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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JULIAN SCOTT HARRELL, Defendant and Appellant.	B231521 (Los Angeles County Super. Ct. No. YA 058299)

APPEAL from a judgment of the Superior Court of Los Angeles County, Edward B. Moreton, Jr., Judge. Affirmed with directions.

Derek K. Kowata, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Eric E. Reynolds and Allison H. Chung, for Plaintiff and Respondent.

* * * * * *

A jury convicted appellant Julian Scott Harrell of the first degree murder of Andrew Curtis and found true special circumstance, gang, and firearm allegations. Appellant contends that the trial court made evidentiary and instructional errors, and he argues that his sentencing was unconstitutional. He additionally urges that we should correct two errors in the abstract of judgment. We agree that the abstract of judgment should be corrected in two respects, but in all other respects, we affirm.

STATEMENT OF FACTS

1. Prosecution Evidence

a. Brandon R.

Brandon R. knew appellant from high school by the name of "Red Flag." On March 31, 2004, just before 3:30 p.m., Brandon and his girlfriend, Diamond J., were waiting for a bus at the intersection of Manchester and Crenshaw. Brandon and Diamond were standing behind the bus stop bench. The victim, Curtis, was sitting on the bench. Curtis was wearing all blue. Brandon wondered why Curtis would be wearing so much blue in a known Blood gang neighborhood. Two or three minutes after Curtis sat down on the bench, Shavante Delarosa sat next to him and had a friendly conversation with him. Brandon saw Delarosa walking with appellant and another man across the street before she sat down next to Curtis.

Lazaro Castro approached Curtis and Delarosa and looked like he was trying to flirt with the Delarosa. Brandon noticed that Castro had a "CK" tattooed on his face. Delarosa did not seem to want to talk to Castro. Curtis told Castro that it looked like Delarosa was not interested and asked Castro to "back off." Castro asked Curtis, "Where you from?" Curtis replied, "I'm not from nowhere." Castro then said, "I know you from somewhere." Curtis said he was just trying to mail some letters for his mother. He had letters in his hand. Another man came up and asked Curtis, "What you doing with my brother?" Appellant then came up and punched Curtis in the face. Curtis fought back. While this was going on, Castro kept reaching for Delarosa's purse and saying, "I should smoke him." Curtis stumbled into the street and the fighting continued in the middle of the street. Delarosa looked like she was trying to break up the fight, but Castro kept

going for her purse. Appellant and Castro both stuck their hands inside her purse at the same time, and Brandon saw one of them pull out a gun. Brandon ran when he saw the gun, though he only ran a few feet when he turned back because he realized Diamond was not with him. He turned around and grabbed Diamond and he heard a pop. He ran around a nearby gas station and hid behind the building. After one or two minutes, he saw appellant, Castro, Delarosa, and another individual running in his direction. Appellant was holding a gun with a red rag and told Delarosa, "Put this in your purse." Delarosa put the gun in her purse and the group ran off.

On April 6, 2004, Brandon identified appellant from a six-pack photographic lineup. He was first interviewed by Detective Stephen Seyler of the Inglewood Police Department on that same date. He did not identify appellant by name on that date because he feared for his life. Appellant knew who he was and where he went to school. Four years after the incident, he gave investigators appellant's name. In the interim four years he had relocated. He was 17 when the incident occurred, and he was supposed to attend the University of Southern California. After police told his coach that would not be wise, he went to a college in South Carolina. After moving to South Carolina, he relocated five more times.

b. Diamond J.

Diamond J. had seen appellant around school before March 31, 2004, and knew who he was. She and Brandon were standing behind the bus stop bench where Delarosa and Curtis were sitting. Castro came from across the street and appeared to be harassing Delarosa. He was saying things like "Hey baby" and "You look good." Delarosa appeared taken aback and told him to move away. Curtis told Castro to leave her alone. Castro asked Curtis where he was from. Curtis said, "I don't bang." Castro and Curtis started fighting and punching each other. Appellant was nearby talking to one of Diamond's friends. When appellant saw the fight, he came over and started punching Curtis also. She heard appellant say, "What, Blood?" Diamond estimated that appellant punched Curtis approximately 10 times. Diamond saw Castro reach into Delarosa's purse and pull out a gun. He gave it to appellant. Things got chaotic and Diamond heard

a gunshot. Curtis was running away from Castro and appellant when she heard the gunshot. Appellant had his arm outstretched in Curtis's direction and shot Curtis. Brandon grabbed her and they ran behind a nearby gas station.

On April 6, 2004, Diamond identified appellant from a six-pack photographic lineup.

c. Forsensic Evidence

Curtis died of a gunshot wound to the back. He had bruises on his lower left eyelid and his lower lip and two small abrasions on his face. A shell casing recovered from the scene of the shooting matched a handgun that officers recovered from Delarosa's residence. The handgun recovered from Delarosa's residence was the same handgun used to shoot Curtis.

d. Gang Evidence

Detective Kerry Tripp was the prosecution's gang expert familiar with the Inglewood Family Blood gang. Blood gangs identify with the color red. Crip gangs are their rivals. Crip gangs identify with the color blue. Detective Tripp knew appellant to be a Blood gang member. He had numerous contacts with appellant over the years. Appellant had admitted to Detective Tripp that he was a Blood gang member whose moniker was Red Flag or Little Red Flag. Castro and Delarosa were also Inglewood Family Blood gang members. Castro has a tattoo on his cheek that says "CK," which stands for Crip killer. The intersection of Crenshaw and Manchester in Inglewood is controlled by the Inglewood Family Bloods. Based on a hypothetical mirroring the facts of the case, Detective Tripp opined that the shooting was committed for the benefit of and in association with a criminal street gang.

