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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. OSCAR TOMAS RAYOS PARRA, Defendant and Appellant.	B263839 (Los Angeles County Super. Ct. No. KA101838)
THE PEOPLE, Plaintiff and Respondent, v. HIPOLITO RAYOS PARRA, Defendant and Appellant.	B267163 (Los Angeles County Super. Ct. No. KA101838)

APPEALS from judgments of the Superior Court of Los Angeles County. Mike Camacho, Judge. Affirmed.

Alan Siraco, under appointment by the Court of Appeal, for Defendant and Appellant Oscar Tomas Rayos Parra.

Marilyn G. Burkhardt, under appointment by the Court of Appeal, for Defendant and Appellant Hipolito Rayos Parra.

Kamala D. Harris and Xavier Becerra, Attorneys General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Margaret E. Maxwell and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

* * * * * * * * * *

Defendants and appellants Oscar Tomas Rayos Parra and Hipolito Rayos Parra[1] were convicted of the murder of Irela Quinones in a joint trial before separate juries. Oscar and Hipolito are half brothers. Ms. Quinones was the former girlfriend of Oscar. Both Oscar and Hipolito gave statements to law enforcement admitting involvement in the death of Ms. Quinones.

Oscar raises multiple contentions: (1) the prosecutor made misleading arguments regarding aiding and abetting liability that allowed the jury to convict on an invalid legal theory; (2) the trial court committed error in failing to instruct sua sponte in accordance with *Crane v. Kentucky* (1986) 476 U.S. 683 (*Crane*); (3) the court erred in instructing with CALCRIM No. 372 which contains argumentative, pro-prosecution language; (4) cumulative error; and (5) the court improperly imposed a parole revocation fine.

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[1] Because of the common surname, we will refer to defendants by their first names only.

Hipolito's sole contention on appeal is that the prosecutor committed misconduct during closing argument by misstating the law regarding aiding and abetting liability.

We find no error and affirm both convictions.

FACTUAL AND PROCEDURAL BACKGROUND

On the afternoon of January 24, 2013, Joseph Bolohan went to the Angeles National Forest with his brother Jordan to pan for gold, an activity they often did for fun. They stopped near East Fork Road and Cattle Canyon Bridge. After they walked down from the main road about 150 feet, they discovered the body of a woman. There was a lot of coagulated blood on her face and throat and they believed she was dead. Because that area of the mountain trail did not have cell reception, they hiked back to the main road, got their truck and drove back to the nearby town to notify authorities. The deceased woman was later determined to be Ms. Quinones.

Earlier that morning, Ms. Quinones had been at home in San Pedro with her then 18-year-old daughter, Ingrid. Ms. Quinones was getting ready for a job interview. Ingrid understood that her mother had received a call from Miguel, one of Oscar's brothers, about a job opening at the airport valet service where he worked. Ingrid knew Oscar because he had lived with them for a few months, until about two months earlier when he moved out. Ingrid believed her mother was no longer in a relationship with Oscar. Ms. Quinones told Ingrid that Miguel was coming to pick her up to take her to the interview.

Around 8:05 a.m., Ingrid and Ms. Quinones saw a pickup truck pull up outside. Ms. Quinones went out to the truck. Ingrid saw Oscar get out of the passenger seat to let her mother

get in, and then he got back into the truck. Ingrid did not see who was driving the truck, but she assumed it was Miguel.

By the afternoon, Ingrid had not heard from her mother and she was not answering her cell phone, which was unusual. Ingrid began to worry. She called Oscar's sister, Maria Cruz. Ms. Cruz was unable to reach Oscar on his phone. Ingrid was concerned because Oscar had been in the truck that morning and he had become aggressive towards Ms. Quinones near the end of the time he lived with them. Ingrid twice heard him threaten her mother with harm. When Ms. Quinones did not return home by the evening, Ingrid went to the police station and reported her missing. Four days later, she identified her mother's body.

