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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. BRANDON DION AUDINETTE et al., Defendants and Appellants.	B267258 (Los Angeles County Super. Ct. No. MA064178)

APPEALS from judgments of the Superior Court of Los Angeles County. Daviann L. Mitchell, Judge. Affirmed with directions.

David McNeil Morse, under appointment by the Court of Appeal, for Defendant and Appellant Brandon Dion Audinette.

Kevin D. Sheehy, under appointment by the Court of Appeal, for Defendant and Appellant Xavier Gage Gaither.

Kamala D. Harris, Attorney General, Gerald Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson, Shawn McGahey Webb,

Theresa A. Patterson, and David W. Williams, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants and appellants Brandon Dion Audinette (Audinette) and Xavier Gage Gaither (Gaither)[1] appeal from judgments entered after they were convicted of conspiracy to murder, attempted murder, and shooting at an inhabited dwelling. They contend that the trial court erred in failing to give a sua sponte jury instruction on heat of passion, and that the court's conspiracy instructions erroneously included a definition of implied-malice murder. Gaither further contends that his sentence violated the Eighth Amendment to the United States Constitution, as well as article I, section 17, of the California Constitution. Gaither also asks that we correct clerical error in the abstract of judgment. We agree that the jury instruction regarding implied-malice murder was given in error, but find beyond a reasonable doubt that the error was harmless. We correct clerical errors in both defendants' abstracts of judgment, but finding no merit to defendants' remaining contentions, we affirm the judgments.

BACKGROUND

Count 1 of a second amended information alleged that defendants conspired with another to commit murder, in violation of Penal Code section 182, subdivision (a)(1).[2] In count 2, defendants were charged with attempted murder of Daiveon Stone (Stone), and in count 3, with the attempted murder of Seville Garner (Garner), in violation of sections 187

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[1] We refer to Audinette and Gaither individually by their last names and collectively as defendants.

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

and 664. The information alleged that both attempted murders were committed willfully, deliberately, and with premeditation. Count 4 charged defendants with shooting at an inhabited dwelling, in violation of section 246. The information alleged as to all counts, that the crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further and assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b), and that a principal personally used a firearm with the meaning of section 12022.53, subdivisions (b), (c), and (e)(1). Defendants were jointly tried, and the jury found them both guilty of counts 1, 2, and 4, as charged, and found true the special allegations. Defendants were found not guilty of count 3.

On September 14, 2015, the trial court sentenced Audinette to 25 years to life as to count 1, plus a 10-year firearm enhancement pursuant to section 12022.53, subdivision (b). As to count 2, the court sentenced him to life in prison, with a minimum parole eligibility period of 15 years, plus 20 years for the firearm enhancement of section 12022.53, subdivision (c), and stayed the sentence pursuant to section 654. As to count 4, the court sentenced Audinette to life in prison, with a minimum parole eligibility period of 15 years, and stayed the sentence pursuant to section 654. Audinette received 412 days of combined presentence custody credit, and was ordered to pay mandatory fines and fees.

On October 20, 2015, the trial court sentenced Gaither to 25 years to life in prison as to count 1, plus a 10-year firearm enhancement pursuant to section 12022.53, subdivision (b). As to count 2, the court sentenced him to life in prison with a minimum parole eligibility period of 15 years, plus a 20-year firearm enhancement pursuant to section 12022.53, subdivision (c), and stayed the sentence pursuant to section 654. As to count 4, the

court sentenced Gaither to life in prison, with a minimum parole eligibility period of 15 years, to run concurrently with the sentence in count 1. He received 412 days of combined presentence custody credit and was ordered to pay mandatory fines and fees.

Defendants each filed timely notices of appeal.

Prosecution evidence[3]

Gang culture and the BOP-BIG rivalry

The parties stipulated that the gangs, Bloods on Point, or "BOP," and Bad Influence Gang, or "BIG," are criminal street gangs as defined in section 186.22. Sheriff Detective Richard O'Neal, the investigating officer in this case, also testified as the prosecution's expert in gang culture, and in particular with regard to the BIG and BOP gangs, having investigated the gangs and their crimes for seven years. The area of the shootings in this case, near Lancaster Boulevard and 5th Street, in the city of Lancaster, was included in the territory that BOP shared with its allied gang, the Black Menace Mafia. BIG had no defined territory; its members were scattered throughout the Antelope Valley. BOP's two main rivals were BIG and another gang closely aligned with BIG, the Front Mob. BOP's rivalry with BIG and Front Mob had gone on for years, but had worsened in the year before the August 20, 2014 shooting.

At this shooting, the gunfire was directed toward an apartment building in which Wilbur Williams, a high-ranking BIG member lived. Bryshaun Wilson and his brother Bryan Wilson were BOP members, and lived within a half mile of the

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[3] Other than two exhibits, neither defendant testified or presented affirmative evidence.

scene of the shooting.[4] Audinette and Gaither were also both BOP members. Audinette's gang moniker was "Hot Handz," Bryshaun's was NK Red, and Bryan's was "Be Evil."

Stone, one of the victims in this case, testified at trial that he was not affiliated with any gang. He claimed that none of his relatives were members of the BIG gang, and he denied knowing of any rivalry with BOP. He also claimed in his police interview that he was not a gang member, but he did admit that that he had friends and relatives in BIG, and that it was "where [his] people from." He told detectives that his stepfather, known as "Big Scam," was the "head dude" of BIG. He also admitted being aware of a "long beef" between BIG and BOP, and that it had "got real hot" between the gangs over the previous two weeks; they were "getting into it" at the local park and had had a "beef" at Club 661.

Detective O'Neal testified that respect was an important concept in gang culture in general, and respect was gained by committing violent acts against the general public to instill fear in the community. Gang members also commanded respect by performing "hood checks," such as by randomly asking someone, "Where you from?" There is no right answer, and hood checks are usually followed by violence. Yelling out the gang's name is similar to a hood check, and lets people know who to fear. This action spreads the word through the neighborhood that the gang has taken over, which also serves to frighten the residents. Fear allows the gang to be more effective in its criminal enterprises, as they can commit crimes without citizens calling the police or providing information.