2. Defense Evidence

Delarosa was charged as a codefendant in the case at bar. She pled guilty to voluntary manslaughter with gang enhancements and an unrelated felony grand theft for

welfare fraud. The court sentenced her to 12 years in state prison, and she agreed to testify truthfully in appellant's trial and Castro's trial.[1]

Castro was Delarosa's boyfriend in March 2004. They had been together for approximately a month and a half at that point. She knew appellant as a friend of Castro's by the name of Red Flag. On March 31, 2004, Castro put a gun in her purse. She was sitting at the bus stop on Crenshaw and Manchester at approximately 3:30 p.m. that day. Castro and Delarosa drove a car to the area near the bus stop and parked. They got out and were walking around the area for approximately 30 minutes to an hour before the fight with Curtis broke out. She eventually sat on the bus stop bench because Castro asked her to wait for him there, and then they would leave. They were going to pick up Delarosa's children from school at 4:00 p.m.

Delarosa saw appellant 15 to 20 minutes before she sat down at the bus stop. He was across the street from the stop in front of a tattoo shop. She did not talk to him that day. Curtis walked up to her at the bus stop after she had been sitting there for 15 to 20 minutes. He asked her for the time and she responded. That was the only conversation she had with Curtis. Castro approached the bench and kissed Delarosa. Curtis asked Castro "what he was coming over there for." Castro replied that he had come over to talk to Delarosa. He asked Curtis where he was from, meaning to which gang does he belong. Curtis said he was "from nowhere." Castro then identified himself by his "hood name . . . and where he was from." Curtis replied that Castro was disrespecting his neighborhood. Castro started yelling and wanted the gun from Delarosa's purse. She initially resisted his efforts to take the gun from her purse. She told him that "it wasn't that serious" and they should leave. Castro became very angry and started arguing with her. He kept reaching for her purse and the gun. She was standing in between Castro and

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1 Castro was also convicted of the first degree murder of Curtis, as well as other crimes arising from a separate incident. He was tried separately. We affirmed his conviction in a nonpublished opinion in February 2010. (*People v. Castro* (Feb. 25, 2010, B210010).)

Curtis, and while she and Castro were arguing, some people ran from across the street and the fight broke out. Approximately 15 to 20 seconds after the fight broke out, Castro retrieved the gun from her purse as she was trying to walk away. No one but Castro attempted to reach into her purse. She did not see Castro hand the gun to appellant. She was walking away toward her parked car when she heard a gunshot. This was approximately 30 seconds after Castro had taken the gun from her purse. She began running to her car. Castro caught up to her in an alleyway and handed her the gun. He told her to hold it. She put the gun back in her purse and her purse in the trunk. At some point in time she moved the gun from her trunk to a closet in her house, where the police found it.

PROCEDURAL HISTORY

Appellant, Castro, and Delarosa were charged with the murder of Curtis. It was further alleged that a principal personally and intentionally discharged and used a firearm (Pen. Code, § 12022.53, subds. (b), (c), (e)(1)),[2] that a principal personally and intentionally discharged a firearm causing great bodily injury and death (§ 12022.53, subds. (d), (e)(1)), and that the offense was a special circumstance within the meaning of section 190.2, subdivision (a)(22). Further, it was alleged that the offense was committed for the benefit of and in association with a criminal street gang. Appellant pleaded not guilty and denied the special allegations. The court granted the People's motion to dismiss the allegations that a principal personally and intentionally discharged a firearm (§ 12022.53, subds. (c), (e)(1)) and that a principal personally used a firearm (§ 12022.53, subds. (b), (e)).

The jury found appellant guilty of the first degree murder of Curtis. It found true the gang allegation and remaining firearm allegation that a principal personally and intentionally discharged a firearm causing death. It further found true the special circumstance allegation that appellant was an active participant in a criminal street gang

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[2] Further statutory references are to the Penal Code unless stated otherwise.

and Curtis's murder was carried out to further the activities of the gang. The court sentenced appellant to life imprisonment without the possibility of parole for murder, plus a consecutive term of 25 years to life for the firearm enhancement. The court imposed and stayed a term of 25 years to life on the gang enhancement. Appellant filed a timely notice of appeal.

STANDARD OF REVIEW

We review the trial court's evidentiary rulings for abuse of discretion. (*People v. Geier* (2007) 41 Cal.4th 555, 586.) We review the legal adequacy of a jury instruction de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1210.) The constitutionality of a statute is a question of law also reviewed de novo. (*People v. Health Laboratories of North America, Inc.* (2001) 87 Cal.App.4th 442, 445.) We review whether a punishment is cruel or unusual and thus unconstitutional de novo, though we view the underlying disputed facts in the light most favorable to the judgment. (*People v. Rhodes* (2005) 126 Cal.App.4th 1374, 1390.)