The murder investigation was led by Detectives Richard Ramirez and Dawn Retzlaff. Based on information learned in their investigation, the detectives interviewed Hipolito on April 10, 2013. They learned that Oscar had gone to Mexico. In November 2013, after Oscar returned from Mexico and was detained, Detectives Ramirez and Retzlaff interviewed him. Two weeks later, they re-interviewed Hipolito.

Oscar and Hipolito were charged by information with one count of murder. (Pen. Code, § 187, subd. (a).) The case proceeded to a joint trial in March 2015. They had separate juries because the prosecution intended to introduce the pretrial statements of both defendants. Oscar's jury was denominated the red jury. The jury for Hipolito was the blue jury.

Ingrid, Joseph Bolohan and Deputy Brian Harper (the first deputy to report to the scene) attested to the above facts. Hipolito's stepsons, Juan and Daniel Rubio, also testified. They said Oscar, their stepfather's half brother, moved in with them for a few months. Oscar did not drive and Hipolito often used

Daniel's truck to run errands and the like. Oscar sometimes went along. Juan recalled that on January 24, 2013, Hipolito and Oscar were being more "silent" than normal. They eventually got into the truck and drove off sometime in the morning. Daniel recalled Hipolito waking him up that morning to tell him he was taking the truck for the day.

Joni Guerrero, Oscar's ex-wife, testified that he phoned her at the end of January 2013 and told her he was going to Mexico, and probably not coming back. He sounded "anxious" and told her she would find out in a couple of days why he was leaving. She called the police and told them about the phone call. She called them again several months later, when Oscar called and told her he was coming back to the United States.

The prosecution presented evidence that the driver's side interior door handle of the truck tested positive for blood, but the sample collected contained a mixture from multiple people and was too degraded for DNA analysis. DNA evidence was presented demonstrating that Oscar's semen was present inside and outside of Ms. Quinones's vagina and rectum, and on her left breast. The semen was likely deposited within five to eight hours before it was collected.

The recording of the November 1, 2013 interview of Oscar by Detectives Ramirez and Retzlaff was played for the red jury only. Oscar said he knew Ms. Quinones and had lived with her, her daughter Ingrid and her son Ray, for about six months. He moved out of their San Pedro apartment at the end of 2012. He initially denied it had been a romantic relationship, but then clarified by explaining that they did not have sexual relations at the apartment out of respect for the children. They would go to motels instead. After he moved out of Ms. Quinones's apartment

and into Hipolito's home, he stayed in touch with her by texting and calling her. Oscar initially said he only saw her in person two times after moving out and did not see her at all in the month of January 2013.

Oscar said he did not drive, and only used a bicycle to get around. Hipolito would sometimes drive him places in his truck. He denied they ever went to Ms. Quinones's apartment in San Pedro.

After further questioning, Oscar admitted Hipolito did drive them to Ms. Quinones's apartment on January 24, but they just went out to eat together and Ms. Quinones left separately with another friend who met them there. Oscar later admitted Ms. Quinones did not leave with another friend, but stayed with them. He said they drove up to the mountains. Hipolito drove, and Oscar claimed he had no idea where they were going.

When they got up to the mountains, Hipolito sprayed some type of pepper spray on Ms. Quinones, which he had from his job as a security guard. She screamed, and started to cry. When Oscar and Ms. Quinones got out of the truck, she fell, and rolled down the hill a bit. Neither he, nor Hipolito went to help her up. Oscar went down to a nearby stream because some of the pepper spray had gotten on him and he needed to wash it off. When he got back to the truck, Hipolito was yelling "let's go, let's go." Oscar jumped into the truck and they left Ms. Quinones there. Oscar explained that Hipolito had been angry with Ms. Quinones because he thought she had been trying to poison Oscar. Hipolito drove them to the mountains "to take her life, I guess."

Oscar eventually admitted both he and Hipolito killed Ms. Quinones. He said Hipolito is "as guilty as I am." He claimed not to remember the details about what happened. After

Hipolito sprayed her with the pepper spray, he said she ran down the hill and they went after her. Hipolito told Oscar to hit her and so he grabbed a rock and hit her in the head. The blow caused her to bleed. Hipolito stayed with Ms. Quinones while Oscar went to wash himself off in the stream. When he was done, Hipolito said they should go. As they drove away, Hipolito threw Ms. Quinones's purse out the window and into the stream.