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[4] We refer to Bryshaun and Bryan by their first names to avoid confusion.

A "mission" in gang culture is a premeditated plan to commit some specific type of crime for the gang, anything from vandalism or graffiti to murder. There are commonly several members of the gang selected to go on these missions, each with a role to play. Typically there are three: a driver, a shooter, and a lookout. The lookout watches for police, rival gang members or others who might be about to shoot at them.

The shooting

Garner testified that in the late afternoon of August 20, 2014, she was sitting on the porch of her apartment building, in a chair positioned right outside the closed front door of her apartment. She saw a young man, later identified as Stone, walk into the cul-de-sac where her building was located, looking upset. He sat on the porch about 17 feet to her right. He had been there for about three to five minutes when a car, which Garner described as a beige Hyundai with dealer plates, passed by. Garner heard someone yell from the car. In his later police interview, Stone described a brand new gray Honda that had passed him as he walked to the apartment from school.[5] An occupant of the car yelled, "BOP, BOP."

A few minutes later, while Garner and Stone were still seated on the porch, a white Chevrolet SUV appeared with windows down and four African American men inside. Within seconds, five to ten gunshots were fired from the SUV, one right after another. Garner's chair was struck by a bullet and fell over, and she crawled into her apartment. One of the bullets lodged in the interior wall of her living room after going through the security door where Garner had been leaning before she fell.

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[5] As Stone was a reluctant witness at trial and answered many questions by claiming not to remember, much of his account appeared only in his recorded interview, which was played for the jury.

After the shooting stopped and the SUV left the area, Stone went to the street, took off his shirt, looked upset, and yelled something. Garner did not see him with a weapon. Within a few minutes, Stone was joined by several other young men who lived in the area and who had been outside working on a car before the shooting. After a few minutes of conversation, Stone walked away, and the others went back to working on the car. Sheriff's deputies soon arrived.

Witness Larhonda Goodie (Goodie) was about to drive her car out of a parking lot of the church near Garner's building, when a white SUV blocked her way, and one of its occupants began firing a gun. She did not remember much at trial, but Deputy Sheriff Jason Goedecke was at the scene soon after the shooting. Goodie told the deputy that the white SUV was travelling about five miles per hour as it passed her. A young African-American man holding a black handgun was hanging out of the passenger side window of the SUV as it was being driven by a second African-American man. She then heard five to six gunshots. As the SUV went by, the gunman pointed backward, somewhat behind him, toward the apartment building. Goodie then saw a few or a couple male blacks chasing the SUV which had sped up. One of them held a silver handgun.

Another witness, Linda Lee, was walking with her daughter and grandchildren on Lancaster Boulevard in front of the same church, when she heard a gunshot, turned toward the sound, and saw more gunshots emanating from an older model white SUV, travelling slowly just across the street from her. Lee was able to observe the driver as well as the front passenger, both African-American men with short hair. The gunman was the front passenger. His arm was extended from the car, out of the front passenger window, and he was firing straight ahead toward the apartments. She saw smoke come from the gun when

he fired. After firing, he looked in her direction for a second, and then the SUV was driven out of view.

Deputy Sheriff Benjamin Tanner and his partner arrived on the scene within minutes of the shooting. They detained Stone and a companion after observing them running from the area. Stone was interviewed and released later, after Garner identified his photograph as the victim who had been on the porch.

Identification of the defendants

Shortly after the shooting, Deputy Carter and his partner found a white SUV about a quarter mile away, parked on Sancroft Avenue, near Bryshaun's home. When Deputy Carter looked into the SUV he saw a black and red Chicago Bulls hat on the front passenger floorboard, with a handgun partially sticking out from under the hat. Deputies also found a brand new Kia automobile parked near the home, which has a similar body style to that of a Honda.

Deputies conducted field showups for the witnesses. Goodie was taken to Sancroft Avenue where she identified Audinette. When Audinette turned to show his profile, Goodie said, "Yep, that's him. He was the driver." She was then asked to view the white SUV, which she identified as the car involved in the shooting. She said, "That's the vehicle. I'm sure." Deputy Goedecke then took her to a showup at another location, where she did not make an identification. Gaither was not in any of the field showups. Lee participated in a field showup and identified a person she thought she recognized, but later thought she had been mistaken.

Detective O'Neal spoke to witnesses and showed them several photographic lineups. Lee circled two photographs of Gaither, and wrote next to one that she was 85 percent certain he

was the shooter.[6] The day after the shooting, Goodie circled a photograph of Audinette, and wrote that she was 85 percent certain that he was the driver. When Detective O'Neal showed Goodie more photographs a week or two later, she circled two photographs of Gaither and wrote, "looks familiar." When he showed her a profile view of Audinette, Goodie was 90 percent certain that he was the driver.[7]

Forensic evidence

Deputy Tanner found five bullet holes in houses near the shooting and he recovered 10 shell casings in the street, spread along 30 to 50 feet. In addition to the baseball cap and gun, deputies recovered several other items from the white SUV, including a knit glove. DNA matching Gaither's was found inside and on the exterior of the glove, as well as on the rear passenger side interior door handle.

A gunshot residue (GSR) test on Stone's hand performed about 30 to 45 minutes after the shooting tested positive. Audinette was taken into custody after the shooting, and Detective O'Neal performed a GSR test on his hand. The GSR test was positive. Trace evidence analyst Joseph Cavalieri testified that the presence of GSR on a person's hand meant he could have fired or handled a gun, been next to someone who fired a gun, or touched a surface with gunshot residue on it.

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[6] When asked at trial, Lee claimed not to see anyone in the courtroom who was in the Tahoe during the shooting, and then started crying and said she was afraid to testify. However, when the prosecutor showed her the photographic lineup with Gaither's photograph in it, she circled the photograph with her finger.

