims of misconduct by his counsel's failure to object. (*People v. Lucas* (1995) 12 Cal.4th 415, 486.) We also decline to exercise our discretion to consider this issue as Durelle urges.

Counsel's failure to object was reasonable under the circumstances. Assuming for the sake of argument that there was no waiver here, there also was no report of misconduct. The foreperson's report to the court was simply that, during their break, some of the jurors had heard news reports about one or more hung juries, which had provided additional motivation to them to try to reach verdicts here. As our Supreme Court has noted:

"The jury system is an institution that is legally fundamental but also fundamentally human. Jurors bring to their deliberations knowledge and beliefs about general matters of law and fact that find their source in everyday life and experience. That they do so is one of the strengths of the jury system. It is also one of its weaknesses: it has the potential to undermine determinations that should be made exclusively on the evidence introduced by the parties and the instructions given by the court. Such a weakness, however, must be tolerated. '[I]t is an impossible standard to require . . . [the jury] to be a laboratory, completely sterilized and freed from any external factors.' " (*People v. Marshall* (1990) 50 Cal.3d 907, 950.)

The foreperson did not state that the jury had discussed these news reports in the course of their deliberations, or that they could not have continued but for these reports. He was ordered to inform the court if any jurors saw anything on the news that they felt inappropriately or in any way influenced their discussions in this matter, and he provided no such information. Therefore, the record indicates that none of the jurors thought that

their discussions had been influenced in any way by any news reports. In short, there is no evidence of misconduct here.

Durelle contends that the court should not have relied on the foreperson to report such misconduct, but instead should have called in the complete jury to discuss the matter. Durelle does not take into account that there was not a report of actual misconduct to begin with. "The decision whether to investigate the possibility of juror . . . misconduct . . . rests within the sound discretion of the trial court. [Citation.] The court does not abuse its discretion simply because it fails to investigate any and all new information obtained about a juror during trial." (*People v. Ray* (1996) 13 Cal.4th 313, 343.) Under the circumstances, the court's actions were within its discretion.[22]

### IV. *The Prosecutorial Misconduct Was Not Sufficiently Prejudicial as to Merit Reversal*

The prosecution argued in rebuttal closing argument, apparently in response to the defense's assertion that Durelle was nonviolent and had not possessed a gun for years, that it had called Durelle's one-time cellmate, George B., despite his possible bias to establish that Durelle was one of the shooters in the subject incident, and speculated that other potential witnesses might not have been available:

"[Defense counsel] makes a lot about the fact that you have to believe George [B.] [to believe Durelle] is the shooter. As I have just submitted to you, ladies and gentlemen, based on circumstantial evidence, you do not. Then why in the world did we call George [B.]? Simply put, ladies and gentlemen, we called George [B.] because we could. He was in a place where we could find him. He was sitting in Santa Rita. We knew we could get to him. We knew we could call him. He wasn't someone when we drive down [the avenue]—believe it or not, ladies and gentlemen, people don't come out with fruit baskets and coffee cake greeting the district attorney and the district attorney inspector.

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[22] We do not address the parties' debate about whether the purported misconduct was prejudicial in light of our holding.

Doors slam in your faces. People say I don't know nothing. You can't make me come. I'm not going to be around."

Defense counsel then objected, stating "[t]hat's not evidence Your Honor, none of that is evidence." The trial court sustained the objection and struck the challenged argument. Soon thereafter, the following exchange occurred:

"[PROSECUTION COUNSEL]: You'll get an instruction, or you have gotten an instruction, that neither side is required to call all witnesses, and I've already talked about . . . why different people on [the avenue] could or might have been called weren't called. We presented all the evidence we were able to get. Neither side is required to call as witnesses all persons and you are not to speculate—

"[DEFENSE COUNSEL]: Objection; that infers that some evidence that wasn't presented was unavailable to them, which is not before this court. That's—misconduct.

"THE COURT: [O]bjection is overruled . . .

"[PROSECUTION COUNSEL]: You may not, you cannot speculate as to evidence which has not been presented to you for any reason."

