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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY CARPIO et al., Defendants and Appellants.	B261698 (Los Angeles County Super. Ct. No. LA073936)

APPEAL from a judgment of the Superior Court of Los Angeles County. Martin L. Herscovitz, Judge. Affirmed.

Allen G. Weinberg, under appointment by the Court of Appeal, for Defendant and Appellant Anthony Carpio.

Tanya Dellaca, under appointment by the Court of Appeal, for Defendant and Appellant Michael Carpio.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Russell A. Lehman and Nicholas Webster, Deputy Attorneys General, for Plaintiff and Respondent.

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Brothers Anthony (Anthony) and Michael (Michael) Carpio issued a gang challenge to a person standing on a high school campus handball court, which turned into a three-way fistfight, and ended when Anthony stabbed the person 10 times with a knife.[1] The victim thereafter died. A jury convicted the brothers of second degree murder (Pen. Code, § 187, subd. (a)),[2] found that the murder was committed for the benefit of a street gang (§ 186.22, subd. (b)), and found that Anthony personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). On appeal, both brothers argue that (1) the testimony of the People's gang expert violated the confrontation clause, and (2) the trial court erred in not instructing the jury on the crime of involuntary manslaughter as a lesser included offense to murder and in giving CALJIC No. 5.31. Michael additionally argues that there was insufficient evidence to support his conviction, as an aider and abettor, of second degree murder. We reject all of these claims, and affirm.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

One afternoon after school, Anthony and Michael walked onto the campus of the Cleveland High School in Reseda, California. The brothers "went up" to Kevin Orellana (Orellana), who was standing on one of the handball courts. Michael asked, "Where you from?" That is a common gang challenge, and Michael admitted he was "hitting up" and "banging on" Orellana. Orellana said something that led Michael to believe that Orellana was associated with a rival street gang. Michael threw a punch, and Anthony soon joined in the three-way fistfight. Orellana fought back, taking on both brothers for a time and, as he gained the upper hand, concentrating first on one brother and then the other. At some point when Orellana was fighting Michael and his back was to Anthony, Anthony pulled a knife and stabbed Orellana 10 times in the head, neck, and left and right torso. As the brothers fled, Anthony dropped the knife. Michael picked it up, cleaned it off, and

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[1] Because both brothers share the same last name, we will use first names. We mean no disrespect.

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

then tossed it away before the brothers got into a waiting minivan and drove off.

II. Procedural History

The People charged both brothers with first degree murder (§ 187, subd. (a)), and further alleged that (1) the murder was committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(4)), and (2) Anthony personally used a deadly and dangerous weapon (§ 12022, subd. (b)(1)). The trial court instructed the jury on several lesser included offenses to first degree murder—namely, second degree murder, voluntary manslaughter based on heat-of-passion, and voluntary manslaughter based on imperfect self-defense. The court also instructed the jury on self-defense.

The jury convicted each brother of second degree murder, and found the gang and weapon-use enhancements to be true.

The trial court sentenced Anthony to state prison for 16 years to life, comprised of 15 years to life for the second degree murder plus an additional year for the weapon-use enhancement. The court sentenced Michael to state prison for 15 years to life.

The brothers filed timely appeals.

DISCUSSION

I. Evidentiary Issues

Both brothers argue that the People's gang expert testified to facts in a manner that violated their Sixth Amendment right to confront and cross-examine witnesses as defined in *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*) and *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*). We review de novo the application of the confrontation clause. (*People v. Giron-Chamul* (2016) 245 Cal.App.4th 932, 964.)

A. Pertinent facts

In its case-in-chief, the People called a gang expert regarding gang culture generally and the Rockwood criminal street gang specifically. The expert was assigned to the gang enforcement unit of the Los Angeles Police Department, and had been assigned specifically to the Rockwood gang for two years.