[7] In their briefs, both Gaither and respondent refer to photographic and other evidence admitted at trial, but neither has caused any exhibits to be transmitted to this court.

Since Gaither was not apprehended until weeks after the shooting, he was not checked for gunshot residue.

The parties stipulated that a criminalist examined the semiautomatic handgun recovered from the white SUV and the 10 shell casings found in the street; found the gun to be functional; and determined that all 10 casings had been ejected from that gun.

Facebook and text messages

Detective O'Neal searched Audinette's and Gaither's Facebook and cell phone data. At trial, he read messages found in the data and explained some of the gang jargon used in the messages.

Four days before the shooting, Audinette received the message, "Paper Boy got shot last night." A few seconds later, he received, "And little E, his bro," and a few seconds after that, "FMG BIG K did it." Detective O'Neal explained that "Paper Boy" was the BOP gang moniker of a person who was shot outside Club 661 that night. FMG meant Front Mob Gangsters, the Antelope Valley gang closely aligned with BIG, and that Big K was the moniker of a Front Mob member.

Beginning in the midmorning on August 20, the day of the shooting, Audinette exchanged text messages with NK Red (Bryshaun), in which they discussed doing a "put on" later that day. Detective O'Neal explained that a put on was a way to initiate a new member into the gang. Under this method of joining a gang, the prospective member must commit a crime, referred to as "putting in work," at the gang's direction, and must be accompanied by higher ranking gang members.

At 10:33 a.m., Bryshaun texted, "We$t BXPin Blxxd WY@?" Detective O'Neal explained that Blood gang members often use the letter X in place of O because O was too similar to the letter C, which was associated with Crip gangs, whom they disliked.

This text message referred to the Westside clique of the BOP gang, and was asking Audinette where he was then located. The two exchanged the following texts over the next few minutes:

> Audinette: "Whoop, I'm at the pad," and, "West BOPing killa";
>
> Bryshaun: "Kum put this nigguh on tha set with me";
>
> Audinette: "Fahso. Let's do it at Bam housek or somethin'. Blood got to meet the homies."
>
> Bryshaun: "Ok, oh, Kylila, he say he know Bam already. The nigguh know Bam's government name and all the shit, Blxxd. He said he been telling Bam he want he put on."

Detective O'Neal testified that Bam was the gang moniker of a BOP member, and that Audinette's next reply to Bryshaun's text (that the prospective member already knew Bam) was an explanation of the rules of a put on.[8] Audinette explained: "But how it works is blood. One the originals gotta be there and who he gonna be under gotta be there, basically blood. Homies got to be there cause we caint . . . have niggaz . . . running around banging the set but not know anybody. You feel me? Wy@ . . . Come get me blood. You with Evil [Bryan]."

Bryshaun responded to Audinette's explanation, "Whxxp, I feel you. I'm at school. I get out in ten minutes. And Evil gone whxxp me. Then I'm a bang yo line and I say give Blxxd his own name because NK's and HH'z [Audinette] there's only one of a kind type niggaz, but I think we should put Blood on."

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[8] Bryshaun was a newer BOP member, and had joined the gang under the sponsorship of an older brother, a high-ranking member of the gang.

At 12:46 p.m., Gaither texted to a "Da Goer" or "GB": "We finna do a put on." GB replied: "Who? U N it." The reply on Gaither's phone was "Yup. ND and some nigga. U my little homie. I gotta B there." GB replied: "LOL."

About a half hour before the shooting, Audinette sent out the following message: "Nun posted wit my killahz on 3rd." Detective O'Neal explained that "3rd" referred to Third Street, one of the areas that BOP shares with the Black Menace Mafia.

On August 21, the day after the shooting, Gaither posted on Facebook the following message: "Kaught nigga slippin, put a hole in his life. He slipped on dat ice and got froze last night." Detective O'Neil explained that to a gang member, being caught "slippin" meant you made a mistake and were found unprotected (i.e., alone or unarmed) walking on the street or in a rival gang's neighborhood. He further testified that, "Put a hole in his life" meant "I shot him."

Also on August 21, Gaither exchanged text messages with his father. Gaither wrote, "Dad, I'm in Cklass [Crip killer class]. Text me." In response to a text from his father asking, "What's up?," Gaither wrote, "Someone got shot in the face right in front of me yesterday." Gaither's father asked, "Where?" Gaither replied, "On da East [east side of Lancaster Boulevard]." Gaither's father then asked, "Why?" Gaither replied, "Enemies." Gaither's father then wrote, "So it could have been you?" Gaither replied, "No, other way. I'm gonna call you when I get out of cklass." Detective O'Neal explained that "ck" stood for "crip killer."

Later on August 21, while Audinette was in custody, Gaither exchanged Facebook messages with a person identified as "Miesha Tauhpretty Baa." Gaither wrote, "I know, I know. Hot Hands my nigga though. And if anything happened, me and the homies gon. Look out for Hot Hands, baby, on me." Gaither

also wrote, "They is tryna get Hot Hands with some shit though. No lie. But they got no proof I was there."

Audinette was released from custody two days after the shooting. On August 23, after Audinette's release, Gaither and his father exchanged text messages. The father asked, "Have you heard any more? Have you heard anything?" Gaither then wrote, "Yep, everybody got out. No problems." That same day, Gaither exchanged messages with someone identified as "Babyhussle Ler." Babyhussle Ler wrote, "Aye, one of yo homies got killed or shot in Lanbaster." Gaither replied, "Nope on BOP. Them was Bigeez. U know how we do it. On 5th ND Blvd." A minute later, Gaither wrote, "Exacktly on BOP. They get knocked down." Detective O'Neal explained that the boulevard mentioned in the text was Lancaster Boulevard. Detective O'Neal explained that members of "Blood" gangs often used B in place of C because the letter C signified Crip gangs; thus, Lancaster was spelled, "Lanbaster."

