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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**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 ONE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>DAVID PAUL GUERRERO,<br><br>Defendant and Appellant. | B259164<br><br>(Los Angeles County Super. Ct. No. TA097537) |

APPEAL from a judgment of the Superior Court of Los Angeles County, Allen J. Webster, Judge. Conditionally reversed and remanded with directions.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Michael R. Johnsen and Kathy S. Pomerantz, Deputy Attorneys General, for Plaintiff and Respondent.

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A jury convicted David Paul Guerrero and codefendants Joe Toledo and Jose G. Enciso of the first degree murder of Darryl White and found gun and gang allegations true. Each defendant was sentenced to state prison for 50 years to life, but we reversed the convictions on the ground that the trial court abused its discretion by admitting inflammatory, irrelevant gang evidence. (*People v. Toledo* (Oct. 5, 2011, B219800) [nonpub. opn.].) Guerrero and his codefendants were retried and reconvicted. Guerrero again appeals, arguing the trial court again erred in admitting gang evidence, and erroneously instructed on aider and abettor liability.

We agree the trial court erroneously instructed on the natural and probable consequences doctrine as it applies to aider and abettor liability, necessitating conditional reversal for reconsideration of a portion of Guerrero's sentence. We otherwise affirm.

## BACKGROUND

Several street gangs claim overlapping territory in Compton, California, including the Compton Varrio 70 (CV70) and Leuders Park Piru (Leuders Park) gangs, which maintain a longstanding feud. Guerrero and his codefendants were members of CV70. White was a member of the Natural Born Players (NBP), a group associated with Leuders Park.

On the morning of November 27, 2002, the day before Thanksgiving, White and his cousin, Brandon Buckhalter, spray painted "NBP" on some walls and a street sign at the intersection of San Vicente Street and Bradfield Avenue in Compton. White also painted over graffiti referring to CV70.

Guerrero was outside his home with Toledo, Enciso, and Marcos Contreras, also a CV70 member. Guerrero went inside,

perhaps to use the restroom. While Guerrero was inside, Toledo learned of White and Buckhalter defacing the CV70 graffiti and hurried inside the house to get a revolver from Guerrero. Guerrero followed Toledo out. Guerrero, Enciso, and unidentified backseat passengers then approached White and Buckhalter on Bradfield in a blue Chevy Tahoe driven by Enciso. When Enciso brandished a chrome handgun, White and Buckhalter ran away from the Tahoe and turned onto Palmer Street. Guerrero and his companions pursued but temporarily lost sight of the NBP members while turning the Tahoe around. A neighbor driving on Bradfield saw two Black men argue with the occupants of the Tahoe, and saw a gun in the hand of the Tahoe's front passenger, whose arm was hanging out the window. He saw the Tahoe turn around and pass him in the direction the two men were running, and then turn onto Palmer.

Buckhalter and White ran to a friend's house, where Buckhalter talked with the friend on the porch. White left the house and went back down the street and around the corner. Then White came running back around the corner chased by Toledo and Contreras. White ran into the yard of a neighboring house, closely pursued on foot by Toledo and Contreras. A woman who lived a few houses down from the friend's house heard one of the pursuers shout, "Yeah, mother fucker. You think you got away, but we got you now." Toledo and Contreras took different routes to the yard at 1813 East Palmer Street, cornered White, and shot him five times with two guns, a revolver and a semiautomatic, twice through the heart. Then they ran back to the Tahoe and were driven away. White died at the scene.

The police investigation spanned several years.

Two months after the shooting, Danny Guerrero, David Guerrero's brother, was stopped in his vehicle. Under a seat, police discovered a semiautomatic handgun that was later determined to have ejected the semiautomatic cartridge casings recovered at the scene of the White shooting.

Guerrero was arrested three years after the murder, on November 9, 2005, along with Enciso. Toledo was arrested two months after that.