DISCUSSION

1. The Trial Court's Exclusion of Castro's Statements

Appellant contends that we must reverse his conviction because out-of-court statements by Castro were admissible as declarations against penal interest and the trial court erred in excluding them. We disagree.

a. Background

The prosecutor filed a motion to exclude out-of-court statements by Castro that he shot Curtis but essentially did so in self-defense. The prosecutor argued that his statements were self-serving and not a declaration against penal interest and were therefore unreliable. He did not include with the motion a transcript of the police interview in which Castro made these statements. Instead, he attached a copy of our opinion affirming Castro's conviction in which we stated:

"On May 14, 2004, following his arrest, [Castro] was interviewed at the Inglewood police station by Detective Stephen Seyler. [Castro] told Seyler that people frequently shot at him, and members of a rival gang had shot at him earlier on the day

Curtis was killed. He did not know Curtis but he did not think Curtis was a gang member. When [Castro] walked up to his girlfriend at the bus stop, Curtis started talking 'crazy' to him, and [Castro's] 'homies' began hitting Curtis. [Castro] saw Curtis reaching toward his pocket and thought he was reaching for a gun. [Castro] shot Curtis once, but tried to shoot him in the leg, so as not to kill him." (*People v. Castro, supra*, B210010.)

The court granted the motion to exclude Castro's statements on the ground that the statement was made with the intention of avoiding criminal liability and was exculpatory, thus rendering the statement unreliable.

Appellant filed a motion for reconsideration of the court's ruling excluding Castro's confession. Among other things, he argued that the prosecutor took no issue with the reliability of Castro's statements during Castro's trial when they were admitted and the prosecution argued that Castro was the lone shooter.[3] Appellant attached the entirety of the recorded police interview in which Castro confessed to shooting Curtis. In it, before Castro confessed, Detective Seyler told him that Delarosa had already given a statement, that the detective had the handgun Castro gave to Delarosa, and that there was video from nearby businesses and the intersection camera that showed him handing the gun to her. The detective also told Castro: "Some -- some people said that maybe he was saying something; maybe he was a Crip, this and that; maybe you thought he was going to do something. But whatever happened, what I know is you shot that young man. . . . [¶] . . . Maybe you didn't mean to pull it. Maybe you thought he was going for something. I don't know. . . . [¶] . . . [¶] . . . Maybe you have to take action. But if it's something like that, you better lay it out because otherwise what happens is, as I said, you're not here by accident. You got arrested on a warrant filed in the system. This case

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[3] Appellant also filed a motion to preclude the prosecution from arguing that appellant was the shooter because it was inconsistent with its position in Castro's trial that Castro was the shooter. The court granted that motion.

is filed with the D.A. I have every belief you're going to be convicted of first degree murder." The detective also told him that appellant and other accomplices were in custody and had essentially told the police that they "didn't know [Castro] was going to do that," and they were "just messing with the kid." Detective Seyler went on to repeatedly tell Castro about the witnesses and evidence the police had collected against him and that he knew Castro was the shooter. Eventually, Castro stated that his "homeboy" started fighting with Curtis, and Curtis went "in his pocket." Castro said he thought Curtis was going to shoot him. He said when he shot Curtis, he was not trying to kill him and he was not aiming for the upper body, but for the leg. He told the detective: "And do it show when I fired the shot on the camera? I fired the shot like this. I didn't fire it up like this. Hey deputy, I mean, I ain't trying to incriminate myself right here." Castro asked the detective if he could be given some "slack" because he did not try to kill Curtis -- he asked whether he could be charged with something lesser than murder.

The court tentatively denied the motion for reconsideration for the same reasons it denied the initial motion. The court noted that appellant had given it a full transcript of what Castro told the police, and he told them he was not trying to incriminate himself and did not try to kill Curtis, all of which was consistent with the court's initial impressions that Castro's statement was exculpatory.

b. Analysis

"Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made, . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true." (Evid. Code, § 1230.) For Castro's statements to be admissible under this hearsay exception, appellant had to show (1) that Castro was unavailable, (2) that his statements were against his penal interest when made, and (3) that his statements were sufficiently reliable to warrant admission despite their hearsay character. (*People v. Duarte* (2000) 24 Cal.4th 603, 610-611 (*Duarte*).) This first requirement is not at issue. The parties stipulated that Castro would invoke his Fifth

Amendment right against self-incrimination if called to testify at appellant's trial. He was thus unavailable for purposes of this analysis. (*Id.* at p. 609.)

Looking at the two other requirements for admissibility, the trial court did not abuse its discretion in excluding Castro's statements. The exception to the hearsay rule for declarations against penal interest is "inapplicable to evidence of any statement or portion of a statement not itself specifically disserving to the interests of the declarant." (*People v. Leach* (1975) 15 Cal.3d 419, 441.) Any portion of a statement that is not specifically disserving to the declarant should thus be redacted. (*Duarte, supra,* 24 Cal.4th at p. 612.) Castro's statements that he thought Curtis was pulling a gun from his pocket and was going to shoot Castro, that Castro tried to shoot Curtis in the leg, and that he did not want to kill Curtis were not specifically disserving. (*Id.* at p. 613 [statements that declarant shot at the wrong house, that he did not intend to kill anyone, and that he shot high at the roof so as not to hurt anyone were not specifically disserving].) Indeed, they positively served Castro's penal interests. He obviously intended them to demonstrate that he was acting in self-defense or committed something less than murder, and he even asked for leniency on this basis.