On August 26, 2014, after Audinette had been released from custody, Detective O'Neal received some text messages from him. Detective O'Neal knew Audinette, as he had had numerous prior contacts with him, had a very good rapport with him, and Audinette had provided information in the past. They communicated frequently by cell phone, and Detective O'Neal had his number stored in his contacts. On August 26, 2014, Audinette sent him the following texts: "Bryshaun's brother said he left a gun under my hat though"; "I left it in the truck the night before"; and a half hour later, "But I'm upset because my hat was in the truck, Brian said that's where the gun was left under my hat."

Gang crime

The prosecutor gave Detective O'Neal a hypothetical question which mirrored the facts in evidence, and elicited the

detective's opinion that the hypothetical crime was committed for the benefit of, at the direction of, and in association with a criminal street gang in furtherance of the gang and to promote the gang. Detective O'Neal added that in his opinion, it was a stereotypical gang drive-by shooting.

DISCUSSION

I. Heat of passion

Gaither contends that the trial court erred in failing to sua sponte instruct the jury on attempted voluntary manslaughter based on sudden quarrel or heat of passion, as a lesser included offense of attempted murder. Audinette joins in Gaither's argument without separate discussion.[9]

A trial court must instruct sua sponte on lesser included offenses that are supported by substantial evidence. (*People v. Licas* (2007) 41 Cal.4th 362, 366.) "[T]he 'substantial' evidence required to trigger the duty to instruct on such lesser offenses 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. [Citations.]" (*People v. Cruz* (2008) 44 Cal.4th 636, 664; see also *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162 (*Breverman*).)

"Manslaughter is a lesser included offense of murder. [Citations.] The mens rea element required for murder is a state of mind constituting either express or implied malice. A person who kills without malice does not commit murder. Heat of passion is a mental state that precludes the formation of malice and reduces an unlawful killing from murder to manslaughter."

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[9] As Audinette has failed to provide a particularized argument in support of his claimed right to relief on this point, we confine our discussion to Gaither's arguments. (See *People v. Bryant, Smith and Wheeler* (2014) 60 Cal.4th 335, 363-364.)

(*People v. Beltran* (2013) 56 Cal.4th 935, 942, fn. omitted.) Similarly, "the offense of attempted murder is reduced to the lesser included offense of attempted voluntary manslaughter when the defendant acted upon a sudden quarrel or in the heat of passion. [Citations.]" (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137.)

"Heat of passion arises if, '"at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment."' [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. While some measure of thought is required to form either an intent to kill or a conscious disregard for human life, a person who acts without reflection in response to adequate provocation does not act with malice." (*People v. Beltran*, *supra*, 56 Cal.4th at p. 942.) "When relying on heat of passion as a partial defense to the crime of *attempted* murder, both provocation and heat of passion must be demonstrated. [Citation.]" (*People v. Gutierrez* (2003) 112 Cal.App.4th 704, 709.)

"Heat of passion has both objective and subjective components. Objectively, the victim's conduct must have been sufficiently provocative to cause an ordinary person of average disposition to act rashly or without due deliberation and reflection. [Citation.]" (*People v. Enraca* (2012) 53 Cal.4th 735, 759.) "To satisfy the subjective element of this form of voluntary manslaughter, the accused must be shown to have killed while under 'the actual influence of a strong passion' induced by such provocation [Citation.]" (*People v. Moye* (2009) 47 Cal.4th 537, 550.)

Gaither posits two possible bases for finding that the crime was committed in a heat of passion. First, he argues that a member of his gang was killed by a member of Stone's gang a few days earlier, thus providing sufficient provocation, given the violent rivalry between the two gangs. Second, Gaither points to evidence that Goodie saw three African-American men chasing the white van after the shooting, and one was holding a silver pistol. He notes that Stone's hand tested positive for gunshot residue about 45 minutes after the shooting, that Stone admitted in his interview that he had handled a silver gun earlier that day, and that Detective O'Neal testified that someone had identified Stone as the shooter. Defendant speculates that Stone or another BIG gang member recognized BOP members driving through BIG's neighborhood and fired at the white SUV before the BOP gunman in the SUV fired or as he fired, causing the BOP gunman to fire back or continue to fire in a heat of passion.

Even if the killing of Gaither's fellow gang member by a rival gang four days before could be considered sufficient provocation, it remains that a crime is not committed in the heat of passion unless the provocative conduct was shown to have been engaged in or reasonably believed by the defendant to have been engaged in *by the victim*. (*People v. Lee* (1999) 20 Cal.4th 47, 59.) Gaither presented no evidence here that Stone was involved in the killing of a BOP gang member, or that Gaither reasonably believed him to be involved in that crime. Indeed, there was no evidence of the identity of the BOP member's killer at all.

Gaither's second scenario, like the first, is speculation, not substantial evidence. "'Speculation is an insufficient basis upon which to require the trial court to give an instruction on a lesser included offense.' [Citation.]" (*People v. Sakarias* (2000) 22 Cal.4th 596, 620.) If Gaither fired first from the moving vehicle, he was the initial aggressor, and may not reasonably claim he

fired back in a heat of passion as the vehicle moved away. (See *People v. Johnston* (2003) 113 Cal.App.4th 1299, 1312.) There was no evidence that if Stone fired, he fired first, or that he was anywhere but seated on the porch of the apartment building when Gaither fired from the white SUV. Garner testified that Stone was sitting there when the gunfire erupted from the street, and that she did not see Stone with a weapon. Contrary to Gaither's speculation, the evidence demonstrated a "stereotypical gang drive-by shooting." And as respondent notes, the objective standard is not measured by the reaction of a reasonable gang member. (*People v. Enraca*, *supra*, 53 Cal.4th at p. 759.)

