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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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 SEVEN

THE PEOPLE, Plaintiff and Respondent, v. JORGE HUMBERTO CARLOS, Defendant and Appellant.	B242214 (Los Angeles County Super. Ct. No. VA111515)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michael A. Cowell, Judge. Affirmed.

Mark D. Lenenberg, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, and Zee Rodriguez and David E. Madeo, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Jorge Humberto Carlos appeals from the judgment entered following his conviction of one count of first degree murder (Pen. Code,[1] § 187, subd. (a)), two counts of attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a)), two counts of shooting at an occupied motor vehicle (§ 246), and one count of possession of a firearm by a felon (§ 12021, subd. (a)), with true findings on various firearm and gang enhancements (§§ 12022.53, subds. (b), (c), (d), and (e), 186.22, subd. (b)). Carlos raises the following arguments on appeal: (1) the evidence was insufficient to support one of the convictions for shooting at an occupied motor vehicle because it was based on uncorroborated accomplice testimony; (2) the trial court erred in failing to instruct the jury on a witness's status as an accomplice with CALJIC Nos. 3.16 and 3.19; (3) the trial court erred in instructing the jury on the natural and probable consequences theory of liability with CALJIC No. 3.02; and (4) there was cumulative error. We affirm.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

I. The Prosecution Evidence

A. July 12, 2009 Shooting

On the afternoon of July 12, 2009, Ernie Martinez was driving a white Ford Explorer when he saw Carlos and Heraclio Meza standing on a street corner in Norwalk, California. Martinez had known both Carlos and Meza for a few years. Carlos, who was known as "Bones," and Meza, who was known as "Shorty," were members of the Vario Norwalk gang. Martinez agreed to give Carlos and Meza a ride to a friend's house, and dropped them off near the corner of Hopland Street and Elaine Avenue in Norwalk. As Martinez waited at the intersection to make a turn, Carlos and Meza suddenly got back into the Ford Explorer and began shooting at another vehicle.[2] Meza fired a gun from the

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1 All further statutory references are to the Penal Code.

2 At trial, Martinez testified that the vehicle that Carlos and Meza shot at was a brown SUV. However, shortly after the shooting, Martinez told the police that the vehicle was a white pickup truck.

right rear passenger seat and Carlos fired a gun from the left rear passenger seat directly behind Martinez. Immediately after the shooting, Carlos and Meza got out of the vehicle and Martinez drove away.

Raquel Escamilla observed the shooting from her house. She saw a white SUV or minivan traveling on Elaine Avenue followed by a white pickup truck. Two shots were fired from the right passenger side of the SUV toward the truck. The SUV drove away on Hopland Street and the pickup truck drove away on Elaine Avenue. Escamilla did not see the occupants in either vehicle. A deputy sheriff responding to the scene of the shooting recovered two nine-millimeter shell casings from the street near the intersection of Hopland Street and Elaine Avenue.

The vehicle that was shot at followed Martinez for about 30 minutes until he drove onto the freeway. A short time later, while Martinez was still on the freeway, a white pickup truck pulled up next to his Ford Explorer. A man in the pickup truck took out a gun and fired several shots at Martinez's vehicle before driving away. Martinez continued driving to the West Covina Mall, where he was detained after being observed by an officer running through the mall. When the police later located Martinez's Ford Explorer in the mall parking lot, the driver's side window had been shattered and the vehicle had several bullet holes. A single .40 caliber shell casing was recovered from the floorboard of Martinez's vehicle.

On July 13, 2009, Martinez identified both Carlos and Meza in a six-pack photographic lineup. Under Carlos's photograph, Martinez wrote, "This is George, aka Bones. Shot out of my car." Under Meza's photograph, Martinez wrote, "This is Shorty, the guy in my vehicle in the front [seat]." Martinez testified at trial under a grant of immunity.