Oscar denied having sex with Ms. Quinones before they killed her. He also denied cutting her with a knife, saying Hipolito must have done it. He reiterated they were both guilty. "If he hadn't taken me in the car I wouldn't have done anything." He put the blame on Hipolito because "he took me." "[I]f she'd done to you what she did to me, you would have done what I did too." After some additional questions, he repeated that the "two of us killed her." He said he only went to Mexico to visit his mother and several other family members.

Detectives Ramirez and Retzlaff's interview of Hipolito recorded on April 10, 2013, was played for the blue jury only. In that interview, Hipolito said he had driven Oscar to Ms. Quinones's apartment in San Pedro on January 24, 2013. Oscar told him they needed to take her to a job interview. They got to her apartment around 8:00 a.m. She came out and got into the truck, and sat between him and Oscar. Oscar directed him where to drive and they ended up in the mountains. Once Hipolito parked near a trailhead, Oscar said that he and Ms. Quinones were going to go talk. Hipolito saw them walk down the hill toward a stream.

Hipolito said they were gone for about 20 minutes. When Oscar came back to the truck, he told Hipolito "she's not coming back with us." Oscar told him to leave. Hipolito said he assumed

the worst and was "scared." Oscar later admitted to Hipolito that he had killed Ms. Quinones. Oscar told him he was upset with her because during the time they lived together, Ms. Quinones tried to poison him by putting a "powder" in his drinks, and she had also made a pornographic movie.

Hipolito said that before they drove away, Oscar threw Ms. Quinones's purse away. Once they got back on the freeway, Oscar threw his cell phone out the window. Hipolito said he did not call the police, because he was scared and worried about his family. Oscar had previously made threats about Hipolito's wife. When Hipolito told Oscar that his wife did not like him and did not want him living with them, Oscar told Hipolito she better shut her mouth or he would "shut it for her." A few days later, Hipolito drove Oscar to the bus station to go to Mexico. Before Oscar left, he bought a new cell phone.

The detectives' second interview of Hipolito recorded on November 14, 2013, was also played for the blue jury only. At the start of the interview, Hipolito was told that Oscar had been arrested. Hipolito responded that that was good news. "My family can sleep peacefully."

When asked to explain again the events of January 24, Hipolito basically reiterated the same story he told in April, with some additional details. Oscar told him Miguel had a job for Ms. Quinones so they went to pick her up. He added that he knew Oscar was angry about some pornographic movie that Ms. Quinones had made and that he wanted to have a "serious" talk with her about it. When Hipolito initially resisted driving him, Oscar said that if he did not help him, "your wife is going to pay." Hipolito did not call police because he was scared of Oscar.

Oscar told Hipolito to drive up to the mountains. During the drive, Ms. Quinones and Oscar seemed happy together and were chatting, and sometimes kissing. Hipolito knew an area in the Angeles National Forest where he had gone with his family to picnic and relax. Hipolito was not sure if Oscar had been there before. After they parked near the bridge, Oscar got out of the truck and told Ms. Quinones "let's go." Hipolito saw them go down the hill and walk under the bridge.

He said Oscar came back about 20 minutes later, wiping his hands on the front of his jacket. When Hipolito asked about Ms. Quinones, Oscar said "she's not coming with us." That scared Hipolito. Oscar took money out of Ms. Quinones purse and then threw the purse towards the stream. When they got back home, Oscar called another of his brothers, Miguel, who gave him money to buy a new cell phone. A few days later, Oscar asked Hipolito to take him to the bus station to go to Mexico.

Hipolito denied spraying Ms. Quinones with pepper spray or giving any pepper spray to Oscar. He admitted he had a canister of pepper spray because he had been a security guard. It had been hanging from a work belt in a closet at his home, but it went "missing" during the time Oscar was living with his family. He assumed Oscar took it. Oscar did not own any guns, but Hipolito owns two guns. He was scared of Oscar because "he's bad."