Turning to the subjective component of heat of passion, Gaither argues that in reaction to the actual or threatened attack with a silver revolver by Stone or another BIG gang member with him, the white van shooter panicked and fired rashly. Gaither's argument is based upon the same speculation which failed to support the objective component. His attempt to draw a comparison with the facts of *Breverman*, also fails. There, according to the defendant's account to the police, a mob of armed young men with hostile intent trespassed onto the defendant's property, threatened him, challenged him to fight, and then smashed his vehicle, which was parked near the front door, causing the defendant to fire at the intruders in fear and panic as they approached the front door and again as they fled. (*Breverman, supra*, 19 Cal.4th at pp. 150-151, 164.) A defense witness in the house corroborated the defendant's version and testified that she "'absolutely' was in 'fear' [and that] defendant yelled 'call 911.'" (*Id.* at p. 152.) Thus, the defendant's own statements and those of a witness provided evidence that the defendant's "reason was *actually* obscured as the result of a strong passion." (*Id.* at p. 163, italics added.)

Here, there was no direct evidence of the shooter's subjective state of mind, such as presented in *Breverman*. Evidence of the defendant's state of mind is usually found in his own testimony. (See *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1016-1019.) However, Gaither did not testify; nor did he give statements to law enforcement or present any witnesses as in *Breverman*. Circumstantial evidence of Gaither's state of mind suggested that he intended to benefit his gang by going on a mission as the gunman of his team to commit a drive-by shooting in a neighborhood where one or more rival BIG gang members lived. There was no evidence that he rashly reacted in panic to an unprovoked attack as he and two or three fellow gang members just happened to be passing through.

We conclude that the trial court had no duty to instruct with regard to heat of passion. If the trial court had erred in failing to so instruct, the test of prejudice would be that of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*People v. Beltran*, *supra*, 56 Cal.4th at p. 955.) Here, the jury expressly found that Gaither attempted to murder Stone willfully, deliberately and with premeditation, and that Gaither did so with the specific intent to promote, further and assist in criminal conduct by gang members. "This state of mind, involving planning and deliberate action, is manifestly inconsistent with having acted under the heat of passion." (*People v. Wharton* (1991) 53 Cal.3d 522, 572.) Indeed, the jury was instructed that "[a] decision to kill made rashly, impulsively, or without careful consideration is not deliberate and premeditated." We agree with respondent that given such findings, Gaither suffered no prejudice from the absence of a voluntary manslaughter instruction.

II. Conspiracy to commit murder

Audinette contends that the trial court erroneously instructed the jury that he could be found guilty of conspiracy to

commit murder based on implied malice, without a finding of intent to kill.

"[T]he crime of conspiracy to commit murder requires a finding of unlawful intent to kill, i.e., express malice, and . . . conspiracy to commit murder cannot be based on the underlying criminal objective or target offense of second degree *implied malice* murder." (*People v. Cortez* (1998) 18 Cal.4th 1223, 1228-1229, citing *People v. Swain* (1996) 12 Cal.4th 593, 603 (*Swain*).)

The trial court instructed the jury that in order to prove conspiracy to commit murder, the People had to prove that the "defendant intended to agree and did agree with the other defendant or Bryshaun Wilson [to] commit 187 P.C., murder [and that] the defendant and one or more of the other alleged members of the conspiracy intended that one or more of them would commit 187 P.C., murder." Requiring an intent to murder was correct so far as it went, particularly in conjunction with the instruction regarding intent to kill as an element of attempted murder, as "all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder." (*People v. Cortez*, *supra*,18 Cal.4th at p. 1237.) The instruction was not required to specify first degree murder. (*Id.* at pp. 1238-1239.) However, the court also instructed the jurors that in deciding whether defendant conspired to commit murder, they should refer to separate instructions defining murder. Those instructions stated that murder can be based on either express or implied malice, and explained that express malice meant the intent to kill, while implied malice required only the intent to commit a act dangerous to human life with conscious disregard of the danger.

Respondent agrees that it was error to permit a conviction of conspiracy to commit murder to be based on implied malice.

(See *Swain*, *supra*, 12 Cal.4th at p. 607.) But respondent contends that the error was harmless beyond a reasonable doubt under the test of *Chapman v. California* (1967) 386 U.S. 18, 24, the harmless error test traditionally applied to misinstruction on the elements of an offense. (*Swain*, *supra*, at p. 607.) Respondent reasons that in convicting Audinette of attempted murder and finding that he acted with premeditation and deliberation, the jury necessarily determined that he harbored intent to kill; and respondent argues that such a finding is inconsistent with the theory of implied malice, which assumes that the defendant did not intend for his actions to result in death. (See *Swain*, at pp. 602-603.)

Audinette counters that the jury did not find that he personally acted with premeditation and deliberation, but rather, that the crime was committed with premeditation and deliberation. He argues that as the evidence showed he was the driver, not the shooter, he was convicted as an aider and abettor. He further argues that because an aider an abettor need not have the same mental state as the actual perpetrator, the jury in this case was not required to find that he harbored an intent to kill. Audinette then paraphrases that part of the conspiracy instruction which told the jury that each conspirator is liable not only for the crime he conspired to commit, but also for any unintended crime which was the natural and probable consequence of the original plan. He concludes that the jury could have convicted him of the separate attempted murder charge based upon a finding that he conspired to commit implied malice murder, and thus did not have the intent to kill.

Despite such an abstract possibility, a review of the entire record and the instructions given reveal "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." (*Neder v. United States* (1999) 527 U.S. 1, 15-

16.) Although the aider and abettor does not necessarily have the same mental state as the actual perpetrator when he aids and abets a *general* intent crime, attempted murder requires the specific intent to kill. (*People v. Lee* (2003) 31 Cal.4th 613, 623-624.) "Thus, to be guilty of attempted murder as an aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator's intent to kill and with the purpose of facilitating the direct perpetrator's accomplishment of the intended killing -- which means that the person guilty of attempted murder as an aider and abettor must intend to kill." (*Id*. at p. 624, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) Here, the trial court correctly and thoroughly instructed the jury that intent to kill was required for aider and abettor liability. In relevant part, the court read CALCRIM No. 401, as follows: "Someone aids and abets a crime if he or she *knows of* the perpetrator's unlawful purpose and he or she *specifically intends to* and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." (Italics added.) Knowing of the perpetrator's specific intent to kill and intending to aid in that crime is the equivalent of sharing that specific intent to kill. (See *People v. Williams* (1997) 16 Cal.4th 635, 676.)