Even if Castro's statements could have been redacted so that only the specifically disserving statement that he shot Curtis remained, the court acted within its discretion in concluding the statement was untrustworthy and unreliable. "While redaction, when properly employed, can help ensure that only the 'specifically disserving' [citation] and, hence, most reliable, portions of a particular hearsay declaration are actually admitted into evidence, redaction cannot enhance the underlying or general trustworthiness of a declaration as a whole." (*Duarte, supra,* 24 Cal.4th at p. 614.) "[R]edaction as a logical matter simply cannot bear on, let alone alter, the declarant's motives or any other circumstance that might affect a given declaration's fundamental reliability and inform a court's assessment thereof. [¶] Thus, even when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission." (*Ibid.*) To determine whether a declaration against penal interest

passes the required threshold of trustworthiness under section 1230, we may consider the circumstances under which the declaration was uttered, the possible motivation of the declarant, and the declarant's relationship to the defendant. (*Ibid.*)

Here, however incriminating of Castro himself, the circumstances show that Castro's statements were also generally an attempt to avoid blame and curry favor with the authorities. (*Duarte, supra,* 24 Cal.4th at pp. 614-615 [codefendant's self-incriminating statements were untrustworthy because they attempted to shift blame or curry favor].) This was underscored when he appealed for leniency after telling Detective Seyler that he essentially shot Curtis in self-defense. An examination of the entire interview transcript shows that Castro never uttered a single simple statement confirming his culpability without also alluding to Curtis's culpability or circumstances Castro thought might be mitigating. Castro was evidently "'trying to fasten guilt' on others" (Curtis) while "'keeping his own skirts as clean as possible' [citation] under the circumstances." (*Id.* at p. 616.) Moreover, Castro made his statements "'in the coercive atmosphere of official interrogation,'" after the detective told him the police believed he was the shooter and had the witnesses to prove it. (*Id.* at p. 617.) Under these circumstances, Castro may have believed that he had little to lose and perhaps something to gain by saying he shot Curtis while attempting to minimize his responsibility. In short, "[a] statement which is in part inculpatory and in part exculpatory (e.g., one which admits some complicity but places the major responsibility on others) does not meet the test of trustworthiness and is thus inadmissible." (*In re Larry C.* (1982) 134 Cal.App.3d 62, 69.)

Assuming arguendo that the trial court erred in excluding Castro's statements, we find any error was harmless under *People v. Watson* (1956) 46 Cal.2d 818, 833-837.[4]

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[4] To the extent appellant argues the trial court committed error of a constitutional magnitude, we disagree. Generally, the "routine application of state evidentiary law does not implicate [a] defendant's constitutional rights." (*People v. Brown* (2003) 31 Cal.4th 518, 545; see also *People v. Fudge* (1994) 7 Cal.4th 1075, 1102-1103 [the "'[a]pplication

(*Duarte*, *supra*, 24 Cal.4th at pp. 618-619.) It was not reasonably probable the jury would have acquitted appellant, had the jury considered Castro's statement that he shot Curtis. First, the jury had evidence before it that Castro was the shooter. Brandon testified that Castro was the one who kept reaching for Delarosa's purse and said, "I should smoke him." Delarosa testified that Castro pulled the gun from her purse. Second, the prosecutor never expressly argued that appellant was the shooter as opposed to Castro. Indeed, the court prohibited the prosecution from arguing that anyone but Castro was the shooter because it had taken the position that Castro was the shooter in his trial. Accordingly, in closing statement, the prosecutor argued to the jury that appellant was guilty of murder as an aider and abettor under the natural and probable consequences doctrine. A confession by Castro that he was the shooter was *consistent* with this theory of liability and probably would not have resulted in a better outcome for appellant.[5]

2. Instruction on Natural and Probable Consequences Doctrine (CALCRIM No. 403)

"[U]nder the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.' . . . [I]f a person aids and

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of the ordinary rules of evidence . . . does not impermissibly infringe on a defendant's right to present a defense'"].)

[5] Appellant relies on a declaration from his trial counsel that he submitted with his motion for new trial in which counsel states: "After the jury found Mr. Harrell guilty in this case, I interviewed two of the jurors in the hallway outside of the courtroom. Both jurors stated that the panel had reached its verdict based upon prosecution evidence and argument that Harrell was the single individual who shot Andrew Curtis. Both stated that, if the jury had known that Lazaro Castro had confessed to being the shooter, that confession may have made a difference in the jury's deliberations." The trial court did not consider the statements and ruled they were inadmissible, and we agree. Under Evidence Code section 1150, no evidence is admissible to show the effect of statements, conduct, conditions, or events "upon a juror either in influencing him to assent to or dissent from the verdict or concerning the mental processes by which [the verdict] was determined." (See also *People v. Daya* (1994) 29 Cal.App.4th 697, 716 [testimony that described a juror's subjective deliberative process "was clearly inadmissible" under Evid. Code, § 1150].)

abets only an intended assault, but a murder results, that person may be guilty of that murder, even if unintended, if it is a natural and probable consequence of the intended assault." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*), citation omitted.) Accordingly, pursuant to CALCRIM No. 403, the trial court instructed the jury on the natural and probable consequences doctrine as follows:

> "To prove that the defendant is guilty of MURDER under the natural and probable consequences doctrine, the People must prove that:
>
> "1. The defendant is guilty of ASSAULT WITH A FIREARM or BATTERY either as a the [*sic*] actual perpetrator or aider and abettor;
>
> "2. During the commission of ASSAULT WITH A FIREARM or BATTERY a coparticipant in that ASSAULT WITH A FIREARM or BATTERY committed the crime of MURDER;
>
> "AND
>
> "3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the MURDER was a natural and probable consequence of the commission of the ASSAULT WITH A FIREARM or BATTERY."