B. July 16, 2009 Shooting

On July 16, 2009, at about 7:00 p.m., Victor Flores and his two younger brothers, Ernesto Flores and Alejandro Flores, were headed to a meeting for soccer coaches in

Norwalk.[3] Victor was driving his Mitsubishi Eclipse, Ernesto was in the front passenger seat, and Alejandro was in the rear passenger seat. None of the Flores brothers was a member of a gang or had any weapons. As Victor was driving along the street, a Toyota sedan pulled up next to his vehicle. The driver and front passenger in the Toyota made eye contact with Ernesto and acknowledged him by lifting their chins. Carlos was the driver of the Toyota and Meza was the passenger.

Victor turned into the parking lot of a Stater Brothers shopping center and parked his vehicle in front of a soccer shop. The Toyota pulled up behind Victor's Mitsubishi and stopped perpendicular to it. The driver's side of the Toyota was facing the back of the Mitsubishi and blocking it in the parking space. Victor looked in his rear view mirror and then over his shoulder at the occupants in the Toyota. From the driver's seat of the Toyota, Carlos pointed a gun at the Mitsubishi through the open window. Meza exited the Toyota and approached the right side of the Mitsubishi with his hand in his pocket. Victor yelled at his brothers to duck as he shifted his vehicle into reverse and accelerated into the Toyota. He then hit some bushes and drove away. As Victor was maneuvering the Mitsubishi, he heard seven loud gunshots and felt his vehicle being struck with bullets. Ernesto felt a blast of heat by his head.

Victor and Ernesto were not injured in the shooting. Alejandro was fatally shot in the right side of his head and his right knee. Two .40 caliber Smith and Wesson bullets were recovered from Alejandro's body. Based on a forensic examination of the Mitsubishi, at least three different bullets entered the vehicle during the shooting. The trajectory of the two bullets that struck Alejandro was rear to front from the passenger's side to the driver's side. The trajectory also had a steep downward angle consistent with the shooter being fairly close to the vehicle. A total of five shell casings from two separate firearms were recovered from the ground where the Mitsubishi had been shot.

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[3] For clarity and convenience, and not out of disrespect, we refer to the Flores brothers by their first names.

There were three .38 Super caliber casings and two .40 caliber Smith and Wesson casings. No weapons were found in the Mitsubishi.

On July 17, 2009, Ernesto reviewed a six-pack photographic lineup and identified Carlos as resembling the driver of the Toyota. Victor was unable to make a photographic identification at that time. On February 22, 2010, at a live lineup in the county jail, Victor and Ernesto each separately identified Carlos as the driver. Victor and Ernesto later made in-court identifications of Carlos at a preliminary hearing in May 2010 and at trial in April 2011. Victor also separately identified Meza as the other shooter at a November 2009 preliminary hearing.

C. Arrests of Carlos and Meza

On July 19, 2009, at about 3:30 a.m., Meza was arrested after he was observed by a deputy sheriff crouching behind a car. When the deputy ordered him to stand up, Meza pulled a handgun from his pocket and threw it to the ground. He then tried to flee, but tripped and fell. Following his arrest, a fully loaded Glock .40 caliber handgun was recovered from the area where Meza had thrown it.

On July 23, 2009, at about 5:00 a.m., Carlos was arrested at his home in Norwalk. As deputies entered the house, Carlos pushed an exterior air conditioning unit from a window and dove out of the window to the ground. After attempting to flee on foot, Carlos was taken into custody. A loaded Bryco Arms nine-millimeter semi-automatic handgun was recovered under a sofa cushion in a bedroom where Carlos and another man, Gumaro Lopez, resided. Carlos's residence was 0.9 miles from the Stater Brothers shopping center and 0.3 miles from Meza's residence.

The two .40 caliber Smith and Wesson casings recovered from the Stater Brothers parking lot, along with the two .40 caliber Smith and Wesson bullets recovered from Alejandro's body, were fired from the Glock handgun seized during Meza's arrest. The single .40 caliber casing found in Martinez's Ford Explorer following the shooting at Hopland Street and Elaine Avenue also was fired from that same Glock handgun. The two nine-millimeter casings recovered from the intersection of Hopland Street and Elaine

Avenue were fired from the Bryco Arms semi-automatic handgun found in Carlos's bedroom.