During closing arguments to both juries, the prosecutor argued there was evidence of motive for Oscar and evidence he was the direct perpetrator, with Hipolito aiding and abetting. However, she argued that either defendant could be found guilty under either theory. The red jury found Oscar guilty of first

degree murder, and the blue jury found Hipolito guilty of second degree murder.

The court sentenced Oscar to state prison for an indeterminate term of 25 years to life, awarding 546 actual days of custody credits. The court sentenced Hipolito to state prison for an indeterminate term of 15 years to life, awarding 589 actual days of custody credits. The court imposed various fines.

This appeal followed. On June 9, 2016, we consolidated defendants' appeals for purposes of oral argument and decision.

DISCUSSION

1. The Claim the Prosecutor Argued a Legally Inadequate Theory

Oscar raises a claim of error pursuant to *People v. Guiton* (1993) 4 Cal.4th 1116 (*Guiton*). He contends the prosecutor incorrectly argued to the jury that he could be found guilty of first degree premeditated murder, as an aider and abettor, even if he had no intent to kill and had no knowledge Hipolito intended to kill. He contends the improper argument, combined with the instruction on aiding and abetting (CALCRIM No. 401), while technically a correct statement of law, compounded the likelihood the jury would be misled. Oscar maintains that his conviction must be reversed because it cannot be determined from the record that the jury did not rely on the invalid theory in convicting him of first degree murder. We disagree.

In *Guiton*, the court erroneously instructed the jury on a legal theory that was unsupported by the evidence. Despite the lack of evidence the defendant sold cocaine as charged, the court instructed the jury with the elements of that crime and that charge was submitted to the jury. *Guiton* explained that an erroneous theory may be either legal or factual. Where a legally

erroneous theory is presented to the jury, reversal is ordinarily warranted. Where the erroneous theory is purely factual, as was the case there, reversal is also warranted unless the record demonstrates the defendant was convicted on a valid theory. (*Guiton*, *supra*, 4 Cal.4th at pp. 1125-1131.)

While Oscar asserts *Guiton* error, the true crux of his argument is that the prosecutor misstated the law during closing argument, and invited the jury to convict on an invalid basis. Accordingly, his argument is more akin to the claim of error asserted by the defendant in *People v. Morales* (2001) 25 Cal.4th 34 (*Morales*).[2]

In *Morales*, the defendant was charged with possession of a controlled substance in violation of Health and Safety Code section 11352. Defendant argued the prosecutor had made statements during closing argument that encouraged the jury to find him guilty of possession simply because he had been under the influence of the controlled substance, which is an incorrect statement of the law. (*Morales*, *supra*, 25 Cal.4th at pp. 38-42.) On appeal, the defendant argued that *Guiton* required reversal because the jury may have convicted him on the legally incorrect theory. (*Morales*, at pp. 42-43.) There was no contention any specific jury instruction stated the law of possession incorrectly.

Both the Court of Appeal and our Supreme Court rejected the defendant's argument. The Supreme Court explained: "[T]he

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[2] We are not persuaded by Oscar's citation to *People v. Morgan* (2007) 42 Cal.4th 593. There, the defendant's claim of *Guiton* error was considered even though the instructions given by the trial court were accurate. *Morgan* explained that the instructions nonetheless were deficient and failed to fully instruct on kidnapping. (*Morgan*, at p. 613.) Thus, the defendant's claim was not merely a disguised claim of prosecutorial misconduct.

court did not present to the jury a case that was premised on a legally incorrect theory. The prosecutor arguably misstated some law, but such an error would merely amount to prosecutorial misconduct [citation] during argument, rather than trial and resolution of the case on an improper legal basis." (*Morales*, *supra*, 25 Cal.4th at p. 43.) The Supreme Court further concluded that any claim of prosecutorial misconduct had been waived by the defendant's failure to object at trial. The court also disagreed with the defendant's interpretation of the prosecutor's argument and found no reasonable likelihood that the prosecutor's remarks, when viewed in the context of all the evidence and the court's instructions, misled the jury. (*Id*. at pp. 44-47.)

