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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 FOUR

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY SILVAS et al., Defendants and Appellants.	B289803 (Los Angeles County Super. Ct. No. BA441220)

APPEAL from a judgment of the Superior Court of Los Angeles County, Mark S. Arnold, Judge. Affirmed.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Silvas.

David Y. Stanley, under appointment by the Court of Appeal, for Defendant and Appellant Juan Vallejo.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Christopher

G. Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury convicted appellants Anthony Silvas and Juan Vallejo of the first degree murder of Jesse Aguilar, who had been found beaten and bound in the trunk of a burning car. The evidence at trial included several incriminating statements by Silvas, including an alleged admission that he had killed Aguilar. Silvas's former brother-in-law, to whom Silvas separately admitted "crack[ing]" or otherwise handling Aguilar, testified that Silvas was upset with Aguilar for visiting Silvas's girlfriend. Other evidence indicated Vallejo aided and abetted the killing.

On appeal, relying on the evidence that Aguilar upset him by visiting his girlfriend, Silvas contends the trial court prejudicially erred in failing to instruct the jury on two possible legal effects of provocation: (1) reducing murder to voluntary manslaughter by precluding a finding of malice; and (2) reducing murder from first to second degree by precluding a finding of premeditation and deliberation. Vallejo contends the trial court's instructions omitted an element of his guilt, as an aider and abettor, of first degree murder by implicitly allowing the jury to convict him without finding he personally acted with premeditation and deliberation.

We affirm the judgment.

STATEMENT OF THE CASE

The state charged each appellant with murder (Pen. Code, § 187, subd. (a)) and torture (*id.,* § 206). A jury found appellants guilty of first degree murder and acquitted them of torture. The court sentenced each appellant to a prison term of 25 years to life. Appellants timely appealed.

PROCEEDINGS BELOW

A. *Prosecution Case*

1. *Discovery and Analysis of Aguilar's Body*

Los Angeles County Sheriff's Department detective Ray Lugo testified that early in the evening of October 26, 2006, he investigated the scene of a car found burning underneath a freeway overpass. Aguilar, to whom the car was registered, was found dead in the trunk, wrapped in plastic with his hands and feet bound. In one hand, Aguilar was clutching a piece of blue fabric with "DV-13" written on it. Investigators found a gasoline canister and matching spout inside the car.

Dr. Matthew Miller, a deputy medical examiner for the Los Angeles County Department of Medical Examiner-Coroner, opined Aguilar's death was caused by "head trauma and other undetermined factors." He observed the head trauma was inflicted with a weapon, likely heavier than a normal knife. By "other undetermined factors," he meant bleeding out or suffocation. He observed Aguilar's head and

upper body were wrapped in plastic or another material. He opined Aguilar was likely dead before the fire started.

Edward Nordskog, a Los Angeles County Sheriff Department's detective, testified as an expert on arson and deaths by fire. In contrast to Dr. Miller, he opined Aguilar was likely burned alive. He further opined at least two people committed the crime, reasoning multiple participants were necessary to position a body of Aguilar's size in the trunk and to drive both Aguilar's car and a getaway car. Finally, he opined at least one participant likely had prior familiarity with the crime scene and selected it in advance.

2. *Aguilar's Final Contacts*

Los Angeles County Sheriff's Department detective Sandra Jimenez testified that her review of phone records revealed that Aguilar exchanged several calls with Silvas on the evening of October 25, 2006, the day preceding the discovery of Aguilar's body. Silvas also called Vallejo's home phone number between and after his calls with Aguilar.

Cynthia Hernandez, Silvas's sister, testified that in 2006, Aguilar visited her regularly. She believed Aguilar and Silvas were selling meth together. The last time she spoke to Aguilar was October 25. She asked if he was going to visit her, but he said he was going to meet Silvas instead.

3. *Silvas's Incriminating Statements*

Lawrence Carrillo, Silvas's former brother-in-law, testified that around Halloween 2006, Silvas told Carrillo he

"cracked" or "got" Aguilar. Silvas told Carrillo "that white fool got handled," and said he was with "the homies" at the time. A few days before, Silvas had said he was upset with Aguilar for visiting Silvas's girlfriend at her house. Carrillo knew Silvas was bothered, but did not recall whether Silvas was "very" upset. Silvas later told Carrillo he was worried about what he had done to Aguilar, which Carrillo understood to mean he was worried he would be caught.