D. Gang Evidence

Los Angeles County Sheriff's Detective Dan Leicht testified as a gang expert on the Vario Norwalk gang. According to Detective Leicht, the Vario Norwalk gang had approximately 550 active members with primary activities that included robbery, assault, gun possession, and attempted murder. The two shootings in this case occurred within the territory claimed by the gang. Carlos was a self-admitted member of the Vario Norwalk gang in the Primos clique. At the time of his arrest, Carlos had numerous gang tattoos, including "NWK" on his arm, "VN" and "WK" on his legs, "NORWALK" on his chest, "VNP" on his back, and "PRIMOS" on his neck. Meza was also a Vario Norwalk gang member and had tattoos of "NORW" on his thigh and "BARRIO" on his knee. When presented with a hypothetical based on the facts in this case, Detective Leicht opined that each of the shootings would have been committed for the benefit of and in association with the Vario Norwalk gang. Detective Leicht further explained that it was common for two gang members to commit a shooting in concert so that each member could provide protection for the other and facilitate completion of the crime.

II. The Defense Evidence

On August 7, 2009, Los Angeles County Sheriff's Detective Manual Avina and two other detectives were working undercover at the county jail. Posing as jail inmates, the detectives spoke at length with Meza while he was in custody in his cell. Meza told the detectives that he was in custody for the Stater Brothers case which involved a murder. He also initially indicated that whenever he committed any crimes, he was either by himself or with his girlfriend. At one point, Meza was removed from the cell to provide a DNA sample. He returned with a court order that listed both his and Carlos's names, and after reading the order aloud, he said that he did not know who Carlos was.

In describing the Stater Brothers shooting to the undercover detectives, Meza stated that he was driving with his girlfriend when he saw an Eclipse with three

individuals that he recognized as enemies from a rival gang. Meza blocked the Eclipse in the parking lot, exited his vehicle, and then fired a total of ten shots at the driver, front passenger, and rear passenger who Meza thought was armed with a rifle. Meza appeared to take sole responsibility for the shooting and never mentioned that there was anyone else in his vehicle who was armed. Near the end of the conversation, after admitting his own involvement in the shooting, Meza told the detectives that "Jorge Carlos" was his "crimey," or a person with whom he would commit crimes.

Doreen Perez testified that Carlos was a long-time friend of her son. On July 16, 2009, at about 5:00 p.m., she saw Carlos at her house in Norwalk when she left to attend a baseball game. When she returned home sometime after 7:15 p.m., Carlos was still at her house and there was a strong police presence in the area. Albert Perez and Carlos Perez both testified that on July 16, 2009, Carlos came to their house in the afternoon and only left for about 30 minutes to change his clothes at his nearby home. Carlos was still at their house when they saw a number of police cars and helicopters circling the neighborhood.

Dr. Robert Shomer testified as an expert on eyewitness identifications. According to Dr. Shomer, eyewitness identification of strangers has a very low level of reliability and is highly influenced by a number of factors, including the suddenness of the encounter, the existence of stress, the tendency to focus on a weapon, the passage of time, and the suggestiveness of the procedure used to make the identification. Additionally, the confidence shown by a witness in making an identification does not correlate with its accuracy. Dr. Shomer acknowledged that he could not render an opinion as to whether any witness in this case had made an accurate identification.