With respect to gang culture generally, the expert testified that gang members will confront one another ("hit [them] up," in the vernacular) by asking, "Where you from?"; and if the answer reflects that the person is from another gang, the instigator will often, although not always, "use some sort of violence." These challenges and the resort to violence, the expert explained, protect the gang's territory and are designed to make community members and rival gang members fear and respect the gang.

With respect to the Rockwood gang specifically, the expert testified that the gang has approximately 200 members; that it controls an area just west of downtown Los Angeles; and that its members are associated with the letters "7" and "9" (corresponding to the letters "R" and "W" on a telephone keypad) and wear items from sports teams that prominently feature the letter "P" such as the Pittsburgh Pirates or Steelers (corresponding to Rockwood's Spanish translation—Piedra Madera). He testified that the "primary activities" of Rockwood gang members include vandalism, robbery, assault with a deadly weapon, weapons charges, narcotics charges, attempted murder and murder. The prosecution introduced certified court records as to two of those predicate offenses and the expert further testified to the commission of such crimes by two known Rockwood gang members: Richard Alvarez (Alvarez) was convicted of a 2007 murder and Rodrigo Bernal (Bernal) was convicted of a 2008 murder.

With respect to the crime charged in this case, the expert opined that Michael and Anthony were both members of the Rockwood gang. He concluded Michael was a Rockwood gang member because (1) police had in the past spoken with Michael, he had told them he was a Rockwood gang member, and police had memorialized that conversation in a field identification or "F.I." card; (2) Michael told police during a post-arrest interview in this case that "everybody" at Cleveland High School "calls me Rockwood"; (3) Michael had two tattoos—a "P.M." and "79"—on his body; and (4) a notebook seized from both brothers when they were arrested had the words "West Los Rockwood" written on it, and the names of rival gangs crossed out. The expert concluded that Anthony was a Rockwood gang member based on a prior admission memorialized in a F.I. card and based on the notebook seized from the brothers. After

the prosecutor presented a hypothetical matching the facts of this case, the expert opined that the brothers' confrontation, fight and stabbing of Orellana benefitted and was in association with the Rockwood street gang.

B. Governing law

Until recently, an expert could testify about any out-of-court statements that formed the basis for his opinion without having to satisfy either the hearsay rule or the confrontation clause, even if the statements would have otherwise been inadmissible under the hearsay rule. (E.g., *People v. Gardeley* (1996) 14 Cal.4th 605, 618-620.) These earlier cases rested on the notion that the out-of-court statements were not being admitted for their truth, but instead for their effect on the hearer (namely, the expert). (*People v. Montiel* (1993) 5 Cal.4th 877, 919 ["matters admitted through an expert go only to the basis of his opinion and should not be considered for their truth"].)

However, our Supreme Court's recent decision in *Sanchez* overruled this earlier precedent and reinstituted a distinction the earlier cases had "blurred." (*Sanchez*, *supra*, 63 Cal.4th at p. 678.) *Sanchez* rejected as fiction the notion that the out-of-court statements an expert relies upon as the basis for his or her opinion are not admitted for their truth; the expert's opinion hinges on the truth of such statements, the *Sanchez* court reasoned, so they are "necessarily considered by the jury for their truth." (*Id.* at pp. 684, 686.) The *Sanchez* court was nevertheless careful to explain the limits of this new approach to evaluating expert testimony. *Sanchez* adhered to earlier law insofar as (1) an "expert may still *rely* on hearsay in forming an opinion, and may tell the jury *in general terms* that he did so" (*id.* at p. 685; Evid. Code, § 801, subd. (b) [an expert's opinion may be "[b]ased on matter . . . *whether or not admissible*, that is of a type that reasonably may be relied upon by an expert in forming an opinion"], italics added); and (2) an expert may still tell the jury the specific basis for his or her opinion if it comes from (a) the expert's "general knowledge" "acquired through . . . training and experience, even though that information may have been derived from conversations with others, lectures, study of learned treatises, etc." (*Sanchez*, at pp. 675-676), or (b) the expert's "personal knowledge" (*id.* at p. 685). *Sanchez* limits an expert's ability to testify to the basis of his

or her opinion when it comes from "case-specific" "out-of-court statements" and "facts" of "which he has no personal knowledge" and that "relat[e] to the particular events and participants alleged to have been involved in the case being tried" unless the People satisfy the requirements of both the hearsay rule and the confrontation clause. (*Id.* at pp. 676, 684, 686.)