Cynthia Aguirre, whom Silvas was dating at the time of Aguilar's death, testified that on an evening in late October 2006, she picked Silvas up at Vallejo's residence, where he was with Vallejo. She recalled thinking Silvas was acting strangely that evening. During a prior interview given to Detective Lugo, she had not only recalled Silvas acting strangely but also recalled thinking it strange that Silvas was wearing black gloves.[1] Soon after Aguilar's death, Silvas gave Aguirre some CDs marked with Aguilar's name. Aguirre gave them to Silvas's sister, Hernandez, who recognized them as Aguilar's. According to Aguirre, Silvas was upset to learn she had given the CDs bearing Aguilar's name to Hernandez.

Several months after Aguilar's death (in February 2007), Aguirre asked Silvas if he had killed Aguilar. She initially testified that he gave no answer (which she interpreted as an implicit confirmation that he had killed

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[1] An audio recording of Aguirre's prior interview was played for the jury and admitted into evidence.

Aguilar), but after reading a transcript of her prior interview, stated that he answered yes. She further testified that she asked if Aguilar was dead before Silvas burned him, and he answered no.

Detective Jimenez testified that her department assisted in the preparation of a June 2015 television news segment on the investigation of Aguilar's death, featuring photographs of Silvas and Vallejo. Three days later, the department conducted a "*Perkins* operation" targeting Silvas, during which it recorded his statements to two agents of the department posing as fellow incarcerated individuals.[2] An audio recording of conversations was played for the jury and admitted into evidence. During the conversations, Silvas told the agent he and his "crimee" had been on the news, his crimee had not been caught, and his crimee would not say anything. He confirmed the news program had included photos of himself and his "crime partner."

While interrogating Silvas about Aguilar's death, Detective Jimenez falsely claimed the department had detained Vallejo and found Silvas's DNA on zip ties. Silvas then relayed these claims to the undercover agent, but asserted that no zip ties had been used in the crime. He also

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[2] In *Illinois v. Perkins* (1990) 496 U.S. 292, 296-300 (*Perkins*), the United States Supreme Court held that an undercover law enforcement agent whom an incarcerated suspect believes to be a fellow inmate need not give the warnings required by *Miranda v. Arizona* (1966) 384 U.S. 436 before asking questions that may elicit an incriminating response.

asserted he knew his partner had not snitched on him because if he had, the department would have known more details.

4. *Further Evidence of Vallejo's Participation*

A sweep of Aguilar's car following the discovery of his body revealed a blood-stained cigarette. Subsequent testing revealed Vallejo's DNA on the cigarette butt. In a May 2015 interview with Detective Jimenez, Vallejo denied knowing Aguilar and denied recognizing his car when shown a photograph of it. When asked if he was familiar with the South Gate area, in which the car was found, he stated he had worked there until about 2005 (the year before Aguilar's death). Detective Jimenez determined Vallejo's former workplace was located about two miles away from the freeway overpass where Aguilar's body was found.

A few months later (in August 2015), the department conducted a separate *Perkins* operation targeting Vallejo. The jury heard a recording of a brief exchange between Vallejo and an undercover agent -- during which the agent asked Vallejo if he saw "it," and Vallejo responded, "I was right there."[3]

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[3] Outside the presence of the jury, Vallejo's counsel agreed that his statements during the *Perkins* operation related to Aguilar's killing. Indeed, the prosecutor's opening statement had described the context preceding the excerpt played for the jury -- viz., Vallejo confirmed to the undercover agent that he had agreed to do a favor for Silvas related to getting rid of Aguilar,
(*Fn. is continued on the next page*.)

During a 2007 search of Vallejo's residence, he admitted being a member of the Dominguez Varrio 13 (DV-13) gang and said he created hand-drawn scripts to assist in tattooing DV-13 members. The search revealed papers with tattoo scripts similar in lettering to the "DV-13" on the fabric recovered from Aguilar's hand.

B. *Defense Case*

Neither Vallejo nor Silvas testified. Vallejo called no witnesses. Silvas called only Dr. Frank Patrick Sheridan, who opined that Aguilar was likely dead before the fire started.