Durelle contends that the prosecution's comments argued facts that were not in evidence and, moreover, that the prosecutor's reference to his previous remarks, which had been stricken, was a separate act of misconduct. Durelle contends that the prosecutor in effect put himself forward as a witness regarding other, hypothetical witnesses who were never presented, thereby violating Durelle's federal constitutional rights to confrontation and due process.

We agree with Durelle that the prosecutor's remarks constituted misconduct, albeit misconduct of a relatively minor nature. A prosecutor may not "invite[] a jury to speculate about and possibly base a verdict upon 'evidence' never presented at trial." (*People v. Bolton* (1979) 23 Cal.3d 208, 213, 215 [prosecutor's statement in closing argument implying that the defendant had a criminal record unknown to the jury put the prosecutor forward as an unsworn witness not subject to cross-examination, a "probable" violation of the Sixth Amendment of the federal Constitution]; *People v. Gaines* (1997) 54 Cal.App.4th 821, 823-825 [Division Four of this District holding that a prosecutor's

statements in closing argument about the testimony an uncalled witness would have provided denied the defendant of the right to confrontation and cross-examination].) The prosecutor's reference to witnesses did not identify anyone in particular; indeed it is unclear that the prosecutor's first statement about witnesses making themselves unavailable applied specifically to this case or was a reference to the generic difficulties faced by the district attorney's office. Nonetheless, the prosecutor improperly implied by his statements that there was additional evidence in this case regarding defendant's possession of a gun that was not presented. That is misconduct which may well implicate Durelle's rights under the federal Constitution, an issue we need not determine conclusively because we find that it did not cause prejudice in any event. (See *People v. Bolton, supra,* 23 Cal.3d at pp. 214-215.)

Assuming for the sake of argument that the prosecutor's misconduct "has federal constitutional magnitude, it requires reversal unless we are satisfied beyond a reasonable doubt that misconduct did not affect the jury's verdict." (*People v. Gaines, supra,* 54 Cal.App.4th at p. 825, citing *Chapman v. California, supra,* 386 U.S. at p. 24.) We find no basis for reversal here.[23] We are satisfied beyond a reasonable doubt that the prosecutor's misconduct did not affect the jury's verdicts for a number of reasons.

First, the remarks were a part of the prosecutor's effort to establish that Durelle was one of the shooters in the attack on Antron and Underwood. However, the jury found "not true" the enhancements which alleged that Durelle had discharged and made personal use firearms. In other words, the jury concluded that he was *not* one of the shooters, the very point the prosecution was arguing when it committed the misconduct.

Second, the court struck the prosecutor's first remarks, thereby signaling their impropriety to the jury, a more than sufficient remedy under the circumstances for such speculative and insubstantial remarks as those made by the prosecutor here. Moreover, the court's overruling of Durelle's counsel's objection to the prosecutor's later remarks

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[23] The same is the case if we analyze the misconduct under the state's "reasonably probable" standard. (*See People v. Watson, supra,* 46 Cal.2d at p. 836.)

was meritorious. The defense objection came after the prosecutor's reference to a standard jury instruction that the court gave to the jury, to wit, that neither side was required to call as witnesses all persons who may have knowledge of the events. (CALJIC No. 2.11.) Defense counsel did not seek to clarify that his objection was to the prosecutor's reference to hypothetical witnesses. Regardless, the court's overruling of this second objection did not reinstate the previously stricken comments, and the court subsequently instructed the jury that statements by the attorneys were not evidence, and to ignore anything stricken from the record by the court. As already discussed, the jury is presumed to have followed the court's instructions in the absence of evidence to the contrary. (*Romo v. Ford Motor Co*., *supra*, 99 Cal.App.4th at p. 1135.)

Accordingly, we find Durelle was not prejudiced by the prosecutor's misconduct here.

## DISPOSITION

The judgment is affirmed.

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Lambden, J.

We concur:

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Haerle, Acting P.J.

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Richman, J.