III. Jury Verdict and Sentencing

The jury found Carlos guilty as charged of one count of first degree murder (187, subd. (a)), two counts of attempted willful, deliberate and premeditated murder (§§ 664, 187, subd. (a)), two counts of shooting at an occupied motor vehicle based on the July 12 and 16, 2009 shootings (§ 246), and one count of possession of a firearm by a felon

(§ 12021, subd. (a)). The jury made true findings that each offense was committed for the benefit of, at the direction of, or in association with a criminal street gang, and with the specific intent to promote, further, or assist in criminal conduct by gang members (§ 186.22, subd. (b)). The jury also made true findings that Carlos and a principal personally and intentionally discharged a firearm in both the July 12 and 16 shootings, and proximately caused great bodily injury or death in the July 16 shooting (§ 12022.53, subds. (b), (c), (d), and (e)). The trial court sentenced Carlos to total state prison term of 90 years to life, plus an additional life term. Carlos thereafter filed a timely notice of appeal.

DISCUSSION

I. Accomplice Testimony

Carlos raises two related arguments regarding the use of accomplice testimony at trial. First, he contends that the evidence was insufficient to support his conviction for shooting at an occupied motor vehicle based on the July 12, 2009 shooting at Hopland Street and Elaine Avenue because the testimony of his two accomplices in the shooting, Meza and Martinez, was not corroborated by independent evidence. Second, he claims that the trial court prejudicially erred in failing to sua sponte instruct the jury that Meza and Martinez were accomplices as a matter of law (CALJIC No. 3.16), or alternatively, that the jury had to determine whether they were accomplices in evaluating their statements (CALJIC No. 3.19). We conclude that neither argument has merit.

A. Applicable Law

Section 1111 provides, in relevant part, that "[a] conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof." An accomplice is defined by the statute as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the

testimony of the accomplice is given." (§ 1111.) To be chargeable with an identical offense, a witness must be considered a principal under section 31, which defines principals as "[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . ." (§ 31; see also *People v. Williams* (2008) 43 Cal.4th 584, 636; *People v. Lewis* (2001) 26 Cal.4th 334, 368.)

Where the evidence at trial is sufficient to support a conclusion that a witness was an accomplice in the defendant's crime, the trial court has a sua sponte duty to instruct the jury on the principles of law governing accomplice testimony. (*People v. Brown* (2003) 31 Cal.4th 518, 555; *People v. Tobias* (2001) 25 Cal.4th 327, 331.) If the evidence establishes as a matter of law that the witness was an accomplice, the court must so inform the jury and instruct it on the corroboration requirement. (*People v. Williams*, *supra*, 43 Cal.4th at p. 636; *People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) Likewise, if there is sufficient evidence from which a reasonable juror could find the witness to be an accomplice, the court must instruct the jury that if it finds by a preponderance of the evidence that a witness was an accomplice, the witness's testimony implicating the defendant must be independently corroborated. (*People v. Lewis*, *supra*, 26 Cal.4th at p. 369; *People v. Zapien* (1993) 4 Cal.4th 929, 982.) In either case, the trial court also must instruct the jury that the testimony of an accomplice witness is to be viewed with distrust. (*People v. Hayes*, *supra*, at p. 1271; *People v. Zapien*, *supra*, at p. 982.)

"'A trial court's failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record.' [Citation.] 'Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense.' [Citation.] The evidence is 'sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth.' [Citation.]" (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 303; see also *People v. Valdez* (2012) 55 Cal.4th 82; 147 ["A trial court's error in instructing on accomplice liability under section 1111 is harmless if the record contains 'sufficient corroborating evidence.' . . . Corroborating evidence may

be slight, entirely circumstantial, and entitled to little consideration when standing alone."].) If there is insufficient corroboration, the omission of accomplice instructions is subject to the harmless error analysis for state law error under *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Gonzales and Soliz*, *supra*, at p. 304.)

B. Sufficient Corroborating Evidence Supported Each Conviction

In this case, the trial court instructed the jury on the definition of an accomplice (CALJIC No. 3.10), the requirement that the testimony of an accomplice must be corroborated (CALJIC No. 3.11), and the requirement that the testimony of an accomplice must be viewed with caution (CALJIC No. 3.18). The trial court did not instruct the jury that either Meza or Martinez was an accomplice as a matter of law (CALJIC No. 3.16), or that the jury had to determine whether each of them was an accomplice in any of the charged crimes (CALJIC No. 3.19). We need not decide, however, whether the trial court erred in failing to instruct the jury with the full complement of accomplice instructions. Even if we assume that the trial court should have given CALJIC Nos. 3.16 and 3.19, any such error would be harmless because there was sufficient corroborating evidence to support each of Carlos's convictions.