C. *Jury Instructions*

After an in camera conference, Vallejo's counsel confirmed he neither sought additional instructions nor objected to any of those the court planned to give. Silvas's counsel asked the court to deliver an instruction on a heat of passion theory of voluntary manslaughter, explaining "the

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and that Vallejo's "hands were there" even though Silvas was the one who "did it" and the one who "taste[d] that blood." The jury heard no evidence of this context; the prosecutor abandoned his intent to introduce it after the trial court ruled the evidence from Vallejo's *Perkins* operation inadmissible to the extent it inculpated anyone but himself. In closing arguments, the prosecutor and Vallejo's counsel disagreed regarding whether Vallejo's failure to introduce evidence of the excerpt's context allowed the jury to infer that the excerpt related to Aguilar's killing.

provocation might have been [Silvas] allegedly telling Carrillo that he was angry because [Aguilar] had visited [Silvas's] girlfriend." Silvas's counsel conceded this was the only evidence on which he relied. The court denied the request.

The court instructed the jury on first degree willful, premeditated, and deliberate murder (CALCRIM No. 521), instructing it that to find "[t]he defendant" guilty of first degree murder, the jury was required to find he acted with premeditation and deliberation. The court instructed the jury, per CALCRIM No. 203, as follows: "You must separately consider the evidence as it applies to each defendant. You must decide each charge for each defendant separately. . . . [¶] Unless I tell you otherwise, all instructions apply to each defendant."

The court instructed the jury on guilt as an aider and abettor (CALCRIM Nos. 400 and 401). In the process, it instructed the jury that the requirements for such guilt included proof that "[t]he defendant knew that the perpetrator intended to commit the crime . . . [¶] . . . [and] intended to aid and abet the perpetrator in committing the crime . . . ."

D. *Closing Arguments*

1. *Prosecution Closing Argument*

The prosecutor first summarized much of the evidence presented and argued that it proved Silvas and Vallejo murdered Aguilar. In support of finding the murder

premeditated and deliberate, he argued that the manner in which they killed Aguilar and disposed of his body reflected execution of a plan, relying on Silvas's and Vallejo's phone calls on the night of the murder, their use of gasoline and binding materials that they were unlikely to "happen to have lying around," and the remoteness of the location where they disposed of his body.

The prosecutor argued the evidence proved the torture charges as well, relying on Nordskog's opinion that Aguilar was burned alive. The prosecutor reminded the jury Carrillo had testified that Silvas was upset about Aguilar visiting Silvas's girlfriend. However, the prosecutor conceded the evidence did not establish an exact motive and argued motive was unnecessary.

2. *Defense Closing Arguments*

Vallejo's counsel argued the prosecution had not proved Vallejo's guilt as an aider and abettor because the evidence established, at most, mere presence at the scene of the killing and failure to intervene. He emphasized that Silvas's incriminating statements had not identified Vallejo as a participant in the crime. He argued Silvas might have referred to Vallejo as his "crimee" not because Vallejo aided and abetted the crime, but merely because Vallejo had been featured alongside him in the news segment.

Silvas's counsel challenged the credibility of Aguirre's testimony that Silvas had admitted killing Aguilar. He argued Silvas's other incriminating statements were

insufficient to prove Silvas had killed Aguilar rather than merely punched him (before others killed him). He conceded Silvas's knowledge that no zip ties were used in the crime was a strong part of the prosecution's case, but argued Silvas could have been relying on what he heard from DV-13 members.

DISCUSSION

Silvas contends the trial court erred by denying his request to instruct the jury on the theory that the killing was voluntary manslaughter, not murder, because Aguilar provoked him into acting in a heat of passion rather than with malice. In a related contention, he faults the trial court for failing to instruct the jury, on its own motion, with CALCRIM No. 5.22 or a similar pinpoint instruction on provocation reducing murder from first degree to second. Vallejo contends the trial court's instructions omitted an element of first degree murder by implicitly allowing the jury to convict him without finding that he personally acted with premeditation and deliberation. Each appellant purports to join in the other appellant's contentions.