Appellant contends the trial court committed reversible error because this instruction failed to inform the jury that it had to find *first degree premeditated murder*, not simply murder, was the natural and probable consequence of the target crimes. Appellant did not object to the instruction on this basis at trial. Nevertheless, we consider appellant's argument on the merits because a defendant's contention that an instruction misstated the law or violated the defendant's right to due process need not be preserved by objection. (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7; § 1259.) After considering the merits, we are not persuaded.

Appellant relies on *People v. Hart* (2009) 176 Cal.App.4th 662. In *Hart*, an accomplice was convicted of premeditated attempted murder when his codefendant shot the owner of a liquor store during the course of their armed robbery. (*Hart, supra,* 176 Cal.App.4th at p. 665.) The court instructed the jury that it could find the defendant guilty of attempted murder if it found that attempted murder was a natural and probable consequence of attempted robbery. On appeal, the accomplice argued that the

instructions erroneously precluded the jury from finding him guilty of any lesser degree of murder. The Third District found that the instructions were insufficient. It held that they failed to inform the jury that in order to find the accomplice guilty of attempted premeditated murder "it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." (*Id.* at p. 673.) The evidence could have supported a finding that attempted *unpremeditated* murder was a natural and probable consequence of the attempted robbery, but not attempted premeditated murder. Given the evidence, the court concluded that the defendant was prejudiced because the trial court "failed to inform the jury that it could convict [the defendant] of a lesser crime than [the perpetrator's] crime under the natural and probable consequences doctrine." (*Id.* at p. 674.)

In *Cummins*, on the other hand, Division One of this district held that the court did not have to specifically instruct the jury that it must find premeditated attempted murder was a natural and probable consequence of the target crime. The accomplice in *Cummins* "was a willing and active participant in all the steps that led to the attempt on [the victim's] life." (*Cummins, supra*, 127 Cal.App.4th at p. 680.) The defendants had kidnapped the victim, taken him to the edge of a cliff, and then one of the defendants pushed him off. *Cummins* concluded that, "[a]lthough the evidence did not conclusively determine which defendant had physical contact with the victim when he was pushed," the accomplice's conduct made him "no less blameworthy than" the actual perpetrator. (*Id.* at pp. 680-681.) Unlike in *Hart*, the evidence in *Cummins* supported a finding that a greater degree of murder was foreseeable. *Cummins* held that an aider and abettor need not have acted with premeditation and deliberation in order to be convicted of attempted premeditated murder under the natural and probable consequences doctrine. (*Id.* at p. 680.) The court found that when a jury is properly instructed on the elements of attempted premeditated murder and the natural and probable consequences doctrine, nothing more is necessary. (*Id.* at p. 681.) It thus rejected the need for a *Hart*-type instruction.

The *Cummins* court relied on our Supreme Court's decision in *Lee*, in which the court held that an aider and abettor could be convicted of premeditated attempted murder, even if the aider and abettor did not act with premeditation and deliberation. (*Lee*, *supra*, 31 Cal.4th at pp. 624, 626.) Though *Lee* did not involve the natural and probable consequences doctrine, the court noted 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.) The *Cummins* court found no reason to depart from the *Lee* court's reasoning.

Very recently, in *People v. Favor* (2012) 54 Cal.4th 868 (*Favor*), our Supreme Court held: "Under the natural and probable consequences doctrine, there is no requirement that an aider and abettor reasonably foresee an attempted premeditated murder as the natural and probable consequence of the target offense. It is sufficient that attempted murder is a reasonably foreseeable consequence of the crime aided and abetted, and the attempted murder itself was committed willfully, deliberately and with premeditation." (*People v. Favor* (2012) 54 Cal.4th 868, 880 (*Favor*).) The court in *Favor* disapproved of *Hart*'s analysis of this issue, on which appellant relies, and approved of the analyses in *Lee* and *Cummins*. (*Id.* at pp. 876-879.)

We follow the reasoning of *Cummins*, *Lee*, and *Favor*. As in *Cummins*, there was evidence that appellant was an active and willing participant in the steps that led to the murder of Curtis. The evidence showed that he punched Curtis multiple times and was also reaching for Delarosa's purse along with Castro. The court properly instructed the jury on the elements of premeditated murder, and based on the evidence, the jury found the murder of Curtis was willful, deliberate, and premeditated. We conclude, as in *Cummins* and *Favor*, nothing more was required. It was sufficient that the jury found murder was a reasonably foreseeable consequence of the target offense, and separately found that the murder was willful, deliberate, and premeditated. (See also *People v.*

Curry (2007) 158 Cal.App.4th 766, 791-792 [holding that an aider and abettor may be convicted of premeditated attempted murder even if he or she did not personally act with willfulness, deliberation and premeditation, in a case involving the natural and probable consequences doctrine].)

