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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. JULIO OTERO et al., Defendants and Appellants.	B225496 (Los Angeles County Super. Ct. No. TA108801)

APPEAL from judgments of the Superior Court of Los Angeles County, David Sotelo, Judge. Affirmed.

Gordon S. Brownell, under appointment by the Court of Appeal, for Defendant and Appellant Julio Otero.

John Steinberg, under appointment by the Court of Appeal, for Defendant and Appellant Diana Rayos.

Jennifer A. Mannix, under appointment by the Court of Appeal, for Defendant and Appellant Fernando Quintana.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendants and appellants Julio Otero, Fernando Quintana, and Diana Rayos of murder, with findings that the murder was in the first degree (deliberate and premeditated) and committed to benefit a criminal street gang. (Pen. Code, §§ 187, subd. (a); 186.22, subd. (b)(1)(C).)[1] Otero directly killed the victim; Rayos and Quintana aided and abetted Otero (each by different actions). The trial court found that Otero had suffered a prior strike conviction. (§§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d).) The court sentenced Otero to state prison for a term of 50-years-to-life; and Rayos and Quintana to terms of 25-years-to-life. We affirm all three judgments.

FACTS

The Gang Rivalry Setting

During 2008, there was a rivalry in the Watts area between Hispanic gangs allied with the "Grape Street clique" and the "Weigand clique." The "Suicidal Watts" gang allied with Grape Street; their historic enemies were the "Diez Linias" gang who allied with Weigand.

Appellant Julio ("Midget") Otero was a Grape Street gang member. His older brother, Cesar ("Crow") Otero, who was involved in the foundational events leading up to the murder — but who is not a party to the current appeal — was a member of the Suicidal Watts gang, allied with Grape Street. Appellant Diana Rayos was Cesar Otero's girlfriend or common-law wife. Appellant Fernando ("Frito") Quintana also was a member of the Suicidal Watts gang. In summary, all three defendants and appellants were associated with the Suicidal Watts gang, allied with the Grape Street gang.

Moses ("Drowsy") Herrera, who was involved in the foundational events leading up to the murder was a member of the "Watts Colonia Weigand" gang, which was a rival and enemy of the Grape Street-related gangs to which defendants and appellants Otero, Rayos and Quintana were connected. The murder victim, Samuel ("Danger") Zambrano, also was a member of the Watts Colonia Weigand gang.

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[1] All further section references are to the Penal Code.

The area in the vicinity of Wilmington Avenue, 110th Street, Anzac Avenue, and Santa Ana Boulevard was in the "territory claimed by the Suicidal (Grape Street) gang. There was significant Suicidal gang graffiti at different sites within the area, with overlying "extraordinary signs of disrespect" to the Suicidal gang by the Diez Linias gang (allied with the Suicidal's enemy, the Weigand gang). Suicidal graffiti had been painted over with "Xs" and "187s," representing threats to murder Suicidals.

The Murder

On December 18, 2008, Los Angeles Police Department (LAPD) Officer Sybil Chadorchy and her partner, Officer Robert Berry, drove their marked patrol vehicle to the area of Wilmington Avenue and 110th Street in Los Angeles in response to a radio call. When the officers arrived at the scene, they were directed to the murder victim, Samuel Zambrano. Zambrano was lying in a driveway, unconscious and bleeding out of the side of his head. Officer Chadorchy put out a crime broadcast, requesting additional units and paramedics. The officers then started trying to contain and preserve the crime scene, and to get witness statements. No one in the area could or would provide information; they were "really uncooperative." When the paramedics took Zambrano away, they reported to Officer Chadorchy that it appeared he had suffered either multiple stabbing or gunshot wounds, including one to his left temple. Officer Chadorchy did not find a gun nor any shell casings or bullet holes in the area. Zambrano died four days later.[2]

The Investigation

LAPD Homicide Detective Thomas Eiman and his partner, Detective Kouri, investigated the Zambrano murder. On December 20, 2008, the detectives spoke with members of the Zambrano family, who provided several names of persons with possible information about the incident.[3] The names included Moses Herrera, Cesar Otero, and

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[2] An autopsy revealed that Zambrano suffered multiple stab wounds from a sharp object such as a screwdriver or ice-pick, including a fatal stab wound that entered his temple and went into his brain.

[3] When Detective Eiman testified at trial, he explained that it was not unusual to obtain information about a crime from a victim's family members. Local residents who

appellant Julio Otero. On December 23, 2008, the detectives conducted a door-to-door "canvas" of the houses near the crime scene. No one gave any indication that they had seen the crime.

On December 30, 2008, the detectives again conducted door-to-door "knocks" on 110th Street. While they were in front of M.C.'s residence, M.C. came outside and stated that he had seen what happened. M.C. said that Cesar Otero and Moses Herrera were in a fight. A group of gang members from Cesar Otero's gang — the Suicidals — were on the north side of the street, and a group of gang members from Moses Herrera's gang — the Watts Colonias — were on the south side of the street. Moses Herrera was "getting the better" of Cesar, when appellant Julio Otero (Cesar's brother) ran up to a Watts Colonia gang member on the south side of the street, Zambrano. The "next thing" that M.C. knew, Zambrano "just fell to the ground." M.C. thought that Julio Otero had just knocked Zambrano out. M.C. did not know at the time that Julio Otero hit Zambrano with a weapon. M.C. said several times that he did not want to go to court to talk about the crime.

On January 2, 2009, the detectives returned to M.C.'s residence with photographs. When they arrived, M.C. told the detectives his house was recently shot up. M.C. also relayed that, after the shooting, he heard Cesar Otero yelling out, "Suicidal Watts." M.C. expressed concern about testifying in court because something might happen to his son. Detective Eiman observed several bullet holes in M.C.'s residence and what appeared to be an impact mark from a large caliber weapon on a car by the residence. The sunroof of the car also appeared to have been shot out.

On January 12, 2009, the detectives returned to M.C.'s residence and asked M.C. additional questions. During that interview, M.C. told the following version of events: (1) Cesar Otero had been fighting a "big youngster" on the north side of the street; (2) the victim got stabbed on the south side of the street; (3) the victim was on the opposite side of the street from the fight when appellant Otero rushed over and attacked him; (4) the

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were reluctant to talk to police directly were not as reluctant to provide information to a victim's family members.

victim had not been involved in the earlier fight at all; (5) the victim did not provoke the attack; (6) appellant Otero went across the street and attacked the victim; and (7) after the victim fell, the other Suicidals "backed up talking big shit Suicidals;" they all "were claiming Suicidals."

On January 15, 2009, Detective Eiman and other officers executed a search warrant at a residence in which appellant Julio Otero lived with his brother, Cesar Otero (the loser in the street fight). Appellant Quintana also lived at the residence. The officers recovered firearms and ammunition, and gang-related materials.

On February 26, 2009, Detective Eiman met with 14-year-old G.E. in a police car at a school because G.E. was reluctant to meet with police.[4] Prior to this meeting, G.E. had not told anyone what he had witnessed on the night of the stabbing. At the beginning of the interview, G.E.'s demeanor was quiet and somewhat withdrawn; later during the interview, G.E. became emotional and his eyes began to water. G.E. told Detective Eiman that, on the day of the incident, he was with friends and saw "a grip [*sic*] of people out," including defendants and appellants Rayos and Quintana, both of whom were holding guns. G.E. stated that Cesar Otero and another guy fought and then appellant Otero fought with Zambrano. "Frito [appellant Quintana] was standing right there," with a gun.

G.E. explained that Cesar Otero and Herrera started fighting and then Zambrano and appellant Otero started fighting. G.E. saw both appellant Rayos and appellant Quintana with guns. Appellant Quintana had a black semi-automatic and appellant Rayos had a silver one. The guns were held to their sides near their legs.

G.E. also said that he saw appellant Otero get a pointy thing from appellant Rayos before he started fighting with Zambrano. G.E. "barely" saw the weapon in appellant Otero's hand. It was "sticking out." It was something metal and had a point. G.E. saw appellant Otero hit Zambrano in the head with his right arm and Zambrano fell. During

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[4] G.E. was 14-years-old at the time of the Zambrano murder; he and Zambrano were friends.

the interview, G.E. demonstrated how appellant Otero struck Zambrano in the head. G.E. took his right hand and slammed it into his temple sideways.