A. *Standard of Review*

We review appellants' contentions, all of which concern instructional error, de novo. (E.g., *People v. Rivera* (2019) 7 Cal.5th 306, 326 (*Rivera*); *People v. Nelson* (2016) 1 Cal.5th 513, 538 (*Nelson*).)

B. *Omission of Provocation-Based Instructions*

Silvas contends the trial court prejudicially erred in failing to instruct the jury on two possible legal effects of provocation: (1) reducing murder to voluntary manslaughter by precluding a finding of malice aforethought; and (2) reducing murder from first to second degree by precluding a finding of premeditation and deliberation. For both contentions, he relies on his former brother-in-law Carrillo's testimony that Silvas was upset about Aguilar's alleged visit to his girlfriend.[4]

1. *Omission of Heat of Passion Instruction*

Silvas contends the trial court erred by denying his request to instruct the jury on the theory that he committed

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[4] Vallejo joins in Silvas's contentions. However, Vallejo fails to identify any evidence of provocation bearing on his own mental state, instead relying on the premise that he, as a "direct" aider and abettor of Silvas's crime, shared Silvas's mens rea. Vallejo's premise is incorrect -- an aider and abettor's guilt is based on his own mental state, and may exceed the guilt of the perpetrator if the aider and abettor's mental state is more culpable. (*People v. Daveggio and Michaud* (2018) 4 Cal.5th 790, 845-846 (*Daveggio*); see also *People v. McCoy* (2001) 25 Cal.4th 1111, 1121-1122 (*McCoy*) [posing a hypothetical -- based on Shakespeare's *Othello* -- in which Othello, the perpetrator of Desdemona's homicide, is guilty of manslaughter under a heat of passion theory, but Iago, an aider and abettor, is guilty of murder].) In any event, as explained below, Silvas's contentions entitle neither appellant to relief.

voluntary manslaughter, not murder, because he acted in a heat of passion induced by provocation.

a. *Governing Principles*

"Heat of passion is one of the mental states that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter." (*Nelson*, *supra*, 1 Cal.5th at p. 538.) "A heat of passion theory of manslaughter has both an objective and a subjective component." (*People v. Moye* (2009) 47 Cal.4th 537, 549 (*Moye*).) To satisfy the objective component, the defendant must have reacted to provocation "'that would cause an emotion so intense that an ordinary person would simply *react*, without reflection.'" (*People v. Rangel* (2016) 62 Cal.4th 1192, 1225 (*Rangel*), quoting *People v. Beltran* (2013) 56 Cal.4th 935, 949 (*Beltran*).) To satisfy the subjective component, the defendant must have experienced emotion "'so strong that the defendant's reaction bypassed his thought process to such an extent that judgment could not and did not intervene.'" (*Rangel*, *supra*, at p. 1225, quoting *Beltran*, *supra*, at p. 949.) The subjective component is not satisfied if, between the provocation and the killing, sufficient time passed "'"for passion to subside and reason to return . . . ."'" (*Moye*, *supra*, at p. 550.)

The state of mind required for a heat of passion theory is "'manifestly inconsistent'" with premeditation and deliberation. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306, quoting *People v. Wharton* (1991) 53 Cal.3d 522, 572

(*Wharton*).) A murder is "'"premeditated"'" if considered beforehand and "'"deliberate"'" if the decision to kill results from careful thought and weighing of competing considerations. (*People v. Lee* (2011) 51 Cal.4th 620, 636.) In assessing evidence of premeditation and deliberation, courts often consider three factors, viz., planning, motive, and manner of killing. (*People v. Shamblin* (2015) 236 Cal.App.4th 1, 10, citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.)

Under state law, a trial court is required to deliver a heat of passion instruction in any murder case in which the heat of passion theory is supported by substantial evidence, meaning evidence strong enough to persuade a reasonable jury. (See *Moye*, *supra*, 47 Cal.4th at pp. 541, 662-663.) A trial court's failure to instruct on heat of passion where required is reviewed for prejudice under the standard set forth in *People v. Watson* (1956) 46 Cal.2d 818, 836.[5] (*Moye*, *supra*, at p. 541.)