In 2006, Melina Rodriguez, Guerrero's girlfriend, was arrested for drug possession. She told police that on an unspecified day when an unidentified "Black guy got killed," she was living with Guerrero near the intersection of San Vicente and Bradfield, where White and Buckhalter were seen painting graffiti. She was in the house with Guerrero while Enciso, Toledo, and Contreras were outside. Toledo rushed in and told Guerrero to give him a gun. Guerrero gave Toledo a chrome revolver and then followed him outside. She could not otherwise identify the gun. Rodriguez heard shots about five minutes later, and later learned that a Black man had been killed. In a subsequent interview, Rodriguez told police she thought that around the time of the shooting, Enciso had a blue Tahoe—the same kind of car that had pursued White and Buckhalter—but she said Danny Guerrero also had a blue Tahoe around the same time. Rodriguez recanted her statements at the preliminary hearing and at trial, but recorded clips of the interviews were played for the jury.

Also in 2006, police detained Danny Guerrero as he emerged from the house of Sabrina Lewis, his girlfriend, with a rifle bag and duffel bags. A search of the bags and Lewis's residence recovered eight guns, police vest–penetrating

ammunition, and a CD recording of a police interview with Toledo. During a search of another Lewis residence, also in 2006, police found a preliminary hearing transcript of Buckhalter's testimony in a separate case.

Buckhalter identified Toledo and Contreras as the shooters and Enciso and Guerrero as the Tahoe's driver and passenger, respectively.

Guerrero and his codefendants were charged with White's murder, and gang and gun use enhancements were alleged. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (b)(1)(A), 12022.53, subds. (b), (c), (d) & (e)(1).) All defendants were tried and convicted of White's murder; however, we reversed those convictions in 2011. (*People v. Toledo*, *supra*, B219800.) The defendants were retried in 2013.

At trial, Sheriff's Detectives Peter Hecht and Brian Steinwand, the prosecution's gang experts, testified that a task force was created in 2005 to solve crimes associated with gangs in Compton, and as part of that task force, they were assigned to CV70. Hecht testified CV70's primary activities were tagging, robbery, illegal substance dealing, car theft, and murder. He testified there was a longstanding feud between CV70 and Leuders Park, beginning with an incident in 1998 in which a CV70 member shot and injured a Leuders Park member and was himself shot in the face, prompting retaliatory killings of the Leuders Park member and the CV70 member's father in the subsequent weeks. Another incident in 2001 contributed to the gang rivalry, in which Ricky Jimenez, the sister of a CV70 gang member, was murdered.

Hecht testified that gangs demand respect and announce their geographical authority with graffiti. In the gang culture,

crossing out a rival gang's graffiti is a sign of disrespect and requires retaliation. A gang member loses respect by failing to retaliate when a gang's authority is challenged, and can be killed for cooperating with law enforcement. Hecht opined that the White murder benefitted CV70 by increasing its reputation for violence and intimidating the community, thereby discouraging community members from assisting law enforcement in its investigations of CV70 activities.

Guerrero's codefendants both presented alibi witnesses, while Guerrero presented no defense witnesses.

The jury found Guerrero and his codefendants guilty of the first degree murder of White and found true the gang and gun allegations. The trial court sentenced Guerrero to 50 years to life in prison, comprising 25 years to life for the murder plus a consecutive 25 years for the gun enhancement. The court imposed but stayed a 10-year sentence for the gang enhancement, and imposed various fines and conditions, including a $200 restitution fine and a $200 parole revocation fine. Guerrero timely appealed.

## DISCUSSION

On appeal, Guerrero argues that gang evidence admitted at trial was unduly prejudicial, the trial court prejudicially erred in instructing the jury on the natural and probable consequences doctrine for aiding and abetting, and the trial court prejudicially erred in its instruction that a perpetrator and an aider and abettor are "equally guilty."

### I. Admission of Gang Evidence

Guerrero contends the following gang evidence should have been excluded as irrelevant and unduly prejudicial: testimony about prior gang incidents, Steinwand and Hecht's testimony

about their involvement in a gang task force and a related wiretap investigation, a recorded jail cell conversation between Guerrero and codefendants in 2006, and weapons and ammunition found in Danny Guerrero's possession in 2006.