3. Instruction on Aiding and Abetting (Former CALCRIM No. 400)

The trial court instructed the jury on aiding and abetting with a version of former CALCRIM No. 400 as follows: "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 whether he or she committed it personally or aided and abetted the perpetrator who committed it." Appellant contends that we must reverse because the instruction's "equally guilty" language was misleading and prejudicial in that it allowed the jury to find him guilty of first degree murder without first determining whether he acted with the requisite mens rea. We are not persuaded.

Preliminarily, we note that appellant also failed to raise this issue in the trial court. A party may not complain on appeal that an instruction correct in law and responsive to the evidence was flawed unless the party requested appropriate clarifying or amplifying language. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*) ["CALCRIM No. 400 is generally an accurate statement of law, though misleading in this case. Samaniego was therefore obligated to request modification or clarification and, having failed to have done so, forfeited this contention."].) Even if appellant had preserved the issue for appeal, we would nonetheless find that any error was not prejudicial.[6]

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[6] Because we reach the merits of the issue, we need not address appellant's alternative argument that trial counsel's failure to object constituted ineffective assistance of counsel.

In *McCoy, supra,* 25 Cal.4th 1111, the California Supreme Court held that a jury may convict an aider and abettor of a greater offense than the actual perpetrator. (*Id.* at p. 1120 ["Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor's own mens rea. If the mens rea of the aider and abettor is more culpable than the actual perpetrator's, the aider and abettor may be guilty of a more serious crime than the actual perpetrator"].) In *Samaniego*, *supra*, 172 Cal.App.4th at pages 1164-1165, the court held that *McCoy*'s reasoning led to the conclusion that an aider and abettor may also be convicted of a lesser offense than the actual perpetrator. The court found that former CALCRIM No. 400, which at the time stated that a person is "'*equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator,'" while "generally correct in all but the most exceptional circumstances," was misleading in that case and should have been modified. (*Samaniego*, at p. 1165.)

We agree with our colleagues in *Samaniego* that the version of former CALCRIM No. 400 used here was problematic because it suggested to jurors that an aider and abettor must be found "equally guilty" of the same crime as the perpetrator. The current version of CALCRIM No. 400 no longer uses the phrase "equally guilty" and states instead: "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator."

But as in *Samaniego*, any error here was harmless. To the extent the instructional error affected appellant's constitutionally guaranteed trial rights, we must employ the harmless error standard of *Chapman v. California* (1967) 386 U.S. 18, 24. We find the error was harmless beyond a reasonable doubt because the jury necessarily found the requisite mental states to convict appellant of murder under other instructions. (*Ibid.*) The court did not instruct the jury with CALCRIM No. 400 in a vacuum. The court's instructions included CALCRIM No. 401, which explained that: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that . . . [¶] . . . [¶] . . . [t]he defendant knew that the perpetrator intended to commit the crime," and that "[b]efore or during the commission of the crime, the

defendant intended to aid and abet the perpetrator in committing the crime." The court then instructed the jury with former CALCRIM No. 520, which further explained to the jury: "To prove that the defendant is guilty of [murder], the People must prove that . . . [¶] . . . [t]he defendant committed an act that caused the death of another person" and that "[w]hen the defendant acted, he or a principal had a state of mind called malice aforethought." The court also instructed the jury with former CALCRIM No. 521, which stated: "If you decide that the defendant has committed murder, you must decide whether it is murder of the first or second degree. [¶] . . . [¶] The defendant is guilty of first degree murder if the People have proved that he or a principal acted willfully, deliberately, and with premeditation." The court instructed the jury that all other murders are second degree murders.

Moreover, the court instructed the jury with a version of former CALCRIM No. 736 regarding the special circumstance allegation (§ 190.2, subd. (a)(22)), which stated in pertinent part: "If you find the defendant guilty of first degree murder under any theory of first degree murder, the People must prove . . . [¶] . . . [t]he defendant aided or abetted or counseled or commanded or induced or solicited or requested or assisted any actor in the commission of a murder *with the intent to kill* Andrew Curtis." (Italics added.) The jury found true that "the defendant intentionally killed Andrew Curtis while the defendant was an active participant in a criminal street gang."

By convicting appellant of first degree murder rather than second degree murder, and by finding the special circumstance allegation to be true, the jury necessarily found that appellant acted, either of his own accord or in the aid and assistance of another, willfully and with the intent to kill. Given the court's other instructions, its use of former CALCRIM No. 400 did not relieve the jury of its duty to find the requisite mental states for an aider and abettor under the natural and probable consequences doctrine.

4. Constitutionality of California's Death Penalty Law

Section 190.2, subdivision (a) provides that the penalty for first degree murder is death or life imprisonment without the possibility of parole if one or more of certain special circumstances have been found. The jury found one of those special

circumstances true -- that appellant intentionally killed Curtis while appellant was an active participant in a criminal street gang, and the murder was carried out to further the activities of the gang. (§ 190.2, subd. (a)(22).) Appellant was thus eligible for the death penalty, although the prosecution did not seek it in this case.