C. Analysis

The brothers argue that the expert's testimony violated *Sanchez* because the expert testified (1) that the F.I. cards recorded each brother's admission to gang membership as the basis for his opinion that each brother belonged to the Rockwood street gang, and F.I. cards are "case-specific, out-of-court" statements outside the expert's personal knowledge; (2) about gang culture and the escalation of confrontations between rival gang members; and (3) about the gang membership of the two other Rockwood gang members who committed murders in 2007 and 2008, because the expert had no personal knowledge of their gang affiliation. Michael also argues that the Second Circuit's decision in *United States v. Mejia* (2d Cir. 2008) 545 F.3d 179 (*Mejia*) prohibits an expert from providing testimony about gang culture in general or opining on what case-specific facts mean when that testimony is likely derived from out-of-court conversations with others.

The brothers' last two arguments and Michael's *Mejia*-based argument are without merit. The brothers' second argument lacks merit because *Sanchez* preserves an expert's ability to explain the basis for his or her opinion when that basis is the generalized knowledge in his or her area of expertise; any other rule, the *Sanchez* court noted, would be impractical. (*Sanchez, supra*, 63 Cal.4th at pp. 675-676, 687.) The brothers' third argument lacks merit because *Sanchez*'s express limitation of "case-specific facts" to "those relating to the particular events and participants *alleged to have been involved in the case being tried*" (*id.* at p. 676, italics added) means that facts regarding the gang affiliation of Alvarez and Bernal—neither of whom were involved in the brothers' case being tried—are not "case-specific facts" and thus fall on the side of *Sanchez*'s redrawn line that does not require compliance with the confrontation clause or the hearsay rule.

And Michael's *Mejia*-based argument lacks merit because *Sanchez* charted a different path than *Mejia* when *Sanchez* held that an expert may "give an opinion about what [case-specific] facts may mean." (*Id.* at p. 676.)

However, the brothers are correct that the People may have violated *Sanchez* when the expert testified to the content of the F.I. cards regarding the brothers' gang membership. The expert testified to "case-specific, out-of-court" statements of which he had no personal knowledge. We must therefore assess whether the People established a relevant hearsay exception and whether those statements are non-"testimonial" within the meaning of *Crawford*; unless the answer to both questions is "yes," we must assess whether the error was harmless. (*People v. Trujeque* (2015) 61 Cal.4th 227, 275 [*Crawford* error assessed to see whether it is harmless beyond a reasonable doubt]; *People v. Seumanu* (2015) 61 Cal.4th 1293, 1308 [error under hearsay rule assessed to see whether there is a reasonable probability of a different result].)

Sanchez noted that F.I. cards can be both hearsay and "testimonial" within the meaning of *Crawford* if they are created for use in future prosecutions and not for use in "community policing efforts" or "potential civil injunctions." (*Sanchez, supra*, 63 Cal.4th at p. 697.) We need not delve into the purpose for which the F.I. cards regarding the brothers were created in this case because, even if they were created for use in future prosecutions and even if their admission thereby violated the confrontation clause, the expert's testimony regarding the F.I. cards was harmless beyond a reasonable doubt because there was overwhelming evidence aside from the F.I. cards that Orellana's murder in this case was in association with or benefitted the Rockwood street gang. Aside from the F.I. card, Michael's membership in the Rockwood gang was established by his admission of gang membership during his post-arrest interview, by the multiple Rockwood-affiliated tattoos on his body, by the Pittsburgh Steelers hat he wore when he confronted Orellana and by the notebook with gang-related writing seized from his house. Although the independent evidence of Anthony's affiliation with the Rockwood street gang is weaker, he need not be a gang member to commit a crime in association with or to benefit a street gang. (*People v. Bragg* (2008) 161 Cal.App.4th 1385, 1402.)