With regard to Audinette in particular, the court instructed that to prove Audinette guilty of a crime based on aiding and abetting that crime, the People were required to prove, among other things, that "[Audinette] knew that the perpetrator *intended* to commit the crime" and he "*intended* to aid and abet the perpetrator in committing the crime." (Italics added.) Immediately following CALCRIM No. 401, the trial court defined attempted murder, including the requirement the People prove that the defendant intended to kill the person he attempted to kill.

Thus, the jury was effectively instructed that the perpetrator must have harbored an intent to kill, and that Audinette must have shared that same intent to kill. Further, our review of the whole record reveals overwhelming evidence that he did, in fact, harbor an intent to kill at the time he conspired to commit murder, and no substantial evidence suggesting that Audinette did not harbor an intent to kill. The jury found that at the time of entering into the conspiracy, Audinette intended to promote, further, and assist in criminal conduct by gang members. Four days before, a fellow gang member had been shot, and Audinette had reason to believe that a member of the Front Mob gang, BIG's affiliate, had committed that crime. On the day of the shooting in this case, Audinette and Bryshaun discussed doing a "put on" later in the day with other members of the gang. BOP members in the gray Honda verbally confronted Stone shortly before the conspirators attempted to kill him. Audinette then drove the white SUV to Stone's location with a semiautomatic handgun in the vehicle, and slowed to five miles per hour while Gaither fired the gun 10 times in what the jury found to be a premeditated and deliberate attempt to kill Stone.

This was a stereotypical mission for the benefit of the gang to commit a drive-by shooting at a rival. Such a gang mission is a premeditated plan to commit a specific crime for the gang, sometimes murder. The gang members are selected and each is assigned a role, such as driver, shooter, or lookout. The lookout watches for police, rival gang members or others who might be about to shoot at them. Such a crime is thus carefully planned. Each gang member knows his role. The most reasonable inference was that before starting out on the mission, each member knew and intended that Gaither's role was to spray

Stone with semiautomatic gunfire in such a manner that Stone would not survive.

Finally, at no time did the prosecutor argue that the defendants could be convicted of conspiracy to commit implied-malice murder or that the conspirators conspired to commit some crime other than premeditated murder.

We conclude beyond a reasonable doubt that the error was harmless.

III. Cruel and/or unusual punishment

A. Eighth Amendment

Gaither contends that a mandated prison term of 35 years to life for a crime committed as a juvenile is cruel and unusual. He argues that his sentence must be reversed and remanded for consideration of youth-related factors suggested in *Graham v. Florida* (2010) 560 U.S. 48 (*Graham*), *Miller v. Alabama* (2012) 567 U.S. 460 [132 S.Ct. 2455] (*Miller*), and *People v. Caballero* (2012) 55 Cal.4th 262 (*Caballero*).[10]

The United States Supreme Court has held that the Eighth Amendment prohibits sentencing a juvenile to life without parole (LWOP) for a nonhomicide offense (*Graham, supra,* 560 U.S. at p. 74), or *automatically* sentencing a juvenile to LWOP for a homicide offense. (*Miller, supra*, 132 S.Ct. at p. 2461.) *Graham* held that a juvenile offender must be given a "meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." (*Graham, supra*, at p. 75.) In line with that

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[10] In general, courts should consider the "hallmark features of youth," such as "immaturity, impetuosity, and failure to appreciate risks and consequences," and should do so in the context of the defendant's individual circumstances such as family environment and peer pressure. (*Miller*, *supra*, 132 S.Ct. at p. 2468; see *Graham*, *supra*, 560 U.S. at p. 75; *Caballero*, *supra*, 55 Cal.4th at pp. 268-269.)

holding, the California Supreme Court extended the reasoning of *Graham* and *Miller* to the "functional equivalent" of LWOP, which it defined as any "term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy." (*Caballero*, *supra*, 55 Cal.4th at pp. 266-268.)

Gaither was sentenced to the term mandated by statute for conspiracy to commit first degree murder, 25 years to life, plus a mandatory consecutive 10-year firearm enhancement pursuant to section 12022.53, subdivision (b). (See § 182, subd. (a)(1).) He was 17 years 6 months old when he committed these crimes, 18 years 8 months old at the time he was sentenced, and was given 412 days of presentence custody credit. Without considering any conduct credits he might receive in prison, Gaither would be eligible for parole by the age of 52.

Gaither does not contend that the age of 52 is outside his life expectancy, and he recognizes that a similar age (47) has been held not to be the functional equivalent of LWOP. (*People v. Perez* (2013) 214 Cal.App.4th 49, 58.) Further, like the defendant in *Perez*, Gaither has cited "no case which has used the [*Graham-Miller-Caballero*] line of jurisprudence to strike down as cruel and unusual any sentence against anyone under the age of 18 where the perpetrator still has substantial life expectancy left at the time of eligibility for parole." (*Perez*, *supra*, at p. 57, fn. omitted.) Instead, Gaither argues that *Perez* was not well reasoned, and he asks that we articulate such a rule and reverse the sentence, remand for resentencing, and direct the trial court to consider mitigation factors outlined in *Graham*, *Miller,* and *Caballero*.

Respondent contends that Gaither has forfeited the issue by failing to raise it below. A claim that the Eighth Amendment requires a review of various factors must first be raised in the trial court, or it is forfeited on appeal. (*People v. Gamache* (2010)

48 Cal.4th 347, 403.) Gaither counters that his counsel raised the issue by asking the court to apply the factors considered in *Miller*. Counsel did not make such a request, but instead stated that he thought that some of the *Miller* factors would apply here, acknowledged that *Miller* applied to LWOP sentences, and stated that he understood that by law, the court's hands were tied. Counsel did not object to the sentence as cruel or unusual or submit a sentencing memorandum, state which *Miller* factors might apply, or ask that the trial court take evidence on such factors.