G.E. further said that one of Zambrano's friend, had felt the ice pick hitting his hand and it appeared that Zambrano was trying to defend his friend. Zambrano had asked appellant Otero why he was trying to stab his friend, i.e., Herrera. Appellant Otero had been trying to get Herrera, but Zambrano and the other guys were trying to stop him. Zambrano rushed appellant Otero in an effort to protect his friend. G.E. told the detective that after Zambrano fell, appellant Otero, Cesar Otero, appellant Quintana, and appellant Rayos walked back down Anzac Avenue. G.E. had known Cesar Otero for years and had seen appellant Otero a few times. G.E. had known appellant Quintana and did not really know appellant Rayos, but had seen her a few times.

At the end of the interview, Detective Eiman showed G.E. a number of photographs of appellants. G.E. identified appellant Otero as "Midget," appellant Quintana as "Frito," and appellant Rayos as "Diana." He also identified "Crow" as Cesar Otero. G.E. said he did not want to go to court to testify, but Detective Eiman reassured him that he could be relocated for safety.

The Criminal Case

The People filed an information charging appellants Otero, Rayos, and Quintana with the murder of Zambrano, with an ancillary allegation that murder was committed for the benefit of a criminal street gang. (§§ 187; 186.22 (b)(1)(C).) As to Otero, the information alleged that Otero personally used a deadly weapon. (§ 12022, subd. (b)(1).) Further, the information alleged that Otero had suffered a prior strike conviction in 1998 for voluntary manslaughter (§§ 667, subds. (b)–(i); 1170.12, subd. (a)-(d).)

The charges were tried to a jury. In addition to the several police witnesses who were involved in the investigation of Zambrano's murder, the prosecution called G.E. as a direct eyewitness. G.E. testified that he was playing in the front yard of M.C.'s house when he heard some noise, went to the fence, leaned over it, and saw Cesar Otero ("Crow") and Moses Herrera ("Drowsy") fighting. G.E. did not see how the fight

between Crow and Drowsy started, and did not see any weapons being used in that fight. G.E. had a clear view of the fight. It was not quite dark yet, but it was getting dark.

G.E. saw appellant Quintana on the north side of the street. G.E.'s friend, Zambrano, the murder victim, was on the opposite side of the street. Quintana was holding a black gun in his right hand. Appellant Rayos was standing closer to the corner of Anzac Avenue, about 50 feet away from Quintana. G.E. saw a gun in Rayos's right hand. G.E. did not see anyone else at the scene holding a weapon. G.E. was positive that it was Quintana that he was looking at; he had no difficulty recognizing him. G.E. had no difficulty recognizing Rayos either because he had known her since he was a kid. He had known Quintana even longer. During the fight between Crow and Drowsy, Zambrano (the murder victim) was standing on the other side of the street near M.C.'s house. Zambrano was not standing near appellants Rayos and Quintana.

As the fight between Crow and Drowsy began "slowing down," with the two of them starting to back up, G.E. saw appellant Otero running from Anzac Avenue. Otero "paused" by Rayos at the corner and she gave him something. Otero then ran towards Zambrano, and they "just started fighting."[5] "I just seen [Rayos] like put her hand out, and I just seen [Otero] grab something." "[I] just seen her handing him something." G.E. did not see what was in Otero's hands when he stepped away from Rayos. G.E. could tell, however, that Rayos had a black gun in her right hand held at her thigh and something else in her other hand. Quintana and Rayos kept their guns at their sides, and did not lift the guns.

G.E. saw appellant Otero fighting with Zambrano, and then, "out of nowhere [he] just seen [Zambrano] drop." Appellants Quintana and Rayos watched the fight between appellant Otero and the victim, Zambrano.

G.E. saw some people pick up Zambrano and bring him into the yard at M.C.'s house. G.E. saw blood on Zambrano's head. His eyes were open, but he was not saying anything. After Zambrano fell to the ground, Cesar Otero and appellants Otero,

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[5] On cross-examination, G.E. testified Zambrano joined the fight between Crow and Drowsy.

Quintana, and Rayos walked together back down Anzac Avenue. One of the men said, "Don't say anything." The other people who had been on the block, including any young men that had accompanied Zambrano, all split up and left the scene.

The jury returned verdicts finding all three appellants guilty of murder. All three verdicts included findings that the murder was deliberate, premeditated first degree and that it was committed for the benefit of a criminal street gang. The jury found "not true" the allegation that Otero had personally used a deadly weapon.

The trial court sentenced the appellants as noted at the outset of his opinion. All three defendants filed timely appeals.

DISCUSSION

Otero's Appeal

Otero contends his first degree murder conviction must be reversed because the evidence was legally insufficient to support the jury's finding that he deliberated and premeditated the victim's murder. We disagree.

When presented with a defendant's contention on appeal that a particular factual finding is not supported by substantial evidence, we follow well-settled rules of review: first, we must examine the evidence in the light most favorable to the jury's decision, and presume in support of that decision the existence of every fact the jury could reasonably deduce from the evidence; second, we may not substitute our own conclusions for those reached by the jury, nor may we substitute our assessment of the credibility of a witness in place of the jury's credibility calls; and, third, we may accept circumstantial evidence as being sufficient to sustain a jury's findings. (See generally *People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Lindberg* (2008) 45 Cal.4th 1, 27; and see also *Jackson v. Virginia* (1979) 443 U.S. 307, 318-319 [a state criminal defendant's due process rights under the federal constitution require evidence in support of a conviction which, viewed in the light most favorable to the prosecution, would allow a rational trier of fact to find the elements of the crime beyond a reasonable doubt].) With regard to the issue involved in the current appeal, that is, whether Otero deliberated and premeditated the killing of the victim, we add these more focused rules: because a defendant's thought processes are

often insusceptible to direct proof (e.g., by an admission), a jury may infer facts about such thought processes from the evidence of the circumstances surrounding the charged offense, and a reasonable inference drawn from the circumstances of the offense will be sufficient to satisfy the requirement that substantial evidence supports the defendant's conviction. (*People v. Pre* (2004) 117 Cal.App.4th 413, 420.)

A first degree murder conviction requires more than a showing of the intent to kill. "'Deliberation' refers to careful weighing of considerations in forming a course of action; 'premeditation' means thought over in advance." (*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) A defendant can deliberate and premeditate in a brief interval; the test is not necessarily one of time, but of reflection. (*People v. Solomon* (2010) 49 Cal.4th 792, 812 (*Solomon*).) In *People v. Anderso*n (1968) 70 Cal.2d 15 (*Anderson*), our Supreme Court set forth a three-category framework for analyzing whether substantial evidence supports a finding of deliberation and premeditation: (1) planning activity; (2) pre-existing motive; and (3) the manner of killing. (*Id*. at pp. 26-27.) "In so doing, *Anderson*'s goal 'was to aid reviewing courts in assessing whether the evidence is supportive of an inference that the killing was the result of preexisting reflection and weighing of considerations rather than mere unconsidered or rash impulse.' (*People v. Perez* (1992) 2 Cal.4th 1117, 1125 [(Perez)].)" (*Solomon, supra*, 49 Cal.4th at p. 812.) *Anderson* did not establish an exhaustive list that excludes other types and combinations of evidence that could support a finding of premeditation and deliberation. (*Solomon, supra*, 49 Cal.4th at p. 812.) The Supreme Court, for example, has found that "an execution-style killing may be committed with such calculation that the manner of killing will support a jury finding of premeditation and deliberation, despite little or no evidence of planning and motive." (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127, citing *People v. Hawkins* (1995) 10 Cal.4th 920, 957.)

The evidence here, viewed in the light most favorable to the jury's verdict, established these facts: there was a street fight between Moses Herrerra, a member of the Watts Colonia Weigand gang, and Cesar Otero, a member of the Suicidal gang. The two gangs were enemies. Appellant Otero was a member of the Suicidal Watts gang. In

addition, appellant Otero was Cesar Otero's brother. As the fight was slowing down, and Cesar Otero had been bested, the victim, Zambrano, got involved. Appellant Otero saw his brother losing the fight. Otero went to appellant Rayos and armed himself with an ice-pick. Otero then went to Zambrano, and stabbed him three times,[6] including one stab into the temple that penetrated into the left side of Zambrano's brain.