The same is true here. The jury was properly instructed on first and second degree murder and aiding and abetting liability, including CALCRIM No. 520 as follows:

"The defendant is charged with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder. [¶] The defendant acted with *express malice* if he unlawfully intended to kill. [¶] The defendant acted with *implied malice* if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with

conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time. [¶] If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521."

The court also gave CALCRIM No. 521 regarding first degree murder, and CALCRIM No. 401 regarding aiding and abetting liability. Like *Morales*, the trial court here did not instruct the jury with an invalid legal theory. The jury was properly instructed on the degrees of murder and aiding and abetting liability. "We presume the jury understood and applied the court's instructions." (*People v. McCurdy* (2014) 59 Cal.4th 1063, 1094 (*McCurdy*).)

Indeed, Oscar does not contend the instructions, including CALCRIM No. 401, were deficient or inaccurate, only that when combined with the prosecutor's argument, the jury could have been misled by them because CALCRIM No. 401 includes language that provides an aider and abettor must know only of the perpetrator's "unlawful purpose." Oscar's argument is based solely on one somewhat garbled and confusing sentence by the prosecutor during closing argument: "So if someone aids and abets a crime, and he knows the perpetrator's unlawful purpose, not even that he – the perpetrator intended to kill, but that the aider and abettor knows of [the] unlawful purpose, and he specifically intends to and does, in fact, aid or facilitate or promote or encourage or instigate the perpetrator's commission of that crime."

Oscar argues the prosecutor told the jury they could convict him of first degree murder if he aided and abetted Hipolito even if he did not know Hipolito intended to kill. First, the prosecutor was not talking about first degree murder when the above passage was made, but rather, she was discussing aiding and abetting liability generally. And, when the "self-interrupted" sentence is read in context with the whole argument and the instructions, it is plain the prosecutor never meant to make any such argument, and there is no reasonable likelihood that the jury was misled.

Defense counsel did not object to this statement by the prosecutor. Oscar's claim of *Guiton* error is really a claim of prosecutorial misconduct based on alleged misstatements of the law during closing argument. Because his counsel did not object to the alleged misstatement or seek an admonishment, the claim is forfeited. (*People v. Samayoa* (1997) 15 Cal.4th 795, 841 (*Samayoa*).)

2. The Failure to Sua Sponte Give an Instruction Based on *Crane*

Oscar next contends the trial court erred by failing to sua sponte instruct the jury on evaluating the reliability of his pretrial admissions. We review claims of instructional error de novo. (*People v. Alvarez* (1996) 14 Cal.4th 155, 217.) We find no error.

Oscar concedes he did not challenge the voluntariness or admissibility of his pretrial statement, nor did he request an instruction based on *Crane*. However, he maintains the trial court should have sua sponte fashioned an appropriate instruction explaining to the jury its duty to determine the reliability of the statement.

"It is settled that, even in the absence of a request, a trial court must instruct on general principles of law that are commonly or closely and openly connected to the facts before the court and that are necessary for the jury's understanding of the case." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1047.) However, the trial court "is required to instruct only on general principles that are necessary for the jury's understanding of the case; *the judge need not instruct, without request, on specific points or special theories that might be applicable to the particular case*." (5 Witkin, Cal. Criminal Law (4th ed. 2012) Criminal Trial, § 677, p. 1044, italics added.) Further, "[a] trial court has no sua sponte duty to revise or improve upon an accurate statement of law without a request from counsel [citation], and failure to request clarification of an otherwise correct instruction forfeits the claim of error for purposes of appeal [citations]." (*People v. Lee* (2011) 51 Cal.4th 620, 638.)

Oscar points to no authority, and we have found none, that requires a trial court to sua sponte create a special instruction on the reliability of a defendant's out-of-court confession. *Crane* did not address the issue of jury instructions at all. *Crane* took issue with a trial court's exclusion of defense evidence concerning the circumstances under which the defendant's confession had been obtained. *Crane* concluded that a defendant is entitled to present a defense which may properly include evidence tending to show whether or not a confession was coerced. (*Crane*, *supra*, 476 U.S. at p. 690.) Such evidence is relevant to the weight and credibility the jury may give to the defendant's confession. Nothing in *Crane* suggests a trial court has a sua sponte duty to instruct on the reliability of confessions.