Moreover, as respondent also notes, if *Miller, Graham*, and *Caballero* were applicable here, Gaither's contention would nevertheless be rendered moot by sections 3051 and 4801, which were enacted by the Legislature to bring juvenile sentencing in conformity with the requirements of those cases. (See *People v. Franklin* (2016) 63 Cal.4th 261, 268-269 (*Franklin*).) Under section 3051, subdivision (b)(3), a juvenile offender such as Gaither, is "eligible for release on parole by the board during his or her 25th year of incarceration at a youth offender parole hearing, unless previously released or entitled to an earlier parole consideration hearing pursuant to other statutory provisions." A sentence of 25 years to life is not the functional equivalent to life without parole. (*Franklin*, *supra*, at p. 286.)

Gaither contends that that the United States Supreme Court's recent decision in *Montgomery v. Louisiana* (2016) 577 U.S. __ [136 S.Ct. 718], demonstrates that the California Supreme Court erred in holding that section 3051 satisfied the Eighth Amendment, because *Montgomery* held that the *Miller* factors must be considered at the time of sentencing, not at some future parole hearing. He also argues that the statute might pass constitutional muster if it provided for parole eligibility at 15 years, and he invites this court to review scientific evidence

supporting the establishment of such a limit. *Montgomery* held that *Miller*'s prohibition on mandatory life without parole for juvenile offenders applied retroactively to those sentenced prior to *Miller*. (*Montgomery, supra*, at pp. 734-735.) Indeed, contrary to Gaither's contention, the court expressly clarified that the states may remedy a *Miller* violation by permitting such juvenile offenders to be considered for parole after 25 years. (*Montgomery*, at p. 736.)

Regardless, the trial court did consider mitigation evidence, such as Gaither's age and family circumstances. The court heard statements from Gaither's mother and uncle, who spoke of his character and their belief that he was innocent but immature, and guilty only of "wrong association." The court found that Gaither had family support, although he had turned his back on it. The court also found that the evidence showed Gaither to be more culpable than the others, that he was on probation at the time of the shooting, and that he had refused to come to court.[11] Nevertheless, in consideration of Gaither's age, the court ordered the sentence imposed as to count 4 to run concurrently, thus avoiding a life term with an additional 15-year parole eligibility period.

Gaither does not suggest what additional facts, if any, the trial court should have considered. Gaither does not contend that the record of the sentencing hearing provided insufficient

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[11] Gaither was on juvenile probation after he had been found unlawfully in possession of a firearm and ammunition. The probation report states that Gaither's criminality began at about age 14 with theft and weapons violations, and that he had been a member of the BOP gang since 2012. Gaither was in court at sentencing, but had refused to attend for the reading of the verdict, and deputies reported that he had challenged them to a fight.

information relevant to his eventual youth offender parole hearing under section 3051, such as might be necessary to measure his "subsequent growth and increased maturity." (*Franklin*, *supra*, 63 Cal.4th at pp. 268-269, 282-283; § 4801, subd. (c).) Indeed, Gaither seeks only reversal and resentencing, and has not asked for a remand to make a more complete record, as afforded in *Franklin*. (See *Franklin*, at pp. 286-287.) Thus, no remand is necessary, and as section 3051 has effectively converted his sentence from 35 years to life, to 25 years to life, he is not entitled to resentencing. (See *Franklin*, at pp. 278-279.)[12]

B. California Constitution

Gaither also contends that the sentence was cruel or unusual under article I, section 17, of the California Constitution, which prohibits "punishment [that] is grossly disproportionate to the defendant's individual culpability as shown by such factors as his age, prior criminality, personal characteristics, and state of mind." (*People v. Dillon* (1983) 34 Cal.3d 441, 479 (*Dillon*); see also *In re Lynch* (1972) 8 Cal.3d 410, 424 (*Lynch*).)

In *Lynch*, "the California Supreme Court formulated a three-point analysis for the determination whether a sentence is cruel or unusual: (1) the nature of the offense and the offender, with particular regard to the degree of danger which both present to society; (2) a comparison of the challenged penalty with the punishment prescribed in the same jurisdiction for other more serious offenses; and (3) a comparison of the challenged penalty with the punishment prescribed for the same offense in other jurisdictions. [Citation.]" (*People v. Mantanez* (2002) 98 Cal.App.4th 354, 359; *Lynch, supra*, 8 Cal.3d at pp. 425-427.)

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[12] At oral argument Gaither referenced recently filed *People v. Phung* (Mar. 15, 2017, G051876) __ Cal.App.5th __ [LEXIS 237] which fails to support his arguments here.

Disproportionality need not be established in all three areas. (*Dillon, supra*, 34 Cal.3d at p. 487, fn. 38.)

Because the *Lynch*/*Dillon* proportionality determination is a fact-bound inquiry, it ordinarily may not be considered for the first time on appeal. (*People v. Ross* (1994) 28 Cal.App.4th 1151, 1157, fn. 8.) Gaither did not raise the issue below, but partially quoting *People v. Partida* (2005) 37 Cal.4th 428, 438, he contends that it is cognizable on appeal as an "additional legal consequence." A federal due process violation may be raised for the first time on appeal as an additional consequence of state law error. (*People v. Thornton* (2007) 41 Cal.4th 391, 443-444.) Gaither has not established an underlying state law error. Further, he does not cite authority suggesting that such a rule applies to a fact-based *Lynch*/*Dillon* proportionality determination, and we have found none.

Regardless, Gaither has failed to overcome his "'considerable burden' to show the sentence is disproportionate to his level of culpability. [Citation.]" (*People v. Em* (2009) 171 Cal.App.4th 964, 972; see *People v. Wingo* (1975) 14 Cal.3d 169, 174.)