Here, the gang enhancement overwhelmingly applies to Anthony because he committed the murder with a Rockwood gang member—Michael.

II. Sufficiency of the Evidence

Michael challenges the sufficiency of the evidence supporting his second degree murder conviction. The jury was instructed it could find Michael liable for Orellana's death on two theories: (1) Michael aided and abetted Anthony's commission of the second degree murder; or (2) Michael aided and abetted the battery of Orellana, and second degree murder was a natural and probable consequence of that battery. Michael challenges the evidence supporting both theories.

In evaluating a claim challenging the sufficiency of the evidence, our role is limited. We "review the whole record in the light most favorable to the judgment to determine whether it contains substantial evidence—i.e., evidence that is credible and of solid value—from which a rational trier of fact could have found the defendant guilty beyond a reasonable doubt." (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054-1055 (*Nguyen*).)

A. To support a finding that Michael aided and abetted a second degree murder

Murder is the "unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) There are two degrees of murder, first degree and second degree. (§ 189.) What distinguishes them is that first degree murder involves aggravating circumstances over and above proof of an unlawful, malicious killing, such as proof that the homicide was committed willfully, deliberately and with premeditation. (§ 189; *People v. Cravens* (2012) 53 Cal.4th 500, 507 (*Cravens*).) *All* murders, regardless of degree, require "malice," and malice may be express or implied: Malice is "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature" (§ 188), and is "implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger" (*People v. Elmore* (2014) 59 Cal.4th 121, 133 (*Elmore*); § 188).

A person is liable for a crime if he commits the crime himself or if he aids and abets another in its commission. (§ 31.) A person is liable as an aider and abettor if (1) he knows of the actual perpetrator's unlawful purpose, (2) he, by his act or advice, aids, promotes, encourages or instigates the actual perpetrator's commission of the crime, and (3) he acts with the intent or purpose to commit, encourage or facilitate the actual perpetrator's commission of the crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118; *People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*); *People v. Beeman* (1984) 35 Cal.3d 547, 561.) When a person is directly aiding and abetting a crime, he must have the same intent as the actual perpetrator. (*McCoy*, at p. 1118 & fn. 1; *Nguyen*, *supra*, 61 Cal.4th at p. 1054.)

There is sufficient evidence upon which a rational jury could conclude that Michael aided and abetted Anthony in committing the second degree murder of Orellana. Michael admitted in his post-arrest interview that he did not allow Anthony to carry a knife in Michael's car, which indicates Michael's awareness that Anthony sometimes carried a knife. Both Michael and Anthony arrived at the high school campus together. Anthony stood by while Michael confronted Orellana, and jumped into the fight when Michael looked to be losing. Michael nevertheless jumped back into the fight, distracting Orellana while Anthony came around behind him and stabbed him. Immediately after the attack and as they fled, Michael picked up the knife Anthony had used, wiped it down, and again discarded it. Looking at the totality of this evidence (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 76-77 [jury may look to conduct before, during and after a charged offense in assessing the intent of an aider and abettor]), a jury could rationally infer that Michael and Anthony had a plan to fight and, if necessary, to stab Orellana; that Michael knew of this plan and intended to further it; and that Michael jumped back into the fight and wiped down the knife in furtherance of that plan.