Oscar's counsel argued to the jury that his pretrial statement should be viewed with caution. If Oscar believed it was necessary for the jury to be instructed on assessing the circumstances under which his statement was made, he should have requested a pinpoint instruction. (See, e.g., *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1090-1092 [finding no fault with the giving of a special instruction stating, " 'It is for the jury to decide whether the statements are reliable and credible, depending upon the manner in which they are obtained.' "]; Cf. *People v. Garceau* (1993) 6 Cal.4th 140, 193-194 [affirming court's refusal to give instruction to view confession with caution that was argumentative and repetitive of standard cautionary instructions].)

3. The Alleged Error in Instructing with CALCRIM No. 372

Oscar also claims instructional error in the giving of CALCRIM No. 372. He contends the instruction contains argumentative, pro-prosecution language and should not have been given.

Respondent argues Oscar forfeited the issue by failing to object or seek modification of the instruction in the trial court. Oscar concedes he did not object, but contends the erroneous instruction impacted his substantial rights, and we therefore have the purview, pursuant to Penal Code section 1259, to resolve his claim.

We conclude Oscar forfeited his contention by failing to object or to seek a modification of the language of the instruction. In any event, we briefly explain why it was not error for the court to instruct with CALCRIM No. 372.

The jury was instructed as follows: "If the defendant fled or tried to flee immediately after the crime was committed or after he was accused of committing the crime, that conduct may show that he was aware of his guilt. If you conclude that the defendant fled or tried to flee, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled or tried to flee cannot prove guilt by itself."

Oscar contends the instruction is in direct conflict with Penal Code section 1127c which provides, in relevant part, as follows: "The flight of a person immediately after the commission of a crime, or after he is accused of a crime that has been committed, is not sufficient in itself to establish his guilt, but is a fact which, if proved, the jury may consider in deciding his guilt or innocence. The weight to which such circumstance is entitled is a matter for the jury to determine."

Oscar contends the instruction invites an improper one-sided inference because it states, "*If* the defendant fled . . . , that conduct may show he was aware of his *guilt*." (Italics added.) Oscar states that CALJIC No. 2.52 follows the language of the statute and allows the jury to decide whether evidence of flight reflects on guilt *or* innocence. "It has long been accepted that if flight is significant at all, it is significant because it may reflect consciousness of guilt, which in turn tends to support a finding of guilt." (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 31 [rejecting challenge to CALCRIM No. 372]; accord, *People v. Price* (2017) 8 Cal.App.5th 409, 455-458.) We do not view the language of the instruction as argumentative, nor do we find it significant that the instruction does not tell the jury to consider flight as tending to support guilt "or innocence." We see no reason to

depart from the analyses of the cases that have already concluded CALCRIM No. 372 is not infirm.

4. Cumulative Error

Oscar urges us to find cumulative error. "The 'litmus test' for cumulative error 'is whether defendant received due process and a fair trial.' [Citation.]" (*People v. Cuccia* (2002) 97 Cal.App.4th 785, 795.) Whether viewing his claimed errors individually or cumulatively, Oscar has failed to show he was deprived of a fair trial. At most, he has shown his trial was "'"'not perfect—few are.'"'" (*People v. Farley* (2009) 46 Cal.4th 1053, 1124.)

5. The Parole Revocation Fine

Finally, Oscar contends the trial court erred in imposing a parole revocation fine pursuant to Penal Code section 1202.45 because his indeterminate sentence does not include a "period of parole" within the meaning of the statute.