Gaither does not undertake the comparisons suggested in the second and third *Lynch* categories. His discussion of the nature of the offense and the offender is limited to an argument that the same punishment for first degree murder and conspiracy to commit murder was grossly disproportionate, because "[t]he weight of the trial evidence linking him to the shooting consisted of his association with gang members and his being in the back seat of the white SUV while someone with darker skin in the front passenger's seat discharged the firearm."[13] Gaither has

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[13] Gaither is apparently referring to Detective O'Neal's testimony that when he showed photographic lineups to witness

characterized the evidence in an attempt to minimize his role in the crime, has disregarded the seriousness of the crime, and has utterly failed to discuss any facts relating to the "nature of the offender" other than his age, such as his "prior criminality, personal characteristics, and state of mind." (*Dillon*, *supra*, 34 Cal.3d at p. 479.)

Contrary to Gaither's argument to the contrary, the weight of the evidence showed that he was the shooter. His text message sent a few hours before the shooting established that he intended to participate in the "put on." He bragged about his role the next day: "Kaught nigga slippin, put a hole in his life. He slipped on dat ice and got froze last night." Detective O'Neal explained, "Put a hole in his life" meant "I shot him." Lee testified that the shooter was in the front passenger seat, and she was not sure that anyone was in the back seat. With 85 percent certainty, Lee selected two photographs of Gaither from a photographic lineup shown to her by Detective O'Neal, and identified him as the shooter. At trial, Lee was too frightened to make a courtroom identification, but she circled Gaither's photograph with her finger. Goodie told Deputy Goedecke that she saw two men in the white SUV: the driver and the shooter. She was 90 percent certain that Audinette was the driver, and identified two photographs of Gaither as looking familiar.

In addition to the nature of the offense, the nature of the offender also demonstrates a high degree of danger to society.

Lee, she identified Gaither in two of them, but as to one of the photographs she said without further explanation, "He's too light." The photographs have not been made part of the appellate record, and unlike the jurors and the trial judge, we have not seen Gaither or a photograph of him to assess his complexion. Gaither's claim that he was in the back seat during the shooting consists of conjecture based upon the location of the glove and his DNA in the rear.

We reject Gaither's suggestion that he did not harm anyone simply because no one was *physically* hurt, as well as his suggestion that the fact that no one was killed greatly diminished the seriousness of the crime. "[T]he only offense more serious than conspiracy to commit . . . murder is first degree murder itself." (*People v. Williams* (1980) 101 Cal.App.3d 711, 723, fn. omitted.) Gaither conspired a premeditated murder with fellow gang members. In furtherance of the conspiracy, he armed himself with a semiautomatic handgun, fired multiple rounds toward an apartment building, intending one death and risking others, and bragged about it the next day. Gaither had been a member of BOP gang for about two years, and was on probation after he was found to be a minor in possession of a concealable firearm, in violation of section 29610. He showed disrespect for his family, the court, and law enforcement by refusing to attend the reading of the verdicts and by challenging deputies to fight.

Gaither attempts to compare himself with the offenders in *Dillon* and *In re Nunez* (2009) 173 Cal.App.4th 709. The comparisons fail. In *Nunez*, the offender was three years younger than Gaither, and his "'mental functioning and behavior was diminished *beyond* that typical of 14-year-old children by mental illness, namely post-traumatic stress disorder and major depression.'" (*Nunez*, at p. 733.) In *Dillon*, the 17-year-old would-be robber was unusually immature, had no prior trouble with the law, let alone involvement in a criminal street gang, and did not intend to commit premeditated murder, as did Gaither, but reacted to a suddenly developing situation that he perceived as putting his life in immediate danger. (*Dillon*, *supra*, 34 Cal.3d at p. 488.)

Gaither has not demonstrated that his sentence was grossly disproportionate to his level of culpability, or to any

individual characteristics beyond his age. His punishment was thus not cruel or unusual under the California Constitution.

IV. Clerical error in abstract of judgment

Gaither requests correction of the abstract of judgment to conform to the oral pronouncement, and respondent agrees that the abstract should be corrected. Item 6 of the abstract states that Gaither was sentenced to 35 years to life on counts 1 and 2 "PLUS enhancement time shown above." The enhancements are noted above in item 2, which show a 10-year enhancement for those counts, imposed pursuant to section 12022.53. Thus, the abstract could be interpreted as reflecting a sentence of 35 years to life plus a 10-year enhancement, rather than the orally pronounced 25 years to life plus a 10-year enhancement. Also in both counts 2 and 4, Gather was sentenced to life with a minimum parole eligibility of 15 years, not "35 years to life" as marked on the abstract for count 2, nor "15 years to life on count 4" as is also recorded. We direct the corrections be made.

We note that Audinette's abstract contains a clerical error as well, as it states in item 1 that he was convicted of attempted murder in count 4, although count 4 was shooting at an inhabited dwelling, a violation of section 246. Item 5 does not reflect the sentence on counts 2 and 4, which was life in prison with a 15-year minimum eligibility period, although the section 654 stay is correctly noted in item 1. We may correct clerical errors in the abstract, and we may do so on our own motion. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185-188.) We thus correct both abstracts.

DISPOSITION

The judgments are affirmed. Item 6 of Gaither's abstract of judgment is corrected to reflect that the sentence imposed for count 1 was 25 years to life plus enhancements, not 35 years to life plus enhancements. The abstract should be further corrected

in item 5 to show as to counts 2 and 4 a sentence of life, with a minimum parole eligibility of 15 years. Item 1 of Audinette's abstract of judgment is corrected to reflect that count 4 was shooting at an inhabited dwelling in violation of section 246, and to add at item 5 that the sentence on each of counts 2 and 4 was life with a minimum parole eligibility period of 15 years. The superior court is directed to prepare amended abstracts of judgment reflecting the corrections, and to forward certified copies to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, Acting P. J.
CHAVEZ

We concur:

_____, J.
HOFFSTADT

_____, J.*
GOODMAN

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