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[5] Our Supreme Court has declined to resolve whether omission of a heat of passion instruction may constitute a federal constitutional infirmity in the instructions on the malice element of murder, which would require review for prejudice under the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. (See *People v. Franklin* (2018) 21 Cal.App.5th 881, 890-891; *People v. Thomas* (2013) 218 Cal.App.4th 630, 643-644 (*Thomas*).) At least one court has reached the issue, holding that where a heat of passion instruction is requested and warranted by the evidence, the instruction's omission is federal constitutional error requiring reversal unless harmless beyond a reasonable doubt.
(*Fn. is continued on the next page*.)

b. *Analysis*

The trial court did not err in declining to instruct the jury on heat of passion because there was no substantial evidence of provocation. (See *Moye*, *supra*, 47 Cal.4th at pp. 541, 662-663; *Thomas*, *supra*, 218 Cal.App.4th at pp. 633, 641-644.) The sole evidence of provocation on which Silvas relies is Carrillo's testimony that Silvas, appearing "bothered," reported being upset with Aguilar because Aguilar had visited his girlfriend. Carrillo did not testify to any sign of strong emotion; indeed, he did not recall whether Silvas seemed "very" upset. Moreover, his testimony did not concern Silvas's emotional state at the time of the killing. Indeed, no evidence established how or when Silvas learned of the visit.[6] Thus, only impermissible speculation could support findings that Silvas experienced emotion so strong as to bypass his judgment upon learning of the visit, and that insufficient time passed before the killing for his emotion to cool and reason to return. Accordingly, there was no substantial evidence supporting the subjective element of

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(*Thomas*, *supra*, at pp. 633, 641-644.) Silvas argues that we, too, must apply the *Chapman* standard. We need not reach the issue, as we conclude there was no error, and any error would have been harmless, even under the *Chapman* standard.

[6] On appeal, Silvas asserts he killed Aguilar the first time the two met in person after Silvas learned of the alleged visit. He did not testify, however, and identifies no evidence in the record supporting that assertion.

the heat of passion theory. (See *People v. Landry* (2016) 2 Cal.5th 52, 98 [testimony that defendant sounded angry when talking to victim just before killing, coupled with letter in which defendant alleged victim had threatened to harm or kill him, "d[id] not begin to demonstrate" provocation satisfying heat of passion theory]; *People v. Rogers* (2009) 46 Cal.4th 1136, 1169-1170 & fn. 18 [finding no substantial evidence defendant lost control at time of killing, despite evidence he argued with victim earlier that day and told witness victim was killed in a fight].) For the same reasons, no substantial evidence supported the theory's objective element -- viz., provocation sufficient to cause emotion bypassing judgment in an ordinary person.[7] (See *Rangel*, *supra*, 62 Cal.4th at p. 1225.)

The absence of evidence of provocation that affected Silvas's mental state at the time of the killing distinguishes this case from those on which Silvas relies. (See *Thomas*, *supra*, 218 Cal.App.4th at p. 645 [defendant testified he fired at victim "because he was afraid, nervous and not thinking

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[7] No evidence supported a finding that Silvas was informed of the visit in a taunting or otherwise provocative manner. Nor did any evidence support a finding that Silvas believed Aguilar engaged in specific provocative conduct during the alleged visit. For instance, despite Silvas's characterization of the visit as an attempt to "'take his woman,'" there was no evidence Silvas had reason to believe Aguilar made sexual or romantic advances to his girlfriend. Indeed, Silvas concedes the visit was a "minor transgression" which "would not ordinarily require a manslaughter instruction . . . ."

clearly," and other witnesses testified he engaged in "'pretty heated'" argument minutes before killing, cried, called out for his father, paced, and seemed angry]; *People v. Le* (2007) 158 Cal.App.4th 516, 528-529 [insult shortly before killing "served as the spark that caused [a] powder keg of accumulated provocation to explode," and direct evidence of defendant's mental state before and during killing suggested emotion obscured his judgment]; *Wharton*, *supra*, 53 Cal.3d at pp. 571-572 [killing was preceded by weeks of provocation, during which defendant's statements to psychotherapists indicated tension was building and he was losing control]; *People v. Berry* (1976) 18 Cal.3d 509, 515-516 [defendant and defense expert testified defendant acted in uncontrollable rage resulting from two weeks of taunting related to wife's infidelity]; *People v. Bridgehouse* (1956) 47 Cal.2d 406, 413, 414 [victim had affair with defendant's wife "over a considerable period of time" and defendant "was mentally and emotionally exhausted and was white and shaking" immediately before killing].)