The facts show motive, planning and a method of killing indicating a deliberate and premeditated intent to kill sufficient under the *Anderson* analysis to support Otero's conviction for first degree murder. The evidence showed Otero's motive to avenge and/or put a stop to his brother's beating in a public street fight. Perhaps just as important, the evidence showed motive to put a stop to any loss of their gang's intimidation and "respect" amongst the residents in the area caused by the sight of a Suicidal gang member being bested in a public street fight. Planning is shown by the fact that Otero, who was initially unarmed, went to Rayos, paused, and then armed himself with a deadly weapon. (*People v. Steele* (2002) 27 Cal.4th 1230, 1250.) The infliction of a deep, penetrating stabbing injury into Zambrano's brain through the temple is sufficient to demonstrate his deliberation and premeditation by the manner of killing; it showed a preconceived design to kill. (*People v. Koontz*, *supra*, 27 Cal.4th at pp. 1080-1082 [shooting a victim in an area of vital organs at close range is a manner of killing that shows premeditation and deliberation]; *People v. Elliot* (2005) 37 Cal.4th 453, 471 [repeatedly slashing a victim's throat does the same].)

Otero's reliance on *People v. Prince* (2007) 40 Cal.4th 1179 (*Prince*) and *People v. Pride* (1992) 3 Cal.4th 195 (*Pride*) for a different result is not persuasive. Otero seems to suggest that *Prince* and *Pride* support the proposition that, in the absence of evidence of numerous stab wounds to a murder victim, a deliberate and premeditated killing is not usually inferred in a stabbing murder case. *Prince* and *Pride* do not, in our view, stand for the proposition that a count of the number of stab wounds is important. On the contrary, *Prince* and *Pride* teach that it is the lethality of the stab wounds that may

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[6] The evidence is also consistent with defendant and appellant having first gone to attack Moses Herrera, before turning on and stabbing Zambrano.

support a finding of a premeditated and deliberated design to kill. Here, an ice-pick was thrust deeply into the brain through the temple. That is certainly lethal enough to show a premeditated design to kill.

The judgment as to appellant Otero must be affirmed because it is supported by substantial evidence demonstrating that he deliberated and premeditated the murder of the victim. That the jury reasonably could have returned a different finding on the same evidence does not justify reversal of Otero's conviction.[7]

Rayos's Appeal

I. CALCRIM No. 400

Rayos contends her murder conviction must be reversed because the trial court, instructing with the former version of CALCRIM No. 400, told the jurors that an aider and abettor is "equally guilty" of a crime as a direct perpetrator, regardless, in Rayos's words, of the aider and abettor's "extent or manner of participation" in the crime. We find no reversible error given the panoply of instructions given to the jury.

A. The Aiding and Abetting Instructions As Actually Given

The trial court instructed the jury on the law of aiding and abetting by giving two predominant instructions, CALCRIM Nos. 400 and 401, immediately in order, next to the other. Using CALCRIM No. 400, the trial court instructed the jury:

> "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is equally guilty of the crime

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[7] The jury's verdict form includes a "not true" finding on the allegation that Otero personally used a deadly weapon, "to wit, ICE PICK." The clerk's minute order indicates that the finding was "true" on the deadly weapon allegation. The abstract of judgment is correct in that there is no indication of a true finding, and no punishment, for a deadly weapon enhancement. Otero's opening brief on appeal argues the clerk's minute order should be corrected. If he wishes to pursue this further, Otero may request a nunc pro tunc order in the trial court correcting the clerk's minute order.

whether he committed it personally or aided and abetted the perpetrator who committed it."

Next in order, using CALCRIM No. 401, the trial court instructed the jury:

"To prove that a defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

1. The perpetrator committed the crime;

2. The defendant knew that the perpetrator intended to commit the crime;

3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and

4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

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.

[¶] . . . [¶]

If you conclude that the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant is or was an aider and abettor.

Mere presence at the scene of a crime which does not itself assist the commission of the crime does not amount to aiding and abetting.

Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

1. Forfeiture

As an initial matter, we agree with the People that Rayos forfeited her claim as to former CALCRIM No. 400 on appeal. In *People v. Samaniego* (2009) 172 Cal.App.4th 1148 (*Samaniego*), Division Two of our court held that a defendant forfeited his objection to former CALCRIM No. 400 by not requesting any clarifying or amplifying

language at trial. Division Two imposed a forfeiture under the well-settled principle that a defendant must request added language to complain on appeal that an instruction which otherwise correctly states the law and is responsive to the evidence is nonetheless too general in the context of his or her particular case. As our colleagues explained, CALCRIM No. 400 is generally an accurate statement of aider and abettor law, though it may be problematic in a murder case where an aider and abettor's intent is at issue.[8] (*Id*. at p. 1163.) Because former CALCRIM No. 400 correctly states the general rule of aider and abettor liability, a defendant is obligated to request modification or clarification to highlight the manner in which an aider and abettor's mental state is specifically implicated in his or her particular case, and, when a defendant fails to do so, he or she forfeits any claim on appeal that the instruction should have been amplified. (*Ibid.*)

2. Error

Even if Rayos's contention was preserved for appeal, we are not persuaded that her conviction for first degree murder must be reversed. Rayos argues former CALCRIM No. 400 created error because its "equally guilty" language allowed the jury to find her guilty of premeditated murder as a directly linked aider and abettor, without finding that she shared Otero's intent to commit a premeditated murder when she handed him a deadly weapon. Much the same argument was accepted in *Samaniego, supra*, 172 Cal.App.4th 1148.

Samaniego held that, when a person aids and abets a killing, the aider and abettor's guilt is determined by the combined acts of the participants as well as by the aider and abettor's own *mens rea*. Thus, when the aider and abettor's *mens rea* is more culpable than the actual killer's *mens rea*, the aider and abettor's guilt may be found to be greater. (See *Samaniego, supra*, 172 Cal.App.4th at pp. 1164-1165, discussing *People v. McCoy* (2001) 25 Cal.4th 1111, 1117, 1122 (*McCoy*). Conversely, when the aider and

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[8] In the case before us today, Rayos's intent was at issue insofar as the prosecution asserted criminal liability under a theory that she directly aided and abetted Otero in the murder.

abettor's *mens rea* is less culpable than the actual killer's *mens rea*, the guilt of the aider and abettor may be less. (*Samaniego, supra*, 172 Cal.App.4th at pp. 1164-1165.)

When a charged offense is a specific intent crime, and the theory of accomplice liability is that he or she directly encouraged or facilitated the crime, the accomplice must share the actual perpetrator's specific intent in order to be found criminally liable to the same extent as the actual perpetrator. This occurs when the accomplice knows the full extent of the actual perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the actual perpetrator's commission of the offense. (*Samaniego, supra*, 172 Cal.App.4th at pp. 1164-1165.) In the case of murder, the aider and abettor "'must know and share the murderous intent of the actual perpetrator.'" (*Ibid*.) Thus, in the context of a murder prosecution, CALCRIM No. 400's direction that a defendant is "equally guilty" of a crime whether he or she committed it personally or aided and abetted the person who actually committed it, while a generally correct statement of aider and abettor law, has the potential to be misleading, when the aider and abettor's intent is at issue. (*Ibid*.; see also *People v. Nero* (2010) 181 Cal.App.4th 504, 517-519 [addressing CALJIC No. 3.00].)[9]

The People argue the language of former CALCRIM No. 400, as given at Rayos's trial, particularly when read and applied together with CALCRIM No. 401, "makes clear" that the equally guilty language in the former instruction would not be understood by jurors to mean that they were to find the aider and abettor's liability comparable with the liability of the actual perpetrator. According to the People, the language of former CALCRIM No. 400 merely pointed out to the jurors, and correctly so, that there is no difference in a person's guilt under the law whether he or she directly commits a crime or he or she aids and abets the person who actually commits the crime. Although the People present a well-reasoned argument that the jury instructions, taken as a whole, resulted in a

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[9] The current version of CALCRIM No. 400 includes a set of brackets around the word "equally," and the current Bench Notes advise: "Before instructing the jury with the bracketed word 'equally,' the court should ascertain whether doing so would be in accord with the . . . principles articulated in [*McCoy, supra*, 25 Cal.4th at pp.1115-1116] . . . and [*Samaniego, supra*, 172 Cal.App.4th at p. 1166]."

correct charge to the jury, we believe the equally guilty language used in former CALCRIM No. 400 could be potentially misleading, as did the Court of Appeal in *Samaniego, supra*, 172 Cal.App.4th 1148. When a charged crime does not have any varying degrees of criminal liability, former CALCRIM No. 400's equally guilty language is not a source of potential misdirection. However, when a charged crime may have more than one degree of criminal liability, depending upon the aider and abettor's mental state, we will not treat former CALCRIM No. 400's equally guilty language as a non-error. Such was the case here. Accordingly, we address the potential misdirection in the light of a harmless error analysis.