Appellant contends that the proliferation of special circumstances under section 190.2 so far broadens the class of death-eligible persons that California's death penalty law is now unconstitutional under the Eighth Amendment. The Eighth Amendment requires that a state's capital punishment scheme "afford some objective basis for distinguishing a case in which the death penalty has been imposed from the many cases in which it has not." (*People v. Crittenden* (1994) 9 Cal.4th 83, 154.) Appellant argues that almost all first degree murders now fall under one of the special circumstances outlined in section 190.2.

Preliminarily, we question whether appellant has standing to bring such a challenge, given that the court did not sentence him to death nor did the prosecutor even seek it. Assuming arguendo that appellant has standing, we would nonetheless reject the contention on the merits. Our Supreme Court has held that "[c]ontrary to defendant's arguments, [California's] statutory scheme 'adequately narrows the class of murder for which the death penalty may be imposed [citation], and is not overbroad . . . because of the sheer number and scope of special circumstances [that] define a capital murder . . . .'" (*People v. Zamudio* (2008) 43 Cal.4th 327, 373, quoting *People v. Harris* (2005) 37 Cal.4th 310, 365; see also *People v. Farley* (2009) 46 Cal.4th 1053, 1133 ["Section 190.2, which sets forth the circumstances in which the penalty of death may be imposed, is not impermissibly broad in violation of the Eighth Amendment."].) Appellant recognizes that his challenge has been rejected by the California Supreme Court but submits that we should reexamine the argument. We decline to do so. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 ["Courts exercising inferior jurisdiction must accept the law declared by courts of superior jurisdiction. It is not their function to attempt to overrule decisions of a higher court."].)

5. Constitutionality of Appellant's Life Without Parole Sentence

Appellant contends that his sentence of life without the possibility of parole violates the Eighth Amendment's and the state Constitution's proscriptions against cruel and unusual punishment because it was grossly disproportionate. We find this argument unavailing.

First, appellant failed to raise this contention in the trial court and therefore forfeited the issue on appeal. Nevertheless, to forestall a subsequent ineffectiveness of counsel claim and in the interest of judicial economy, we consider the issue. (*People v. Norman* (2003) 109 Cal.App.4th 221, 230; *People v. DeJesus* (1995) 38 Cal.App.4th 1, 27.)

Under the Eighth Amendment of the federal Constitution, we must assess three factors to determine whether a sentence is disproportionate to the offense: (1) the gravity of the offense and the harshness of the penalty; (2) sentences imposed for other crimes in the same jurisdiction; and (3) sentences imposed for the same crime in other jurisdictions. (*Ewing v. California* (2003) 538 U.S. 11, 22.) Appellant makes no attempt to present an intrastate comparison of sentences for other crimes or an interstate comparison of sentences for the same crime. His argument fails on this basis alone.

Under the California Constitution, we assess whether a punishment "shocks the conscience and offends fundamental notions of human dignity" based on a number of factors, including: (1) the nature of the offense and/or the offender; (2) a comparison of the sentence with punishments prescribed in California for different offenses; and (3) a comparison of the challenged sentence with punishments prescribed for the same offense in other jurisdictions. (*In re Lynch* (1972) 8 Cal.3d 410, 424.) We reject appellant's claim of disproportionality under the California Constitution for the same reason that we reject his federal claim -- he has failed to offer any inter- and intrastate comparisons.

6. Corrections to Abstract of Judgment

Appellant contends, and the Attorney General concedes, that we should strike from the abstract of judgment the $25 administrative screening fee imposed pursuant to section 1463.07. Appellant also contends the abstract of judgment incorrectly reflects

that appellant was sentenced pursuant to the "Three Strikes" law (§§ 667, subds. (b)-(i), 1170.12) and the "One Strike" law (§ 667.61), and the Attorney General agrees. Appellant is correct in both instances.

Section 1463.07 imposes a $25 administrative screening fee on persons arrested and released on their own recognizance when they are later convicted of the offense for which they were arrested. The record shows that appellant was held in custody subject to $1 million bail, and there is no evidence in the record that appellant was released on his own recognizance. Accordingly, the $25 administrative screening fee should be stricken from appellant's abstract of judgment.

As appellant was not sentenced under either the Three Strikes law or the One Strike law, section 8 of the abstract should also be corrected in that respect.

DISPOSITION

The abstract of judgment shall be amended so that (1) it no longer reflects a sentence pursuant to section 667, subdivisions (b) through (i), section 1170.12, or section 667.61; and (2) the $25 administrative screening fee pursuant to section 1463.07 is stricken. The trial court shall forward the amended abstract of judgment to the Department of Corrections and Rehabilitation. As so modified, the judgment is affirmed.

FLIER, J.

I CONCUR:

BIGELOW, P. J.

RUBIN, J. - Concurring

I concur in the judgment and in the majority's decision except for Part 1, b. entitled "Analysis." Accordingly, I write separately.

The majority finds no error in the exclusion of Castro's statement that it was he, Castro, not appellant, who shot Curtis. Although an admission of shooting another seems almost paradigmatic of the declaration against interest exception to the hearsay rule (Evid. Code, § 1230), the majority concludes that Castro's admission that he was the killer was so untrustworthy, so unworthy of belief, that it was proper for the trial court to exclude it. I disagree.