Even had we found error, we would find it harmless beyond a reasonable doubt. The evidence of provocation affecting Silvas's state of mind at the time of the killing was effectively nonexistent. In comparison, the evidence of premeditation and deliberation -- manifestly inconsistent with a heat of passion -- was overwhelming. Silvas's phone calls with Aguilar and Vallejo on the night of the killing were evidence of planning. On appeal, Silvas admits the evidence that the perpetrator used a weapon to inflict head

trauma is further evidence of planning. (E.g., *People v. Elliot* (2005) 37 Cal.4th 453, 471 [inference that defendant armed himself with knife prior to accosting victim supported further inference he planned violent encounter].) Similarly, there was evidence that the perpetrator armed himself with the other materials used to kill Aguilar and dispose of his body, including a full canister of gasoline and the plastic or other material used to bind Aguilar. Indeed, Silvas concedes the manner of Aguilar's killing showed premeditation and deliberation. Finally, Silvas further admits the evidence that he was upset at Aguilar for visiting his girlfriend was evidence of motive. On this record, we are confident beyond a reasonable doubt that the jury would have rejected the heat of passion theory if instructed on it.

2. *Omission of Provocation Pinpoint Instruction*

Silvas contends the trial court prejudicially erred by failing to instruct the jury, on its own motion, with CALCRIM No. 5.22 or a similar pinpoint instruction on provocation reducing murder from first degree to second.

a. *Governing Principles*

Evidence of provocation may reduce a murder from first to second degree by raising a reasonable doubt regarding whether the murder was premeditated and deliberate. (*Rivera*, *supra*, 7 Cal.5th at p. 328.) An instruction on this theory of provocation is a pinpoint

instruction that a trial court need not deliver on its own motion. (*Ibid.*) The trial court is required to deliver the instruction only if it is requested and evidence supports the theory. (*Ibid.*; 1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2012) Crimes Against the Person, § 125, p. 922 ["Where substantial evidence of provocation is lacking, the trial court does not err in refusing to instruct on provocation reducing the degree of murder"], citing *People v. Avila* (2009) 46 Cal.4th 680, 707 (*Avila*).) The applicable test is purely subjective, lacking the objective element of the test for heat of passion. (1 Witkin & Epstein, Cal. Criminal Law, *supra*, § 125, p. 922, citing *People v. Fitzpatrick* (1992) 2 Cal.App.4th 1285, 1295.)

b. *Analysis*

The trial court did not err in failing to instruct the jury, on its own motion, on provocation reducing murder from first to second degree. Silvas's undisputed failure to request such an instruction, alone, establishes there was no error. (*Rivera*, *supra*, 7 Cal.5th at p. 328 [rejecting an identical contention of error on the sole ground that the defendant did not request the instruction].)[8] Further, for the

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[8] The record does not support Silvas's claims that he lacked an opportunity to request a provocation pinpoint instruction and that such a request would have been futile. Further, he cites no authority, and we are aware of none, supporting his claim that his request for a heat of passion instruction constituted an implicit request for this pinpoint instruction. Finally, because
(*Fn. is continued on the next page*.)

same reasons we found no substantial evidence to support the subjective element of a heat of passion theory, we find none to support the theory that provocation affected appellant's mental state in a manner negating premeditation and deliberation. Accordingly, even if appellant had requested the instruction, the trial court would not have been required to deliver it. (See *ibid.*; *Avila*, *supra*, 46 Cal.4th at p. 707.)

C. *Instructions Concerning Vallejo's Mental State*

Vallejo contends the trial court prejudicially erred by failing to convey to the jury the requirement that it "assess separately the mental state of an aider and abettor versus the mental state of a direct perpetrator," thereby also failing to convey the requirement that in order to convict Vallejo of first degree murder, it must find that Vallejo himself, rather than Silvas, acted with premeditation and deliberation. He characterizes this purported failure as the omission of an essential element of the charge against him. In part due to this characterization, we will assume, without deciding, that Vallejo did not forfeit this contention by failing to raise it in the trial court. (See *Daveggio*, *supra*, 4 Cal.5th at p. 845 [assuming without deciding defendants' failure to object did

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there was essentially no evidence of provocation affecting Silvas's state of mind at the time of the killing, the omission neither affected Silvas's substantial rights nor rendered his conviction vulnerable to challenge for ineffective assistance of counsel.

not forfeit similar challenge to instructions regarding aider and abettor's mental state]; *People v. Mil* (2012) 53 Cal.4th 400, 409 ["no objection is required to preserve a claim for appellate review that the jury instructions omitted an essential element of the charge"].)