3. Prejudice

Because of the potential for misdirection, the critical issue is prejudice. As to the prosecution theory that Rayos acted to aid and abet Otero commit a murder by supplying him with a deadly weapon, we find no prejudice. Although CALCRIM No. 400 has the potential to misdirect jurors in some murder trials, we find, as did the court in *Samaniego*, that no such potential prejudice exists in Rayos's current case. Rayos contends the instructional error affected her constitutionally guaranteed trial rights. Accordingly, we examine the effect of the error under the harmless error test set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Under this test, we may not find the trial error was harmless unless we are convinced beyond a reasonable doubt that the jury's verdict would have been the same absent the asserted error. (*Samaniego, supra*, 172 Cal.App.4th at p. 1165.)

We find any error in connection with CALCRIM No. 400 to have been harmless beyond a reasonable doubt. To the extent the jury found her actions in aiding and abetting Julio Otero were directly linked to the premeditated murder in that she supplied the deadly weapon (the ice-pick) used to kill the victim, the jurors must have resolved the issue of Rayos's intent against her under other properly given instructions.[10] The trial

[10] Another issue is presented by the instructions on the alternate theory of criminal liability under the natural and probable consequences doctrine. We address that issue below.

court did not instruct the jury with CALCRIM No. 400 standing alone. The court also instructed with CALCRIM No. 401, which explained to the jurors that, to prove Rayos was guilty of premeditated murder as an aider and abettor, the People were required to prove that she knew Julio Otero intended to commit the crime. Further, that before or during the crime, Rayos intended to aid and abet Otero in committing the crime. The jury was also given instructions and verdict forms for first degree murder, second degree murder, and voluntary manslaughter. In short, the court's specific instructions trumped the general principle of aider and abettor liability as stated in CALCRIM No. 400. The court also instructed with CALCRIM Nos. 520 and 521, further explaining to the jury that as, to "the defendant," the People needed to prove the defendant committed an act that caused the death of another person. Also, that when the defendant acted, he or she had a state of mind called malice aforethought. And finally, that if the jury determined a murder was committed a decision had to be made whether the murder was in the first or second degree. The court instructed the jury on premeditation as a element of the prosecution's first degree murder theory, and also instructed that jury that if the prosecutor did not meet its burden of proving first degree murder, the jurors were required to find the defendant not guilty of first degree murder.

By convicting Rayos of first degree murder under the instructions given, the jury necessarily found that, when she acted to aid and abet Julio Otero, by arming him with an ice-pick, she did so willfully and with the premeditated intent to kill. We find beyond a reasonable doubt that the jury's findings of guilt would not have been any different had CALCRIM No. 400 been modified to remove any suggestion to the jurors that they were to judge Rayos equally guilty as Otero, the actual stabber. In the end, we disagree with Rayos that the trial court's use of CALCRIM No. 4.00 "precluded the jury from assessing her *mens rea*." The jurors were not "precluded" under the trial court's instructions from examining Rayos's criminal liability independently from that of Otero.

Our analysis is the same under the prosecution's theory that Rayos was liable for premeditated murder under the natural and probable consequences doctrine. The trial evidence showing that Rayos armed Otero with an ice-pick trumped any potential misdirection by the general instruction on the law of aider and abettor liability pursuant to CALCRIM No. 400. The jury's finding that aiding and abetting a cohort in a criminal offense by giving him a deadly weapon naturally resulted in a premeditated murder is eminently reasonably, and not undermined by the use of CALCRIM No. 400.

Finally, our conclusion that the trial court's instruction with former CALCRIM No. 400 did not prejudice Rayos resolves her claim that her trial counsel was ineffective in failing to object or seek modification of the instruction. The record does not support a conclusion that, had former CALCRIM No. 400 been modified on her counsel's request, there is a reasonable probability that the result of Rayos's trial may have been different. (*Strickland v. Washington* (1984) 466 U.S. 668, 686-697 [a defendant's claim that his or her counsel was ineffective has two components: a showing of deficient performance and a showing of prejudice].)

II. CALCRIM No. 403 as to the Jury's Finding that *Premeditated* Murder was a Natural and Probable Consequence of her Actions

As noted above, the prosecuted presented two theories of criminal liability to the jury as to Rayos: (1) she acted as an aider and abettor of the murder by supplying the murder weapon to Julio Otero at the scene; or (2) she was as an aider and abettor of an identified target offense and Otero's murder of the victim was a natural and probable consequence of an aided and abetted target offense. As to the latter theory, the trial court instructed the jury using CALCRIM No. 403 that Rayos was guilty of Zambrano's murder if the jury found that the murder was the natural and probable consequence of one of three identified target crimes -- assault, battery, or disturbing the peace -- that Rayos aided and abetted.

On appeal, Rayos contends her conviction for *premeditated* first degree murder must be reversed because the trial court's instruction failed to inform the jurors that they had to find a *premeditated* murder was a natural and probable consequence of the crime

that she aided and abetted in order to return a verdict of guilty for *premeditated* murder. We disagree.

As a preliminary matter, we agree with the People that Rayos waived her claim of instructional error on appeal by failing to object in the trial court. Although Quintana objected to the giving of instructions on the natural and probable consequences doctrine, Rayos did not. Because Rayos did not object, or request any clarifying or amplifying language, she may not claim on appeal that the instructions on the natural and probable consequences doctrine were too general or incomplete as to her. (*Samaneigo, supra*, 172 Cal.App.4th at p. 1163.) We disagree with Rayos that an objection would have been futile; her circumstances and Quintana's circumstances were not fully overlapping.

Even if Rayos's claim of instructional was not forfeited, we would still find no error. Under the natural and probable consequences doctrine, a person who aids and abets the commission of a target crime may be held criminally liable not only for that crime, but for any other offense that is a natural and probable consequence of the crime aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260 (*Prettyman*).) The doctrine is based on the principle "that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.' [Citation.]" (*Ibid*.)

"The determination whether a particular criminal act was a natural and probable consequence of another criminal act aided and abetted by a defendant requires application of an objective rather than subjective test. [Citations.]" (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) The issue is a factual question to be resolved by the jury in light of all of the circumstances surrounding the incident, and depends upon whether, under the circumstances, a reasonable person in the defendant's position would have or should have known that the offense ultimately committed by a confederate was a reasonably foreseeable consequence of the criminal act that the defendant aided and abetted. (*Ibid*.)

It is true that in Rayos's current case the trial court's instructions did not expressly relate *premeditated* murder to the target crimes under the natural and probable consequences doctrine. However, we find the court's instructions, as a whole, did not

misdirect the jurors that they could find Rayos guilty of *premeditated* murder as an aider and abettor under the natural and probable consequences doctrine, without finding that a *premeditated* murder was a natural and probable consequence of the target offense she aided and abetted. We find the instructions given were sufficient to inform the jury of its duty with regard to finding the premeditation element as it related to an application of the natural and probable consequences doctrine.

People v. Lee (2003) 31 Cal.4th 613 (*Lee*) is instructive. In *Lee*, the Supreme Court examined the necessary showing for an aider and abettor to be found guilty of attempted willful, deliberate and premeditated murder under section 664, subdivision (a). The court concluded the statute requires only that the *murder* attempted was willful, deliberate, and premeditated, not that the *attempted murderer* by way of aiding and abetting personally acted willfully and with deliberation and premeditation. (*Id* at pp. 620-625.) The natural and probable consequences theory of liability was not involved in *Lee*, but the court observed that "where the natural-and-probable-consequences doctrine does apply, an attempted murderer who is guilty as an aider and abettor may be less blameworthy. In light of such a possibility, it would not have been irrational for the Legislature to limit section 664(a) only to those attempted murderers who personally acted willfully and with deliberation and premeditation. But the Legislature has declined to do so." (*Id*. at pp. 624-625.)