Michael raises two arguments in response. First, he asserts that there was no direct evidence that he knew Anthony had a knife. He points to the fact that he denied knowing about the knife during his post-arrest interview. But the jury also knew that Michael was lying to the police when he denied knowing about the knife because they

heard a recording of the conversation that Michael and Anthony had immediately after hopping into the minivan, in which Michael explained how he had wiped down the knife. (The conversation was recorded because one of them accidentally "butt dialed" his cell phone, and their conversation was captured on the recipient's voicemail.) The jury could also have discredited Michael's disavowal of advance knowledge of the knife. What is more, Michael certainly knew that the brothers intended to pick a fistfight, and the punches thrown in a fistfight can also support a finding of implied malice. (E.g., *Cravens, supra*, 53 Cal.4th at p. 511.) Second, Michael points to the evidence that he called Anthony a "stupid fuck" and said, "Dick, I think you planned it" during their accidentally recorded conversation in the minivan. However, the jury heard this evidence and did not find that it outweighed the other evidence indicating a coordinated plan. In reviewing the substantiality of evidence, we are not permitted to reweigh the evidence and must defer to the jury's resolution of these evidentiary conflicts. (*People v. Prunty* (2015) 62 Cal.4th 59, 89.)

B. To support a finding that Michael aided and abetted a battery, and that second degree murder is a natural and probable consequence of a battery

An aider and abettor is not only guilty of the crime he intends to aid and abet, but is also guilty "of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime." (*People v. Rangel* (2016) 62 Cal.4th 1192, 1228-1229; *Prettyman, supra*, 14 Cal.4th at p. 254.) Before criminal liability will attach for a further crime beyond the intended crime, the People must prove (1) that the defendant aided and abetted the intended crime, and (2) the further crime "was a natural and probable consequence of the [intended crime] that the defendant aided and abetted." (*Prettyman*, at pp. 261-262; cf. *Rosemond v. United States* (2014) 134 S.Ct. 1240, 1248 [defining "aiding and abetting" differently under federal law].) In assessing the second element, courts ask: Would a reasonable person in the defendant's circumstances recognize that the further crime was a reasonably foreseeable consequence of the crime the defendant intended to aid and abet? (*People v. Chiu* (2014) 59 Cal.4th 155, 165; *People v. Medina* (2009) 46 Cal.4th 913, 920 (*Medina*); *People v. Gonzalez* (2001) 87

Cal.App.4th 1, 9-10; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1587.) For these purposes, it is enough if the further crime is a "possible consequence which might reasonably have been contemplated." (*Medina*, at p. 920.) Indeed, the further crime "need not have been a strong probability." (*Ibid.*) Under these standards, it does not matter "whether the aider and abettor *actually* [subjectively] foresaw the [further] crime." (*Ibid.*; *Gonzalez*, at p. 9.)

Courts have held that a reasonable person would foresee that murder is a natural and probable consequence of an assault with a deadly weapon. (*Prettyman*, *supra*, 14 Cal.3th at p. 262.) Along the same lines, courts have held that a reasonable person would foresee that murder is a natural and probable consequence of a gang-related assault or fistfight. (E.g., *Medina*, *supra*, 46 Cal.4th at p. 922 [so holding]; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376 [same]; *People v. Godinez* (1992) 2 Cal.App.4th 492, 499-500 [same]; *People v. Montano* (1979) 96 Cal.App.3d 221, 226-227 [same]; see generally *People v. Ayala* (2010) 181 Cal.App.4th 1440, 1449-1450 [gathering cases].) Because there was sufficient evidence that Michael aided and abetted the gang-related confrontation and subsequent battery of Orellana (indeed, he did the confronting and started the fight), and in light of the weight of authority holding that murder is a natural and probable consequence of such acts, there was sufficient evidence to uphold Michael's second degree murder conviction on this theory as well.