1. *Governing Principles*

An aider and abettor's guilt is based on his own mental state, not the perpetrator's. (*Daveggio*, *supra*, 4 Cal.5th at pp. 845-846; see also *McCoy*, *supra*, 25 Cal.4th at pp. 1121-1122.) An aider and abettor's liability for first degree murder "must be based on direct aiding and abetting principles." (*People v. Chiu* (2014) 59 Cal.4th 155, 159 (*Chiu*).) "Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of committing, encouraging, or facilitating its commission." (*Id.* at p. 167.) These showings are not identical to showings of premeditation and deliberation. (See *Daveggio*, *supra*, 4 Cal.5th at p. 847.) "That said, '[i]t would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required.' [Citation.]" (*Ibid.*)

2. *Analysis*

The trial court did not err in instructing the jury concerning Vallejo's mental state. The court instructed the jury to evaluate the evidence and decide the charges separately for each defendant, and to consider each instruction applicable to each defendant (unless otherwise specified). Vallejo identifies nothing in the record rebutting the presumption that the jury followed this instruction. (Cf. *Daveggio*, *supra*, 4 Cal.5th at pp. 820-821 [presuming jury followed instruction to separately consider penalty for each defendant].) Thus, we presume the jury understood the following instruction (CALCRIM No. 521) to apply to Vallejo: "The defendant is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation." Moreover, the court instructed the jury, per CALCRIM No. 401, that guilt as an aider and abettor required proof that "[t]he defendant knew that the perpetrator intended to commit the crime . . . [¶] . . . [and] intended to aid and abet the perpetrator in committing the crime . . . ." This instruction distinguished the aider and abettor's knowledge and intent from the intent of the perpetrator, thereby conveying the requirement to assess each actor's mental state separately. (See *People v. Johnson* (2016) 62 Cal.4th 600, 640-641 (*Johnson*) [finding no reasonable likelihood jury would have believed defendant's first degree murder conviction could be based on perpetrator's mental state rather than his own, in part because CALCRIM No. 401 "cleared up any ambiguity

arguably presented" by instruction that aider and abettor is "'equally guilty'"].)[9] In sum, the court properly instructed the jury to consider proof of Vallejo's mental state, including premeditation and deliberation, before convicting him of first degree murder.

It is true, as Vallejo observes, that "the instruction that an aider must have the specific intent to aid and abet [a killing] . . . is not the same as [an instruction] telling the jury that the aider and abettor must personally premeditate and deliberate the killing." (See *Daveggio*, *supra*, 4 Cal.5th at p. 847.) But it is virtually impossible for a jury to find the former without also finding the latter. (*Ibid.*) Moreover, as explained, other instructions conveyed the requirement to consider whether Vallejo himself acted with premeditation and deliberation.

The principal authority on which Vallejo relies -- viz., *Chiu*, *supra*, 59 Cal.4th 155 -- does not assist him. There, our Supreme Court held an aider and abettor may not be convicted of first degree murder under the natural and probable consequences doctrine, and reversed a first degree murder conviction because the jury, instructed on that doctrine, might have relied on it. (*Chiu*, *supra*, at

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[9] Here, as Vallejo acknowledges, the trial court did not instruct the jury that an aider and abettor and a perpetrator are equally guilty. Thus, the court arguably conveyed the requirement for separate consideration of the aider and abettor's mental state even more clearly than the trial court in *Johnson*. (*Johnson*, *supra*, 62 Cal.4th at pp. 640-641.)

pp. 166-168.) Here, the trial court did not instruct the jury on the natural and probable consequences doctrine. Accordingly, *Chiu* is inapposite.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, P. J.

We concur:

WILLHITE, J.

CURREY, J.