With respect to the July 12, 2009 shooting at the intersection of Hopland Street and Elaine Avenue, Martinez directly implicated Carlos in the shooting when he testified that Carlos and Meza jumped into his Ford Explorer and that each of them then began shooting at another occupied vehicle. Martinez's testimony that both Carlos and Meza were present at the scene and fired shots at the other vehicle was sufficiently corroborated by the prosecution's forensic evidence. The two nine-millimeter casings recovered from the intersection immediately after the shooting were fired from the Bryco Arms nine-millimeter handgun that was later found in Carlos's bedroom. Additionally, the .40 caliber casing recovered from Martinez's vehicle was fired from the Glock .40 caliber handgun that Meza threw during his subsequent arrest. Martinez's testimony was also corroborated by independent evidence that Carlos and Meza committed a similar vehicle shooting in the same area a mere four days later.

With respect to the July 16, 2009 shooting at the Stater Brothers shopping center, Meza implicated Carlos in the shooting when he admitted his own involvement in the shooting to undercover officers and then told them that Carlos was his "crimey," or a person with whom he would commit crimes. Meza's statement about Carlos being his "crimey" was supported by ample corroborating evidence. The two surviving victims in the shooting, Victor and Ernesto, testified that Carlos followed their Mitsubishi into the shopping center and blocked in their vehicle with his Toyota. As Carlos pointed a gun at them from the driver's seat of the Toyota, Meza exited the vehicle and approached the side of the Mitsubishi. Both Carlos and Meza then fired multiple shots at the Mitsubishi, killing Alejandro, who was in the back seat. Following the shooting, Victor and Ernesto separately identified Carlos as the driver of the Toyota in a live line-up and later in court. The forensic evidence also confirmed that two separate firearms were discharged in the July 16 shooting, and that the fatal shots to Alejandro were fired from the same Glock handgun that was used in the July 12 shooting.

In sum, the prosecution presented substantial independent evidence to corroborate the statements made by Meza and Martinez implicating Carlos in both the July 12 and July 16 shootings. Because there was sufficient corroborating evidence connecting Carlos to each of the charged crimes, any alleged error by the trial court in instructing the jury on accomplice testimony was harmless.

II. Natural and Probable Consequences Doctrine

Carlos contends that the trial court committed reversible error when it instructed the jury on the natural and probable consequences theory of aiding and abetting liability with CALJIC No. 3.02. In particular, Carlos claims that the instruction given by the trial court erroneously referred to the target crime as murder or attempted murder rather than shooting at an occupied vehicle. We agree that the target crime was misidentified in the first enumerated element of the instruction, but conclude that such error was harmless.

A. Relevant Instructions

The trial court instructed the jury on the general principles of aiding and abetting liability with CALJIC Nos. 3.00 and 3.01. The trial court also instructed on the natural and probable consequences doctrine with CALJIC No. 3.02, in pertinent part, as follows: "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crimes of murder or attempted murder, under this theory, as charged in Counts 1, 2 and 3, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crimes of murder or attempted murder were committed; [¶] 2. That the defendant aided and abetted those crimes; [¶] 3. That a co-principal in that crime committed the crimes of murder and attempted murder[;] and [¶] 4. The crimes of murder and attempted murder were natural and probable consequences of the commission of the crime of shooting at an occupied vehicle. . . . [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crimes of murder and attempted murder were natural and probable consequences of the commission of that target crime." It is undisputed that the first enumerated element of the instruction should have identified the target crime of shooting at an occupied vehicle instead of the non-target crimes of murder and attempted murder.