**A. Gang Evidence**

Hecht testified that CV70 and Leuders Park had been rivals for some time before the 2002 White murder. He described an incident in 1998 that he said "started the war," in which CV70 member Manuel Castillo shot a Leuders Park member and was in turn shot in the face. A few weeks later, Castillo shot and killed the Leuders Park member who had shot him. The next day, Leuders Park members broke into Castillo's house, killed his father, and shot his uncle. The prosecution also played a recorded interview of Rodriguez by Detectives Steinwand and Hecht, in which she recalled that a Leuders Park member shot Castillo in the face, Castillo retaliated, and Leuders Park then retaliated against his family.

Hecht testified about another incident in 2001, in which Ricky Jimenez, the sister of a CV70 member, was murdered by Black males. The incident infuriated CV70 members, who believed the killers were Leuders Park or possibly NBP members. Rodriguez's interview with detectives provided further information about this incident. She told the detectives that Guerrero said he was present when Jimenez was killed. He and Jimenez were standing on either side of a parked car talking to the driver when the shooters drove by. Rodriguez supposed the shooters were aiming for "the guys," but they hit Jimenez because she was on the street side of the car. Guerrero told Rodriguez NBP's did that shooting.

Detectives Steinwand and Hecht testified that in late 2005, they were assigned to a task force aimed to alleviate violent crimes in Compton. Both detectives were assigned to investigate CV70. The investigation included wiretaps of CV70 members over several months, during which the detectives reviewed thousands of telephone calls and gained familiarity with CV70 members and their activities. At the time of the wiretaps, Guerrero and his codefendants were in custody.

On February 2, 2006, a lieutenant with the Los Angeles County Sheriff's Department placed Guerrero and Enciso, and later Toledo, in a jail cell together, and recorded their conversation. Clips from the recording were played at trial. Before Toledo entered, Guerrero and Enciso discussed Toledo's arrest and said they had told him to leave town. After he arrived, they asked him if he had gotten the warning and why he did not leave town. Toledo told them he had not been interviewed by police. The others also informed him they had told police they did not know him, and Enciso said, "Keep it like that, and they don't got nothing. . . . We gonna beat it homie." Then, Guerrero asked Toledo if F.J. was snitching, referring to a member of White and Buckhalter's extended family. Guerrero noted that F.J. knew Toledo. Finally, Guerrero and Enciso told Toledo not to talk to his girlfriend on the telephone and not to give his address or telephone number to the police, who might go to his home and try to get information from his girlfriend.

Also in September 2006, a sheriff's deputy found Danny Guerrero carrying a rifle bag and duffel bags from his girlfriend's residence to his car. The bags and the residence were searched. Eight firearms were recovered, including six handguns, one machine gun, and one rifle. A detective in the Sheriff's

Department Firearms Section testified that three of the firearms had been modified. The search also found ammunition, including 40 nine-millimeter rounds of a type that can penetrate a ballistic vest, and 70 magazines.

The trial court instructed the jury, in accordance with CALCRIM No. 1403, that "you may consider evidence of gang activity only for the limited purpose of deciding whether the defendant acted with the intent, purpose, and knowledge that are required to prove the gang-related enhancements charged; or the defendant had a motive to commit the crimes charged. You may also consider this evidence when you evaluate the credibility or believability of a witness and when you consider the facts and information relied on by an expert witness in reaching his or her opinion. You may not consider this evidence for any other purpose. You may not conclude from this evidence that the defendant is a person of bad character or that he has a disposition to commit crime."[1]

**B. Legal Principles**

Evidence is relevant if it has any tendency in reason to prove or disprove any disputed fact of consequence to the determination of an action. (Evid. Code, § 210.) Nevertheless, relevant evidence should be excluded if the trial court, in its discretion, determines that its probative value is substantially

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[1] The prosecutor asked Steinwand if he had been advised before his testimony that the case was limited to the 2002 White murder and events leading up to it. He acknowledged that was so. In his opening brief, Guerrero notes this exchange in setting forth the procedural history for his argument about the gang evidence, but he raises no argument that the exchange constituted error. We thus deem abandoned any appeal on this point. (*People v. Stanley* (1995) 10 Cal.4th 764, 793.)

outweighed by the probability that its admission will create a substantial danger of undue prejudice. (Evid. Code, § 352.) In this context, unduly prejudicial evidence is evidence that would cause the jury to "prejudge" a person on the basis of extraneous factors. (*People v. Zapien* (1993) 4 Cal.4th 929, 958.)