The majority accurately describes the analytical framework for considering whether a hearsay statement is admissible as a declaration against interest. The three parts to the analysis set out in *People v. Duarte* (2000) 24 Cal.4th 603, 610-611 are: (1) unavailability of the speaker; (2) the statement is against interest; and (3) overall trustworthiness of the statement. Castro was legally unavailable. He had already been tried and convicted for killing Curtis but the conviction was not yet final, and the parties had stipulated that he would invoke his self incrimination rights if called to testify. I thus agree with the majority that our focus in this case is on elements two and three of the exception: was the statement truly against interest, and was the statement sufficiently reliable. The majority grudgingly concedes that an admission of a shooting is against one's penal interest (see fn. 2, *post*). I part company with the majority when it marks Castro's statement as insufficiently reliable.

I agree with the majority that often a declaration against interest will be coupled with self-serving statements that are not against interest at all. In that situation only the disserving statement is admissible, and the balance should be redacted. (*People v. Duarte, supra,* 24 Cal.4th at p. 612.) The majority identifies the following evidence as containing Castro's declaration against interest to Detective Seyler: "Eventually, Castro

stated that his 'homeboy' started fighting with Curtis, and Curtis went 'in his pocket.' Castro said he thought Curtis was going to shoot him. *He said when he shot Curtis,* he was not trying to kill him and he was not aiming for the upper body, but for the leg." (Maj. opn. at p. 9; italics added.) At least impliedly, the majority acknowledges that Curtis's admission that he was the shooter was disserving.[1] Clearly it was. Nothing good for Castro was going to come out of the specific fact that Castro and not appellant or anyone else was the shooter. After Castro gave his statement to the police, the People were not going to have to prove Castro's guilt on a more elusive aider and abettor theory. Castro had just fixed that he was the perpetrator of whatever crime had occurred.

The majority explains that this admission – disserving as it was – was properly excluded in appellant's trial because it was part of a statement that was so unreliable that even the incriminatory portions needed to be excluded.[2] As an abstract proposition, I guess this could be true. A declaration against interest could be joined with such fantasy that the entire statement could be undermined. And that, in my view, is the weakness in the majority's analysis. It proceeds as if trying to prove an *abstract* proposition: since there was a lot of exculpatory material in Castro's statement, that material overwhelms the incriminating part so that redaction is an impotent remedy. "[R]edaction as a logical matter simply cannot bear on, let alone alter, the declarant's motives or any other

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1 The majority states: "Even if Castro's statements could have been redacted *so that only the specifically disserving statement that he shot Curtis remained,* the court acted within its discretion in concluding the statement was untrustworthy and unreliable." (Maj. opn. at p. 11; italics added.)

2 Defense counsel was clear that he was only seeking to admit Castro's statement that he was the shooter, not the exculpatory material "I want to be very specific about for the record what statement we're trying to offer, which is Castro's admission that he was the shooter in this case." Counsel explained that other witnesses had testified in Castro's trial that it was appellant who was the shooter. He wanted to put the identity of the shooter to rest.

circumstance that might affect a given declaration's fundamental reliability and inform a court's assessment thereof. [¶] Thus, even when a hearsay statement runs generally against the declarant's penal interest and redaction has excised exculpatory portions, the statement may, in light of circumstances, lack sufficient indicia of trustworthiness to qualify for admission." (Maj. opn. at p. 11, citing *People v. Leach* (1975) 15 Cal.3d 419, 441.)

The problem here is that we know *factually* the principle does not apply. We know that Castro's statement that he was the shooter was true; it was reliable and trustworthy. By the time of appellant's trial, Castro had already been tried and convicted on the theory that *he* was the shooter. The prosecution based its case against Castro not on the theory he was an aider and abettor to appellant as the shooter, but on the very truth of what Castro told Detective Seyler – that he, Castro, was the shooter. Our criminal justice system does not aim to convict based on untrustworthy evidence and it is not our custom to send a defendant to prison based on his "unreliable" confession. Thus it was an uncontroverted fact – not some theoretical possibility – accepted by Castro's jury and I would have thought unworthy of future reconsideration that Castro's statement was trustworthy and that the defense had satisfied all three elements of the exception: unavailability, against interest and trustworthiness. Indeed it is hard to imagine how the prosecutor seriously argued to the trial court that the statement was unreliable when it was the People's view of the crime that Castro himself was in fact the shooter, a theory on which the prosecution had already convinced one jury.

That the truth of Castro's statement that he was the shooter was so apparent to everyone at trial is best shown by the trial court's ruling that the prosecutor could not argue that *appellant* was the shooter because the prosecution "had taken the position that Castro was the shooter in [Castro's] trial." (Maj. opn. at p. 13.) The prosecutor complied with that court order and argued to the jury that appellant was guilty as an aider and abettor. If everyone was proceeding on the theory that Castro was the shooter, how could Castro's statement that he was the shooter be unreliable?

Although I conclude that the trial court erred in disallowing evidence of Castro's statement to the police, I agree with the majority that any error was unquestionably harmless for the same reason that it was admissible: the case was tried on appellant being the aider and abettor so it really did not matter that the defense was not allowed to introduce Castro's statement that it was so.

RUBIN, J.