B. Applicable Law

In a criminal case, the trial court must instruct the jury on the general principles of law that are relevant to the issues raised by the evidence and are necessary for the jury's understanding of the case. (*People v. Breverman* (1998) 19 Cal.4th 142, 154; *People v. Blair* (2005) 36 Cal.4th 686, 744-745.) An instructional error that improperly describes or omits an element of an offense is subject to the harmless error analysis set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, and requires reversal unless "'it appears

"beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained."'" (*People v. Mayfield* (1997) 14 Cal.4th 668, 774; see also *People v. Lamas* (2007) 42 Cal.4th 516, 526; *People v. Flood* (1998) 18 Cal.4th 470, 502-503.) However, "'not every ambiguity, inconsistency, or deficiency in a jury instruction rises to the level of a due process violation. . . . "'[A] single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge.'" [Citation.] If the charge as a whole is ambiguous, the question is whether there is a "'reasonable likelihood that the jury has applied the challenged instruction in a way' that violates the Constitution."' [Citation.]" (*People v. Huggins* (2006) 38 Cal.4th 175, 192; see also *People v. Wallace* (2008) 44 Cal.4th 1032, 1075 ["'[f]or ambiguous instructions, the test is whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction'"]; *People v. Rogers* (2006) 39 Cal.4th 826, 873 [in reviewing ambiguous instructions, "we inquire whether the jury was 'reasonably likely' to have construed them in a manner that violates the defendant's rights"].) The arguments of counsel must also be considered in "assessing the probable impact of the instruction on the jury. [Citations.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1202.)

"[A]n aider and abettor's liability for criminal conduct is of two kinds. First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' [Citation.] Thus, for example, if a person aids and abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault. [Citation.]" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

To convict a defendant under the natural and probable consequences theory of liability, the jury "must find that the defendant, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) by act or advice aided, promoted, encouraged or instigated the commission of the target crime[;] . . . (4) the

defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Prettyman* (1996) 14 Cal.4th 248, 262, fn. omitted.) The trial court's instructions to the jury must accurately "describe[e] each step in this process [to] ensure proper application by the jury of the 'natural and probable consequences' doctrine." (*Id*. at p. 267)

C. Instructional Error In Misidentifying The Target Crime Was Harmless

In this case, the Attorney General concedes that the trial court erred in instructing the jury on the first enumerated element in CALJIC No. 3.02 by substituting the non-target crimes of murder and attempted murder in place of the target crime of shooting at an occupied vehicle. The Attorney General asserts, however, that any such error was harmless because it effectively removed the natural and probable consequences doctrine from the jury's consideration and instead required to prosecution to prove that Carlos directly aided and abetted the commission of a murder and attempted murder.[4] Carlos, on the other hand, argues that the error was prejudicial because it permitted the jury to convict him of the non-target crimes of murder and attempted murder under the natural and probably consequences doctrine without making the requisite finding that he aided and abetted the target crime of shooting at an occupied vehicle.

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[4] The Attorney General also contends that Carlos forfeited his claim of error on appeal by failing to object to the challenged instruction in the trial court. We have repeatedly rejected this forfeiture argument, which appears to have been made more reflexively than reflectively. As Carlos correctly points out, an appellate court may review any claim of instructional error that affects a defendant's substantial rights irrespective of whether there was an objection in the trial court. (§ 1259 ["appellate court may also review any instruction given . . . even though no objection was made thereto in the lower court, if the substantial rights of the defendant were affected thereby"]; *People v. Hudson* (2006) 38 Cal.4th 1002, 1012; *People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.) Whether the defendant's substantial rights were affected, however, can only be determined by deciding if the instruction as given was flawed and, if so, whether the error was prejudicial. That is, if Carlos's claim has merit, it has not been forfeited. Therefore, we must necessarily review the merits of his claim that there was instructional error.