In *People v. Cummins* (2005) 127 Cal.App.4th 667 (*Cummins*), the Court of Appeal rejected a claim that the jury should have been instructed it had to find a premeditated attempted murder was a natural and probable consequence of the target crimes of robbery and carjacking. Applying the reasoning of *Lee* to the natural and probable consequences theory of attempted murder, the court held it was sufficient that the jury was instructed on the elements of attempted premeditated murder and on the natural and probable consequences doctrine. (*Id*. at p. 681.)

In *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), the Court of Appeal reached a different conclusion. In *Hart*, the defendant was convicted of premeditated attempted murder when his codefendant shot the owner of a liquor store during a robbery. The jury

was instructed that it could find the defendant guilty of attempted murder if it found that it was a natural and probable consequence of the attempted robbery. The Court of Appeal held the instructions should have included direction to the effect that the jury could not find the accomplice guilty of attempted *premeditated* murder, unless it found that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery. (*Id*. at p. 673.)

We find *Cummins* better follows *Lee*.[11] *Hart* did not address *Lee*, or the application of *Lee*'s reasoning in *Cummins*. We add that *Hart* relied to a great extent upon *People v. Woods* (1992) 8 Cal.App.4th 1570 (*Woods*), but *Woods* pre-dates *Lee*. In summary, no more was needed in Rayos's trial than the instructions given by the trial court on the elements of murder based on natural and probable consequences, and on the requisite findings for premeditated and deliberate attempted murder.

III. CALCRIM No. 403 as to Premeditated Murder and the Target Offense Actually Aided and Abetted

Rayos next contends her premeditated murder conviction must be reversed because the trial court's instruction regarding liability for murder based on the natural and probable consequence doctrine permitted the jury to convict her of murder based on finding that the victim's murder was a natural and probable consequence of the target offenses of assault, battery or disturbing the peace, but failed to instruct the jury they had to find that the murder was the natural and probable consequence of the crime that Rayos *actually* aided and abetted.

The trial court instructed the jury pursuant to CALCRIM No. 403, in relevant part, as follows: "The defendant is guilty of murder if you decide that a defendant aided and abetted one of these three crimes and that the murder was a natural and probable result of one of these crimes. *However, you do not need to agree about which of these crimes a defendant aided and abetted*." (Emphasis added.) Rayos argues the instructional error

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[11] Division Four of our court reached the same conclusion in *People v. Favor* (2010) 190 Cal.App.4th 770, 775-776. The Supreme Court has granted review in *Favor*. Until directed otherwise, we will follow the line of reasoning articulated here.

violated her federal constitutional right to proof beyond a reasonable doubt that she aided and abetted the commission of a certain criminal act, and that the murder committed by Julio Otero was a natural and probable consequence of the criminal act that she *actually* aided and abetted. We are not persuaded.

In Rayos's words, the instruction with CALCRIM No. 403 permitted the jury to find her guilty of murder while finding that she aided and abetted disturbing the peace, and while finding that the murder was a natural and probable consequence of an assault or a battery. Rayos relies on *Prettyman, supra*, 14 Cal.4th 248, in support of her argument. The People, acknowledging *Prettyman*, recognize that CALCRIM No. 403 "arguably could have been written more clearly" to relate the actual target crime aided and abetted by a defendant to the ensuing charged crime under the natural and probable consequences doctrine. At the same time, the People argue that the instruction, as given, did not result in reversible error. We agree.

In *Prettyman*, the Supreme Court held that a trial court must expressly *identify* the target crime or crimes the aider and abettor intended to promote, and must instruct on the elements of the charged offense, in order to facilitate the jury's task in deciding whether the charged crime directly committed by the aider and abettor's confederate was in fact a natural and probable consequence of the identified target crime. (See *Prettyman, supra*, 14 Cal.4th at pp. 262, 266-267.) But *Prettyman* also cited *People v. Solis* (1993) 20 Cal.App.4th 264 (*Solis*) with approval for the proposition that a jury need not unanimously agree on the specific target crime that the defendant aided and abetted. Rather, as *Prettyman* states, each trial juror must be convinced beyond a reasonable doubt that the defendant "aided and abetted the commission of a *criminal act*," and must be convinced beyond a reasonable doubt that the offense thereafter actually committed by the aider and abettor's confederate was a natural and probable consequence of the aided and abetted criminal act. (*Prettyman, supra*, 14 Cal.4th at p. 268.) *Prettyman* disapproved of the *Solis* case only to the extent it supported the principle that a jury may convict a defendant based on a "generalized belief that the defendant intended to assist

and/or encourage unspecified 'nefarious' conduct." (*Prettyman, supra*, 14 Cal.4th at p. 268.)

Under the law as explained in *Prettyman, supra*, 14 Cal.4th at pp. 266-268, and similar cases, the trial court's instructions with CALCRIM No. 403 correctly stated the law to the jurors. *Prettyman* does not require that jurors unanimously agree beyond a reasonable doubt on the specific crime that an aider and abettor intended to encourage or facilitate, only that the juror unanimously agree beyond a reasonable doubt that the aider and abettor intended to encourage and facilitate identified criminal conduct.

In the final analysis, when an appellate court reviews a defendant's claim that an erroneous jury instruction violated his or her federal and state constitutional rights, such as the right to proof beyond a reasonable doubt, the court's task is to determine whether there is a reasonable likelihood that the jury applied the challenged instruction in the way the defendant asserts would violate the constitution. (*People v. Frye* (1998) 18 Cal.4th 894, 957, disapproved on other grounds in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) In evaluating whether such a likelihood exists, we do not examine a challenged instruction in artificial isolation, but in the context of the overall charge to determine whether the instruction misdirected the jury with a resulting constitutional violation. (*People v. Frye, supra*, 18 Cal.4th at p. 957.) We find that it is not reasonably likely that the jurors applied the trial court's instructions in Rayos's case to allow her to be convicted upon proof less than beyond a reasonable doubt.

The instructions with CALCRIM No. 403 did not allow the jurors to circumvent determining – beyond a reasonable doubt – that Rayos intended to and did aid and abet criminal conduct, and did not allow allow the jurors to circumvent determining – beyond a reasonable doubt – that the murder committed by Julio Otero was a natural and probable consequence of criminal conduct aided and abetted by Rayos. Rayos's argument that the jurors "were not required to agree on the theory of conviction" is not persuasive. Assuming the jurors at Rayos's trial did not agree unanimously on the target crime that she intended to and did aid or abet, it does not follow that the natural and probable consequences doctrine could not be applied, and that Rayos could not be

convicted of murder under the doctrine. The previously cited authorities make it clear that where jurors unanimously agree that a defendant intended to and did aid and abet criminal conduct, and the jurors unanimously agree that a non-target crime naturally and probably resulted from the criminal conduct, the doctrine is properly applied to affix guilt to the aider and abettor for the non-target crime.

IV. Substantial Evidence — Premeditation

Last, Rayos contends her premeditated first degree murder conviction must be reversed because the evidence was not sufficient as a matter of law to sustain the jury's finding on the element of premeditation. We disagree.

Under either theory of criminal liability presented to the jury, it reasonably could have found that Rayos — a person who armed a fellow gang member, Julio Otero, with a deadly weapon in a gang confrontation setting — was guilty of premeditated murder. As an aider and abettor directly linked to the murder, the evidence established that Rayos brought both a handgun and an ice-pick to a street fight involving rival gang members. Moreover, she was recognized as the wife of Ceasar Otero, one of the fighters. The act of arming herself indicated that Rayos considered a deadly encounter to be a reasonable possibility, and demonstrated a level of planning. She supplied a deadly weapon, the ice-pick, to Julio Otero after her mate, Cesar Otero, had been bested in the street fight. The manner in which she supplied the weapon to Otero demonstrated planning activity as well. Julio Otero went to Rayos, paused near Rayos, and she handed him the ice-pick. Based on these facts, a jury could reasonably conclude that Otero knew all along that Rayos had the ice-pick. The manner of killing, particularly the use of an ice-pick, showed a design to kill. Evidence of motive is supplied by the gang rivalry setting for the murder, not merely the defendants' gang membership. The evidence, taken as a whole picture, supports the jury's inference that Rayos intended to, and did, actively participate in a premeditated murder.

As to the natural and probable consequences doctrine, the evidence supports the conclusion that the premeditated murder was foreseeable from the criminal act that Rayos aided and abetted. For all the reasons explained in addressing Julio Otero's murder, the

evidence supports the jury's conclusion that a premeditated murder was committed, and the evidence supports the jury's conclusion that a person in Rayos's position would have or should have understood that arming an assailant with a deadly weapon, an ice pick, would lead to a premeditated murder.