Michael raises four objections to this logic. First, he argues that there was no evidence that he knew Anthony was carrying a knife in advance. This argument fails factually because, as explained above, there was evidence from which the jury could infer that Michael *did* know Anthony was carrying a knife. This argument also fails legally because our Supreme Court held in *Medina* that, "in the gang context, it was not necessary for there to have been a prior discussion of or agreement to a shooting, or for a gang member to have known a fellow gang member was in fact armed." (*Medina*, *supra*, 46 Cal.4th at p. 924; see also *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056 (*Montes*) [so holding]; but see *People v. Butts* (1965) 236 Cal.App.2d 817, 836-837 [holding that use of a weapon is not a natural and probable consequence of a random bar

brawl].)

Second, Michael asserts that gang confrontations do not *always* end up in murders, as both the People's gang expert and one of the witnesses to Orellana's stabbing testified. We reject this assertion because the pertinent test is reasonable foreseeability, not inevitability. Michael predicts that this logic will mean that murder will be viewed as a natural and probable consequence of *every* gang confrontation. However, our concern is with the particulars of the gang confrontation presented in this case, and Orellana's stabbing was a natural and probable consequence of that confrontation.

Third, Michael points to the maxim that "'gang evidence standing alone cannot prove a defendant is an aider and abettor to a crime.'" (*Nguyen, supra,* 61 Cal.4th at p. 1055.) But Michael's liability for Orellana's murder rests on more than Michael's gang membership alone; it rests on his knowledge that Anthony sometimes carried a knife, Michael's confrontation of Orellana and his subsequent fistfight, Michael's distraction of Orellana during the fight, and Michael's attempts to conceal evidence by wiping the knife clean.

Lastly, Michael asserts that murder cannot be a natural and probable consequence of a mere misdemeanor like battery. For support, he cites *People v. Munn* (1884) 65 Cal. 211, 213, *People v. Spring* (1984) 153 Cal.App.3d 1199, 1205, and *People v. Huynh* (2002) 99 Cal.App.4th 662, 679. *Munn* and *Spring* did not involve the "natural and probable consequences" doctrine at all, and although *Huynh* suggests a misdemeanor is insufficient, more recent cases have refused to give dispositive weight to whether the intended crime is labeled a felony or misdemeanor as long as the further crime is a reasonably foreseeable consequence of the intended crime. (See *People v. Canizalez* (2011) 197 Cal.App.4th 832, 853-854; see also *Montes, supra,* 74 Cal.App.4th at pp. 1054-1055 [upholding murder conviction in gang context where intended crimes were assault and breach of the peace].) We agree with these more recent cases.

III. Instructional Errors

The brothers contend that the trial court committed two instructional errors: (1) it did not instruct the jury on the crime of involuntary manslaughter as a lesser included

offense to murder, and (2) it read CALJIC No. 5.31, which misled the jury into believing that imperfect self-defense was unavailable if either brother escalated the fistfight into a fight with a dangerous or deadly weapon. We independently review the trial court's jury instructions. (*People v. Jimenez* (2016) 246 Cal.App.4th 726, 731.)

A. Involuntary manslaughter instruction

As part of its duty to instruct the jury on generally applicable principles of law, a trial court may be required on its own to instruct the jury not only on the charged offenses, but also any lesser offenses that are necessarily included in each charged offense. (*People v. Breverman* (1998) 19 Cal.4th 142, 154-155 (*Breverman*).)

Involuntary manslaughter is a lesser included offense of murder. (*People v. Thomas* (2012) 53 Cal.4th 771, 813.) Murder, as noted above, is defined as the "unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Also as noted above, "malice" may be express or implied: Malice is "express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature" (§ 188), and is "implied when an unlawful killing results from a willful act, the natural and probable consequences of which are dangerous to human life, performed with conscious disregard for that danger" (*Elmore, supra*, 59 Cal.4th at p. 133; § 188). By contrast, involuntary manslaughter is defined as an "unlawful killing" committed "without due caution and circumspection" during the commission of (1) an unlawful act (§ 192, sub. (b)); (2) a misdemeanor (*ibid.*); (3) a noninherently dangerous felony (*People v. Burroughs* (1984) 35 Cal.3d 824, 835, overruled in part on other grounds by *People v. Blakeley* (2000) 23 Cal.4th 82); or (4) an inherently dangerous assaultive felony (*People v. Brothers* (2015) 236 Cal.App.4th 24, 33-34 (*Brothers*)). "'The words 'without due caution and circumspection" refer to criminal negligence—unintentional conduct which is gross or reckless, amounting to disregard of human life or an indifference to the consequences.'" (*People v. Guillen* (2014) 227 Cal.App.4th 934, 1027, citing *People v. Penny* (1955) 44 Cal.2d 861, 879.)