The California Supreme Court's decision in *People v. Butler* (2009) 46 Cal.4th 847 is instructive on this issue. In the penalty phase of a criminal trial, the prosecution presented evidence that the defendant had participated in the stabbing death of a fellow jail inmate while awaiting trial on the charged crimes. In connection with the inmate's murder, the trial court instructed the jury on the natural and probable consequences doctrine with CALJIC No. 3.02, but mistakenly transposed the target crime of assault with a deadly weapon and the non-target crime of murder in the first and third elements of the instruction. (*Id*. at pp. 869-870.) The Supreme Court concluded that the error could not have operated to the defendant's prejudice because "the instruction as given properly informed the jury that in order to hold defendant liable for murder, it would have to find that the murder was a natural and probable consequence of an assault with a deadly weapon." (*Id*. at p. 870, fn. omitted.) As the Court further explained, "[t]he transposition of murder and assault in the first and third elements of the instruction had only a subtle effect, and could only have made it more difficult for the prosecution to establish defendant's culpability for murder. Taken literally, the instruction could be read to require a finding that he intended to aid and abet a murder, rather than an assault." (*Id*. at pp. 870-871, fn. omitted.)

We reach a similar conclusion in this case. Although the version of CALJIC No. 3.02 given by the trial court incorrectly identified the target crime in the first enumerated element, the remainder of the instruction accurately reflected the law on the natural and probable consequences doctrine. The instruction properly informed the jury that "[o]ne who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted." It also accurately stated that to find Carlos "guilty of the crimes of murder or attempted murder" under this theory, the jury had to be satisfied beyond a reasonable doubt that "a co-principal . . . committed the crimes of murder and attempted murder" and that "[t]he crimes of murder and attempted murder were natural and probable consequences of the commission of the crime of shooting at an occupied vehicle." When the instruction is considered in the

context of the overall charge, there is no reasonable likelihood that the jury misunderstood and misapplied the instruction in a manner that violated Carlos's rights.

Moreover, by misidentifying the target crime as murder and attempted murder in the first enumerated element, the instruction could be read as requiring the jury to find beyond a reasonable doubt that Carlos directly aided and abetted the commission of a murder and attempted murder rather than the lesser offense of shooting at an occupied vehicle. This theory of aiding and abetting liability was also consistent with the evidence and argument presented at trial. Neither the prosecution nor the defense relied on the natural and probable consequences doctrine in its argument to the jury. Rather, the prosecution argued that Carlos intended to aid and abet the commission of a murder by pointing a gun at the victims' vehicle while Meza approached it from the side and then firing his own weapon directly at the vehicle when it tried to flee. Likewise, Carlos's defense at trial was not that he merely intended to aid and abet a drive-by shooting or that he did not reasonably foresee that a murder or attempted murder would result. Instead, his defense was that he was visiting a friend's house at the time of the shooting and was mistakenly identified by the victims. Given that the parties made no reference to the natural and probable consequences doctrine in their arguments, it is highly unlikely the jury relied on that theory in convicting Carlos. Furthermore, the jury necessarily rejected Carlos's defense that he was not present at the July 16, 2009 shooting, as it found him guilty of the separately charged offense of shooting at an occupied vehicle and also found true the enhancement allegation that he personally and intentionally discharged a firearm in connection with that shooting. Accordingly, based on the instructions as a whole, the argument of counsel, and the evidence presented at trial, any error committed by the trial court in instructing the jury with CALJIC No. 3.02 was harmless.

III. Cumulative Error

Carlos last contends that the cumulative effect of the claimed errors deprived him of due process of law and a fair trial. Whether considered individually or for their cumulative effect, none of the errors alleged by Carlos affected the process or accrued to

his detriment. (*People v. Sanders* (1995) 11 Cal.4th 475, 565.) As our Supreme Court has observed, a defendant is "entitled to a fair trial but not a perfect one. [Citations.]" (*People v. Cunningham* (2001) 25 Cal.4th 926, 1009.) In this case, Carlos received a fair trial and has failed to show any cumulative error requiring reversal.

DISPOSITION

The judgment is affirmed.

ZELON, J.

We concur:

PERLUSS, P. J.

WOODS, J.