At the sentencing hearing, the court imposed, among other fines, a parole revocation fine of $280. The imposition of a parole revocation fine pursuant to Penal Code section 1202.45 is unauthorized where the defendant's sentence contains no period of parole. (*People v. Jenkins* (2006) 140 Cal.App.4th 805, 819; accord, *People v. Oganesyan* (1999) 70 Cal.App.4th 1178, 1185-1186.) Oscar contends that being "eligible" for parole under an indeterminate sentence is not the same as a sentence that includes a "period of parole." Both *Jenkins* and *Oganesya*n involved sentences of life without the possibility of parole.

In contrast, Oscar was sentenced to 25 years to life and will be eligible for parole. We conclude the imposition of the fine is within the meaning and spirit of the statute. (See, e.g., *People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [affirming imposition of

parole revocation fine where the defendant had been given a sentence of death, plus several determinate terms on separate counts].)

6. Hipolito's Claim of Prosecutorial Misconduct

Hipolito contends the prosecutor committed misconduct by making a prejudicially misleading argument about aider and abettor liability.

Hipolito concedes he did not object to the prosecutor's argument. "As a general rule a defendant may not complain on appeal of prosecutorial misconduct unless in a timely fashion--and on the same ground--the defendant made an assignment of misconduct and requested that the jury be admonished to disregard the impropriety." (*Samayoa*, *supra*, 15 Cal.4th at p. 841; accord, *People v. Bonilla* (2007) 41 Cal.4th 313, 336.) Hipolito therefore forfeited his claim of prosecutorial misconduct. We are not persuaded by Hipolito's argument that an objection would have been futile. Nothing in the record suggests the court would have been unreceptive to a properly stated objection or request for an admonishment.

In any event, the prosecutor did not commit misconduct. Throughout her argument, the prosecutor correctly discussed the law regarding first and second degree murder and aiding and abetting liability generally. At one point, the prosecutor said: "It's not necessary that you believe that Hipolito intended to--that he knew that Oscar intend[ed] to kill her, so long as you find that Hipolito aided and abetted this crime, knowing of the unlawful purpose."

The prosecutor was discussing aiding and abetting liability generally. A defendant may be convicted of aiding and abetting an implied malice murder. As the jury was correctly instructed,

the intent for an implied malice murder is *not* a specific intent to kill, but rather, proof of an intentional act, the natural and probable consequences of which are dangerous to human life, knowledge such conduct was dangerous, and proceeding with that conduct with a conscious disregard for human life. The challenged statement by the prosecutor was arguably a somewhat inartful effort to explain aiding and abetting in the context of an implied malice murder, but it was not materially misleading. There is nothing in the argument that would mislead the jury into believing it could convict Hipolito of first degree murder without also concluding he shared a specific intent to kill Ms. Quinones. The argument only presented an alternate theory of culpability. Reading the argument as a whole, and in light of the accurate instructions given to the jury, there is no reasonble likelihood the jury was misled. The blue jury ultimately convicted Hipolito of second degree murder. The conviction is amply supported by the record, a point Hipolito does not challenge on appeal.

Hipolito also finds fault with two other phrases used by the prosecutor during the rebuttal portion of her argument. Hipolito asserts the prosecutor told the jury they could find the requisite intent for aiding and abetting liability if Hipolito believed Oscar was going to do "something bad" to Ms. Quinones or was going to "assault her or hurt her, put her in her place, whatever." Hipolito misrepresents the prosecutor's argument and has taken the two phrases out of context to suggest the prosecutor made an argument that is belied by the record. The two phrases Hipolito quotes were made at two different times during her rebuttal and concerned two different points. The prosecutor was not discussing the requisite intent for aiding and abetting liability

when those phrases were made. Hipolito has failed to show any misconduct.

"[W]hen the claim focuses upon 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." (*Samayoa*, *supra*, 15 Cal.4th at p. 841.) Further, as we already noted above, we presume the jury understood and correctly applied the court's instructions. (*McCurdy*, *supra*, 59 Cal.4th at p. 1094.)

DISPOSITION

Defendant and appellant Oscar Tomas Rayos Parra's judgment of conviction is affirmed.

Defendant and appellant Hipolito Rayos Parra's judgment of conviction is affirmed.

GRIMES, J.

WE CONCUR:

FLIER, Acting P. J.

SORTINO, J.*

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.