A trial court's duty to instruct on lesser included offenses is triggered only "'where there is "substantial evidence" from which a rational jury could conclude that the

defendant committed the lesser offense, and that he is not guilty of the greater offense. [Citations.]'" (*People v. Whalen* (2013) 56 Cal.4th 1, 68, quoting *People v. DePriest* (2007) 42 Cal.4th 1, 50.) "[T]he 'substantial' evidence required . . . is not merely '*any* evidence . . . no matter how weak' [citation], but rather '"evidence from which a jury composed of reasonable [persons] could . . . conclude[]"' that the lesser offense, but not the greater, was committed." (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) In assessing the substantiality of the evidence for these purposes, we view it in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

Applying these standards, whether the trial court was required to instruct the jury on involuntary manslaughter in this case comes down to whether there was substantial evidence that the killing of Orellana was the product of criminal negligence (and thus the lesser offense of involuntary manslaughter), but *not* the product of "express or implied malice" (and thus not the greater offense of murder). There was no such evidence.

Anthony's liability for Orellana's death was based on his own conduct in stabbing Orellana 10 times with a knife; the sheer number of wounds and their infliction in parts of Orellana's body where they would do the most harm (the torso, neck and head) overwhelmingly refute the notion that Anthony somehow "accidentally" stabbed Orellana. Because there is no evidence to suggest that Anthony's conduct was the product of criminal negligence, no involuntary manslaughter instruction was warranted. (E.g., *People v. Cook* (2006) 39 Cal.4th 566, 596-597 (*Cook*) [defendant not entitled to involuntary manslaughter instruction after he "brutally beat [his victim] with a board"; *Brothers*, *supra*, 236 Cal.App.4th at pp. 27-28, 34-35 [defendant not entitled to involuntary manslaughter instruction after she repeatedly beat her victim with a broomstick, burned him with cigarettes, and shoved a cloth gag down his throat].)

Because Michael did not stab Orellana, his liability for the Orellana's death was premised on a finding that he either (1) aided and abetted Anthony's commission of the second degree murder, or (2) aided and abetted a battery (the fistfight between rival gang members), the natural and probable consequence of which was the second degree murder.

In either case, Michael was not entitled to an involuntary manslaughter instruction because the second degree murder itself was not a product of criminal negligence.

Michael raises three further arguments in response. First, he seems to suggest that we must focus on *his* conduct and ask whether he acted with malice or negligently when he engaged in fistfight that led to the homicide. He is wrong. The involuntary manslaughter instruction pertains to *the homicide*, so we must focus on whether the *homicide* itself—not any act leading up to the homicide—was the product of criminal negligence or malice. (E.g., *Cook*, *supra*, 39 Cal.4th at pp. 596-597; *Brothers*, *supra*, 236 Cal.App.4th at pp. 27-28, 34-35.) Second, Michael asserts that a stabbing is not the inevitable result of a fistfight. But whether the stabbing was inevitable (or even foreseeable) is irrelevant to whether it was committed negligently or with malice. If the jury decided that the stabbing was not reasonably foreseeable, its job was to acquit Michael of being an aider and abettor to the homicide—not return a verdict on the inapplicable, lesser included offense of involuntary manslaughter. Lastly, Michael asks us to ignore and/or reconsider our Supreme Court's holding in *Breverman* that a trial court's failure to instruct on lesser included offenses is not an error of federal dimension. (*Breverman*, *supra*, 19 Cal.4th at pp. 165-166.) Because we conclude there was no error, we have no occasion to reach the merits of this argument.