Rayos's argument that the trial evidence was supportive of a different conclusion, namely, that the murder was a "hasty, impetuous, rash or impulsive" act that unfolded in the midst of a street fight, does not persuade us that reversal of the jury's premeditation finding is compelled. As a reviewing court, it is not our task to determine whether we are convinced beyond a reasonable doubt of the premeditation element, but whether a reasonable trier of fact could be so persuaded. (*Perez, supra*, 2 Cal.4th at p. 1126.) We see nothing unreasonable in the jury's premeditation finding as to Rayos in this case.

Quintana's Appeal

I. Substantial Evidence — First Degree Murder

Quintana contends his first degree murder conviction must be reversed because the trial evidence is insufficient to support a finding that he directly "aided and abetted a first degree murder, or any other type of murder." Further, that the evidence is insufficient to support a finding that the first degree murder committed by co-defendant Julio Otero was the natural and probable consequence of any assault, battery or disturbing the peace offense that Quintana aided and abetted. We find the evidence supports both theories of criminal liability.

A. Aiding and Abetting a Premeditated Murder

Quintana argues the evidence, at best, established only that he was standing by, watching a street fight between gang members, holding a gun aimed at the ground, when co-defendant Julio Otero committed a murder. Quintana argues his "mere presence at the scene," even coupled with his knowledge — by observation — that a crime was being committed by Otero, is not enough to prove that he aided and abetted a murder. Relying on *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262 (*Juan H.*), Quintana argues the evidence does not prove that he "provided 'backup'" amounting to aiding and abetting conduct. We disagree.

In *Juan H*., there was a drive-by shooting at a house trailer where Juan (a minor) and his brother and other family members lived. About one-and-a-half hours later, victims Luis Ramirez and Sylvester Magdelano, walked by the trailer. Juan and his brother ran out of their trailer, out of sight, then reappeared and approached Ramirez and Magdelano. While Juan stood behind his brother, Juan's brother asked Magdelano and Ramirez if they were "the ones who shot up his pad." When Ramirez said he did not know what Juan's brother was talking about, Juan's brother "pulled a shotgun from his side or the front of his pants, and shot Ramirez. . . . During the shooting, Juan H. did not say anything, make any gestures, or otherwise encourage [his brother]." (*Juan H.*, *supra*, 408 F.3d at pp. 1266-1267, fns. omitted.)

We disagree with Quintana that his case is like *Juan H*. Quintana went to a street fight armed with a handgun, and he held the gun in the open for all persons present to see during the ensuing attack by Julio Otero. After the murder, Cesar Otero (the initial fighter), Julio Otero (the killer), Diana Rayos (the ice pick armed assistant), and Quintana left the scene together. One of the males said to someone, "Don't say anything." Quintana was not some unarmed minor, standing mute behind his brother as his brother shot a victim. Further, *Juan H*. did not, as does Quintana's current case, include a back-drop of evidence showing a gang culture in which gang members are apt to be violent in a rival-gang-on-rival-gang setting. Here, the trial evidence against Quintana supported a reasonable inference that he acted, in the fair words of the prosecutor in summation, as a "crowd control" actor, intending to prevent anyone from interfering with the conduct of his cohorts, Julio Otero and Diana Rayos, as they worked together to kill the victim.

We find the evidence against Quintana more closely fits *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254 (*Gonzales*), rather than *Juan H*. In *Gonzales*, the Supreme Court affirmed a defendant's convictions for two first degree murders based on an aiding and abetting theory. In affirming, the Supreme Court distinguished the facts in *Juan H*. from the facts in *Gonzales*: "Unlike *Juan H*., Gonzales did and said things both before and after the shooting that indicated his intent to aid and abet the murders. Gonzales joined with [his co-defendant] in (1) asking the driver to turn the car around so they could

confront [the victims], (2) arguing with [the victims], and (3) warning [a witness] to forget what she had just witnessed. Finally, Gonzales was armed, further supporting the inference he provided backup by adding deadly force support to [his co-defendant]." (*Gonzales, supra*, 52 Cal.4th at p. 297.) As to Quintana, we reach a similar conclusion. Quintana took actions both before and after the murder to indicate his intent to aid and abet the murder. He went armed with a handgun, with gang cohorts, to a street fight between gang members. He held the gun in plain view, acting as crowd control. When he left with the other actors involved in the street fight and murder, a member of their group warned-off witnesses. We are satisfied that this is not a *Juan H.*-type case.

B. Aiding and Abetting a Target Crime with a Premeditated Murder as a Natural and Probable Consequence

Quintana argues that, based on the evidence presented at trial, the prosecution "failed to prove [a] first degree murder was the natural and probable consequence of an assault, battery or disturbing the peace." In making his argument, Quintana focuses on the premeditation element required for first degree murder. He argues that a reasonable person in his position would not or should not have known that a confederate would commit a premeditated murder. We disagree.

Under the natural and probable consequences doctrine, guilt is assigned to an aider and abettor for any offense he intended to facilitate or encourage, and for "any reasonably foreseeable offense committed by the person he aids and abets."[12] (*Prettyman, supra*, 14 Cal.4th at p. 261.) "'It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. [The aider and abettor's] knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any

[12] The jury instructions covered two theories as to defendants Rayos and Quintana, i.e., direct aiding and abetting, and the natural and probable consequences doctrine. The prosecutor's primary, indeed, the only express argument to the jurors for Quintana's guilt was the natural and probable consequences doctrine.

reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.'" (*Ibid*., quoting *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5; see also *McCoy, supra,* 25 Cal.4th at p. 1117.)

As to the offense the aider and abettor intended to encourage or facilitate, the so-called target offense, the *mens rea* which must be proven is the intent associated with the target offense. (*McCoy, supra*, 25 Cal.4th at p. 1118 & fn. 1.) As to a further crime not intended by the aider and abettor, the aider and abettor need not have the *mens rea* required for the further offense, but only have the "intent to encourage and bring about conduct that is criminal. . . ." (See *People v. Croy, supra,* 41 Cal.3d at p. 12, fn. 5; and see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1122–1123.)

The foreseeability element under natural and probable consequences doctrine is a factual question to be resolved by the jury in light of all the circumstances shown by the evidence. (*People v. Nguyen, supra,* 21 Cal.App.4th at p. 531.) Criminal liability for the charged offense depends on whether, under the circumstances presented, a "reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant." (*Ibid*.)

A rational trier of fact could find (1) that Quintana came to the crime scene area to perform crowd control for the gang-member-on-gang-member street fight between Cesar Otero and Moses Herrera; that (2) Quintana decided he would continue acting in such a role when a cohort, Julio Otero, moved to attack enemy gang members as the street fight was winding down; and that (3) a reasonable person in Quintana's position would have or should have known that one of his fellow gang members, Julio Otero, who was also the brother of Cesar Otero (who lost the fight), would commit a premeditated gang-member-on-rival-gang-member murder as a natural and probable consequence of assault, battery or disturbing the peace offense that Quintana aided and abetted. Given the evidence of the circumstances of the premeditated murder, and the expert gang evidence, this is not a

lengthy or speculative leap. For the reasons explained above, the evidence supported a finding that Julio Otero committed a first degree murder.

The Supreme Court's recent discussion of the natural and probable consequences doctrine in *People v. Medina* (2009) 46 Cal.4th 913 (*Medina*) reinforces our conclusion. In *Medina*, the Supreme Court affirmed the jury's finding that a first degree murder by a firearm was a reasonably foreseeable, or natural and probable consequence, of a gang-related incident that started as a fist fight. (*Id.* at pp. 917-919, 922-924.) Here, as in *Medina*, evidence establishing foreseeability is found in the gang expert's testimony regarding the likelihood that a confrontation between enemy gang members. In particular, that a confrontation of the nature that occurred would precipitate a violent response. Here, as in *Medina*, the evidence was sufficient to demonstrate that the first degree murder was a reasonably foreseeable consequence of the gang street fight, and Otero's ensuing attack on rival gang members. Here, as in *Medina*, a fatal injury resulted at the culmination of a fight between rival gang members. (*Id.* at pp. 917-924.)

In *Medina*, in finding the evidence sufficient to support first degree murder convictions as to the aiders and abettors, the Supreme Court first restated the principle that the ultimate factual question is one of foreseeability. (*Medina, supra,* 46 Cal.4th at p. 920.) Further, that a reviewing court must examine the record in the light most favorable to the prosecution, without a predetermined check-off list of factors common to past cases, to determine if the ultimate crime was foreseeable. (*Id*. at p. 922.) The lack of evidence the assailants used weapons during the fistfight, or that the gangs involved were in the midst of an active or recent rivalry, is not necessarily dispositive, nor is the fact the shooting occurred after the fistfight ended. (*Id*. at pp. 922-923.) Expert testimony about gang culture and a gang member's need for respect and the use of violence, including murder, to command respect is a proper focus in assessing the evidence in support of the jury's foreseeability finding. (*Id.* at pp. 923-924.)

We find Quintana's current case fits within the framework of the *Medina* model. Here, gang expert Officer Lozano testified there is always a possibility that a gang-member-on-gang-member fistfight will escalate to something more than just a fistfight.

Officer Lozano testified that if a more respected gang member were to get into a fistfight, and lose, there was a possibility for escalation. And, with regard to the particular circumstances surrounding the Zambrano murder, Officer Lozano further testified that it was highly significant that Cesar Otero, the initial gang member who was fighting for the Suicidals, was an older, respected gang member, and that he lost the fight: "It is also very significant as you mention the fact that he is a highly respected gang member. Nobody wants anybody in their gang to get punked by another gang. But to have a respected senior gang member of your hood getting punked and embarrassed or beat up right in your own hood is highly embarrassing, and that sort of action is going to provoke somebody to have to use some sort of violence, however that violence is. There is a whole spectrum of options available." The jurors were not required to ignore that gang members' responses to fistfights may be quite different from other persons' responses in other settings. Here, given that the Suicidals and their allies were disrespected when Cesar Otero lost the fistfight, the use of deadly force, up to and including a premeditated murder by his allies was a reasonably probable response. (*Medina*, *supra*, 46 Cal.4th at p. 920.) The gang expert's testimony, coupled with the facts surrounding the murder, support the jury's verdict that the premeditated murder was a reasonable and probable consequence of Quintana's aiding and abetting activity. (*Ibid*.)

We view Quintana's argument that he was simply watching a street fight like others at the scene as a request that we independently reweigh the evidence, and substitute our perspective for that of the jury. This is not our role as a reviewing court. We must review the evidence in the light most favorable to the jury's conclusions, accept all reasonable inferences drawn from the evidence in favor of the jury's verdict, and must affirm the jury's verdict unless, under "no hypothesis" is there sufficient substantial evidence to support it. (*People v. Redmond* (1969) 71 Cal.2d 745, 755.) The evidence shows that Quintana was no ordinary bystander who just happened by to watch a fight. He was a Suicidal gang member; the fight occurred with members of a rival gang who were in the territory claimed by Quintana's gang; he was not merely present in that he acted in the role of a crowd controller, armed with a firearm at his side. The jury was not

precluded from inferring that he stood ready, willing and able to prevent anyone who attempted to stop Julio Otero when he moved in to commit an assault on a rival gang member.

We are not persuaded to reach a different conclusion by Quintana's reliance on cases such as *U.S. v. Andrews* (9th Cir. 1996) 75 F.3d 552, because each case involving the natural and probable consequences doctrine is to be examined in light of its unique facts. In *Andrews*, there was no evidence, as there was here, that the killing was a gang-related incident arising out of a showing of disrespect by a rival gang member. California courts have regularly found, in light of the nature of gang conflicts, that a jury may reasonably find that it is foreseeable some gang members will carry deadly weapons during those encounters and that a killing may naturally result as a consequence of verbal challenges and fistfights. (See, e.g., *People v. Gonzalez* (2001) 87 Cal.App.4th 1, 7-10; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1056.) As the court noted in *People v. Montes*: "When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts [or jurors] should turn a blind eye to them. . . . [¶] [T]he circumstances in this case were such that it was reasonably foreseeable the initial confrontation would quickly escalate to [deadly force]." (*Id*. at p. 1056.)

II. CALCRIM No. 403 as to the Actual Target Offenses Aided and Abetted, and Premeditated Murder

Quintana next contends his first degree murder conviction must be reversed because, while the trial court instructed on murder based on a theory that Zambrano's murder was the natural and probable consequence of either an assault, battery or disturbing the peace, the court failed to instruct the jury that it was required to find the murder was the natural and probable consequence of the *actual and specific* crime that Quintana aided and abetted. According to Quintana, the instructions allowed the jury to find that he aided and abetted one of the three identified target crimes, e.g., disturbing the peace, but the murder was a natural and probable consequence of a different indentified target crime, e.g., an assault. Basically, Quintana argues that instructions under the

natural and probable consequences doctrine should require jurors to find a directly linked nexus between the crime that an aider and abettor actually assisted, and the charged offense that resulted as a natural and probable consequence.

For the reasons explained above in addressing this issue on Rayos's appeal, we reject Quintana's argument that his conviction must be reversed for instructional error in using CALCRIM No. 403. Quintana's argument does not persuade us that CALCRIM No. 403 either (1) incorrectly states the law (see *Prettyman, supra*, 14 Cal.4th at p. 268), or (2) that it would have been understood by jurors to lower the prosecution's burden of proof to something less than proof beyond a reasonable doubt or (3) that it enabled the jury to convict to convict him on a legally incorrect theory of liability. The instructions with CALCRIM No. 403 did not allow the jurors to circumvent determining — beyond a reasonable doubt — that Quintana intended to and did aid and abet criminal conduct. Neither did the instruction allow the jurors to circumvent determining — beyond a reasonable doubt — that the murder committed by Julio Otero was a natural and probable consequence of criminal conduct aided and abetted by Quintana. Assuming that the jury at Quintana's trial did not agree unanimously on the target crime that he aided and abetted, it does not follow that the natural and probable consequences doctrine could not be applied without violating constitutional protections. As we previously stated, where jurors unanimously agree that a defendant intended to and did aid and abet criminal conduct, and the jurors unanimously agree that a charged crime then naturally and probably resulted from the criminal conduct, the natural and probable consequences doctrine is properly applied to affix guilt to the aider and abettor for the charged crime.

III. CALCRIM No. 403 — *Premeditated* Murder as a Natural and Probable Consequence of the Identified Target Offenses

Quintana also contends his conviction for *premeditated first degree murder* must be reversed because the trial court's instructions only asked the jury to determine whether *murder* was a natural and probable consequence of an assault, battery, or disturbing the peace. As noted above in addressing Rayos's appeal, the trial court instructed the jurors using CALCRIM No. 403 that they could find Rayos guilty of *murder* if they found that

the *murder* was the natural and probable consequence of one of three target crimes, i.e., assault, battery, or disturbing the peace, that she aided and abetted. Quintana argues the trial court's instructions should have more specifically asked the jurors to decide whether a murder *or* a premeditated murder was a natural and probable consequence of the target crime that he aided and abetted, and that, in the absence of the more specific instruction, his conviction for premeditated murder is fatally infected with error. We disagree.

For the reasons explained above in addressing this issue on Rayos's appeal, we will follow *Cummins*, as it construes *Lee*, until we are directed otherwise by the Supreme Court. It was sufficient for the trial court to instruct on the natural and probable consequences doctrine, and to instruct on the distinction between murder and premeditated murder.

IV. CALCRIM No. 400

Quintana contends his murder conviction must be reversed because the trial court, instructing with the former version of CALCRIM No. 4.00, told the jurors that an aider and abettor is "equally guilty" of a crime as a direct perpetrator. Quintana argues that, if the jury found co-defendant and appellant Julio Otero guilty of first degree murder, then CALCRIM No. 400 "required" the jury to find Quintana guilty of first degree murder. As noted above in addressing this issue on Rayon's appeal, we do find that the language of former CALCRIM No. 400 poses a potential for misdirecting a jury in a murder case involving a defendant's liability as a directly linked aider and abettor. At the same time, however, as we did with respect to Rayos, we also find as to Quintana that the use of former CALCRIM No. 400 does not require reversal of Quintana's conviction for first degree murder.