B. CALJIC No. 5.31 instruction

1. Pertinent facts

The trial court instructed the jury on the crimes of first degree murder, second degree murder, and voluntary manslaughter (both due to provocation and due to imperfect self-defense). The court also gave several self-defense instructions, including CALCRIM No. 505 defining self-defense, CALCRIM No. 3471 specifying when the defense is available to the initial aggressor or in cases of mutual combat, and CALJIC No. 5.31. CALJIC No. 5.31 provides: "An assault with the fists does not justify the person being assaulted in using a deadly weapon in self-defense or defense of another unless that person believes and a reasonable person in the same or similar circumstances

would believe that the assault is likely to inflict great bodily injury upon him or someone else."

2. Analysis

The brothers argue that the trial court's decision to give CALJIC No. 5.31 was reversible error for two reasons.

First, they argue that courts are not supposed to mix CALCRIM and CALJIC instructions and that doing so is reversible error. They are wrong. Although the CALCRIM usage guide for a while recommended "never" mixing and matching (Judicial Council of Cal. Crim. Jury Instns. (2007-2008), Guide for Using, p. xxvi), and now "caution[s]" against it (Judicial Council of Cal. Crim. Jury Instns. (Fall 2015 ed.), Guide for Using, p. xxii), the usage guides do not relieve us of the burden to assess whether the instructions as given and as a whole constitute error, which we turn to next.

Second, the brothers assert that dropping CALJIC No. 5.31 into the predominantly CALCRIM-based instructions on perfect self-defense misled the jury into believing that it could not apply the doctrine of imperfect self-defense if a person used a "deadly weapon" in response to an "assault with the fists." In assessing whether CALJIC No. 5.31 created such a misimpression, "we inquire whether there is a reasonable likelihood that the jury misunderstood and misapplied the instruction," and do so by looking to the instructions as a whole. (*People v. Smithey* (1999) 20 Cal.4th 936, 963-964.)

It is not reasonably likely that the jury read CALJIC No. 5.31 to preclude its consideration of voluntary manslaughter on the ground of imperfect self-defense. CALJIC No. 5.31 by its terms addresses how to assess whether a defendant acted in perfect self-defense (not imperfect self-defense) (*People v. Wittig* (1984) 158 Cal.App.3d 124, 137), and is a correct statement of the law in that regard (*People v. Rush* (1960) 180 Cal.App.2d 885, 889-890). What is more, the trial court gave CALJIC No. 5.31 in the cluster of instructions regarding perfect self-defense (and *before* making any mention of imperfect self-defense), and CALJIC No. 5.31 refers to what a defendant "believes and a reasonable person in the same or similar circumstances would believe," which parallels the elements of perfect self-defense set forth in CALCRIM No. 505. Although we agree

with the brothers that CALJIC 5.31 refers to "self-defense or defense of another" without specifying whether it is referring to "perfect" or "imperfect" self-defense, in light of the timing and content of CALJIC No. 5.31, the closing arguments of counsel that assumed that imperfect self-defense remained available, and the absence of any jury note expressing any confusion on this point, it is not reasonably likely that the jury read CALJIC No. 5.31 in the manner the brothers have suggested. We also reject Anthony's further contention that CALJIC No. 5.31 amounts to a "confusing and unnecessary . . . pinpoint instruction" that highlights facts favorable to the People because the instruction is balanced and focuses the jury in an unbiased manner on how to evaluate the elements of perfect self-defense in the context of an escalating fight.

DISPOSITION

The judgments of Anthony and Michael are affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
HOFFSTADT

We concur:

_____, P. J.
BOREN

_____, J.
CHAVEZ