As an initial matter, we must address the People's position that Quintana forfeited his claim of error regarding CALCRIM No. 400 by failing to request any modification or amplification of the instruction. The People's position relies on *Samaniego, supra*, 172 Cal.App.4th at page 1163. To get past the forfeiture gateway issue, Quintana argues that *Samaniego* was wrongly decided on the issue of forfeiture because CALCRIM No. 400 is not merely incomplete or too general in a murder case prosecuted on a theory of aiding

and abetting liability, but rather, it rises to the level of an erroneous statement of law. Quintana argues we should review his CALCRIM No. 400 claim of error even though he did not make an objection below because the instruction, as given, removed the element of his mental for first degree murder from the jury's consideration, and, thus affected his substantial rights. (See, e.g., *People v. Tillotson* (2007) 157 Cal.App.4th 517, 538.) Because the gateway forfeiture issue (did CALCRIM No. 400 remove an element of the crime of murder) overlays the legal issue (did CALCRIM No. 400 remove an element of the crime of murder), we will address Quintana's claim of error in CALCRIM No 400 in one step.

Quintana argues that the use of CALCRIM No. 400 "permitted the jury" to convict him of first degree murder based on its finding that co-defendant Julio Otero had the requisite premeditation and deliberation for first degree murder when he stabbed the victim, Zambrano, without considering Quintana's individual *mens rea* as to the charge of first degree murder charge. In short, Quintana argues CALCRIM No. 400 "failed to . . . require the jury to determine . . . whether he premeditated and deliberated."

For the reasons we discussed above in addressing Rayos's appeal, we agree with Quintana that the use of CALCRIM No. 400 created a potential error. But we do not agree that the error resulted in a failure to instruct on an element as Quintana asserts. As noted above in addressing Rayos's appeal, the trial court did not instruct with CALCIM No. 400 in a vacuum. And, as we explained above, the potential for misdirection under CALCRIM No. 400 was tempered by the trial court's more specific instructions on aiding and abetting liability (CALCRIM No. 401) and on the elements of first degree murder. Here, the court's instructions under CALCRIM Nos. 520 and 521 directed the jurors that if the prosecution did not meet its burden to prove the murder was first degree, they were required to find the defendant was not guilty of first degree murder. The element of deliberation was not, as Quintana argues, wholly removed from the jury's consideration. We find harmless error under the federal constitutional standard of *Chapman v. California*, *supra*, 386 U.S. at p. 24. (See *Samaniego*, *supra*, 172 Cal.App.4th at p. 1165.)

Quintana, of course, stands is in a different position than Rayos. He, unlike Rayos, did not arm co-defendant Julio Otero with a deadly weapon. The trial evidence, viewed in the light most favorable to the jury's verdict, showed that Quintana provided a measure of "crowd control" during the initial fight between Suicidal/Grape gang member Cesar Otero and Diez Linias/Weigang gang member Moses Herrera, and that Quintana continued to act in the role of providing crowd control during the ensuing attack by co-defendants Julio Otero and Diane Rayos on the murder victim, Zambrano. The trial evidence supports the inference drawn by the jury that, as Quintana was holding other gang members at bay by displaying a handgun, he harbored the *mens rea* required for a premeditated murder. The evidence supports a reasonable conclusion that, as Quintana was acting, he intended to assist in the killing with premeditation. The issue is whether the result would have been the same beyond a reasonable doubt had CALCRIM No. 400 been modified to explain that the jury had to consider Quintana's own *mens rea*.

Quintana is correct that no evidence was presented at trial showing he did any direct act to assist Julio Otero in stabbing the victim, or that encouraged Julio Otero to commit the stabbing. Further, that there is no evidence that Julio Otero pre-planned a murder before he and Rayos and Quintana arrived at the scene of the street fight, and no evidence that Quintana knew Rayos brought a deadly weapon to the street fight or that Quintana knew Rayos had passed the deadly weapon to Julio Otero.

According to Quintana, from this lack of evidence, the jury reasonably could have concluded that Quintana did not aid and abet a premeditated murder, and that all he ever truly intended to do was to keep the initial street fight a "fair" fight. Quintana also notes that the jury asked a question during deliberations, to wit: "We need a description of 2nd degree murder," which he says shows the jury's struggle with the degree of the murder. In addition, Quintana argues the use of CALCRIM No. 400 undermined his challenge to the credibility of prosecution witness G.E. at trial. In Quintana's perspective, CALCRIM No. 400 rendered the credibility issues with G.E.'s trial testimony irrelevant "because the jury needed only to make the requisite [premeditation] findings as to Julio [Otero

and] . . . could then find [Quintana] guilty of the same degree of murder" based on the language of CALCRIM No. 400.

Although Quintana's summary of the evidence is fair and accurate, we disagree that reversal is justified because we find beyond a reasonable doubt that CALCRIM No. 400 did not affect the jury's verdict. Quintana's argument, like that presented by Rayos, largely looks at CALCRIM No. 400 in isolation. In our view, CALCRIM No. 400, as given at Rayos's trial, particularly when read and applied together with CALCRIM Nos. 401 and 521, defeat a conclusion that jurors would understand that they were to find the Quintana's liability as and aider and abettor in lock-step with the liability of co-defendant Julio Otero. The overall charge to the jury highlighted that distinction between first and second degree murder, and directed the jurors to determine Quintana's liability as to him. We are confident beyond a reasonable doubt that, had CALCRIM No. 400 been given in its current version, without the use of the former "equally guilty" language, the result of Quintana's trial would have been the same.

V. Constitutionality of the Natural and Probable Consequences Doctrine

In an argument which he expressly acknowledges is presented to our court in order "to preserve it for further review," Quintana challenges the constitutionality of the natural and probable consequences doctrine under state and federal constitutional law. Quintana argues that the natural and probable consequences doctrine, originally a judicial creation under common law, and then "engrafted" onto Penal Code section 31's definition of who constitutes a principal in a crime, violates a defendant's constitutional right to proof of all elements of murder, in particular the element of malice aforethought. Quintana argues the natural and probable consequences doctrine allows a jury to convict a defendant on a "constructive crime" theory, without proof of the statutorily-prescribed element of malice. For this reason, continues Quintana, the principle of parity of criminal liability is "turned on its head" in that an aiding and abetting accomplice may be convicted of a murder so long as the murder is a reasonably foreseeable outcome of a target crime, while the actual perpetrator of the killing may only be convicted upon proof of intent, i.e., the element of malice. Quintana's argument informs us that the Model Penal Code, as well

as the courts in a number of other states, have abandoned the natural and probable consequences doctrine. (See, e.g., *Wilson-Bey v. U.S.* (2006) 903 A.2d 818, 829-839.)

Although the parity-of-liability problems discussed by Quintana did not occur in his case since he stands convicted of the same crime as the actual killer, we take note of his arguments. But, as he further notes, our Supreme Court has "repeatedly endorsed the natural and probable consequences doctrine" (citing, e.g., *Prettyman, supra*, 14 Cal.4th 248), and, thus, we are not free to disregard the doctrine. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

Quintana further contends that the application of the natural and probable consequences doctrine in his case violated his federal constitutional rights to trial by jury and due process. He argues that the doctrine relieved the People of proving an element of the crime of murder, malice, or lowered the burden of proof on the element of malice. As he phrases the issue, Quintana argues a jury instruction that omits an essential element of an offense as defined by state statutory law relieves the state of its due process burden to prove every element of a crime beyond a reasonable doubt. Quintana further argues a jury instruction that submits a theory of criminal liability that is "non-existent" under state statutory law also violates a defendant's due process rights under the Fourteenth Amendment. (Citing *Suniga v. Bunnell* (9th Cir. 1993) 998 F.2d 664.)

Quintana makes an interesting argument, but we are not persuaded to reverse his conviction. Our state Supreme Court has interpreted section 31 to include aider and abettor liability under the natural and probable consequences doctrine (see *Prettyman, supra,* 14 Cal.4th at pp. 259-263). As a matter of state statutory law, the trial court did not submit a non-existent theory of criminal liability to the jury. In the same vein, the trial court did not omit an essential element of the statutory definition of murder because, under the natural and probable consequences theory, the element of malice on the part of the aider and abettor need not be proven. Here, the trial court's instructions required the jury to find that the killing of the victim was a murder, i.e., a killing with malice, and it required the jury to find that the murder was a natural probable consequence of a criminal

act aided and abetted by Quintana. No more was required, and no essential element was omitted such that a violation of due process occurred.

DISPOSITION

The judgment as to defendants Otero, Rayos and Quintana are affirmed.

BIGELOW, P. J.

We concur:

FLIER, J.

GRIMES, J.