Evidence of specific instances of a person's conduct is inadmissible when offered to prove his or her conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) But such evidence is admissible if relevant to prove some fact other than the defendant's disposition to commit a crime. (Evid. Code, § 1101, subd. (b).) "[E]vidence of prior bad acts always involves the risk of prejudice regardless of its probative value . . . ." (*People v. Humiston* (1993) 20 Cal.App.4th 460, 481.)

In a gang-related case, gang evidence is admissible to prove enhancement allegations and to establish the motive for charged crimes. (*People v. Williams* (1997) 16 Cal.4th 153, 193; *People v. Williams* (2009) 170 Cal.App.4th 587, 609.) But given its inflammatory impact, "[g]ang evidence should not be admitted at trial where its sole relevance is to show a defendant's criminal disposition or bad character as a means of creating an inference the defendant committed the charged offense." (*People v. Sanchez* (1997) 58 Cal.App.4th 1435, 1449.) "Thus, as [a] general rule, evidence of gang membership and activity is admissible if it is logically relevant to some material issue in the case, other than character evidence, is not more prejudicial than probative and is not cumulative." (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) "Evidence of the defendant's gang affiliation—including evidence of the gang's territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific

intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime." (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.) But the trial court "must carefully scrutinize gang-related evidence before admitting it because of its potentially inflammatory impact on the jury." (*People v. Albarran*, *supra*, at p. 224.)

We review the trial court's decision on whether evidence, including gang evidence, is relevant and not unduly prejudicial for abuse of discretion. (*People v. Avitia* (2005) 127 Cal.App.4th 185, 193.) "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]'" (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

**C. Analysis**

The 1998 and 2001 events described by Hecht and Rodriguez were directly relevant to the motive for the 2002 shooting of White, particularly because Rodriguez's evidence suggested Guerrero was present when Jimenez was killed. The historical evidence was not unduly prejudicial, as its focus was on crimes committed by Leuders Park or NBP members, not crimes by CV70, and, in particular, not crimes that may have been committed by Guerrero. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1168 [probative value of motive evidence generally outweighs its prejudicial effect].)

Evidence of Steinwand and Hecht's involvement in the task force and wiretaps in 2005 and 2006 was also relevant. The evidence provided a foundation for these experts' opinions

because the task force and wiretaps were a primary means by which Steinwand and Hecht gained knowledge of CV70 and gang culture, and served the jury in evaluating the experts' credibility. It was not unduly prejudicial, because it was presented briefly and in general terms, without reference to specific crimes. Contrary to Guerrero's assertion, the evidence did not leave the jury with the impression that crimes were still being committed that police were unable to control. Moreover, Steinwand testified that Guerrero and his codefendants were in custody at the time of the wiretaps, demonstrating that they could not have been involved in criminal activity taking place at that time.

The jail recording of Guerrero and codefendants on February 2, 2006, was relevant as well. During the conversation, Guerrero and Enciso suggested Toledo should have left town. They encouraged Toledo not to admit to police that he knew them, and Enciso stated, "We gonna beat it homie." This evidence allows an inference that Guerrero and Enciso wanted Toledo to evade capture and that all codefendants were involved in criminal activity together. Although the conversation happened long enough after the White murder that it may not have related to that crime, it still had some tendency to prove the codefendants were concerned about being found guilty of that murder. Further, the jail recording was not unduly prejudicial because the portions played for the jury contained no references to other crimes or other inflammatory material.

Finally, evidence of the firearms and ammunition found in Danny Guerrero's possession in February 2006 was relevant to the prosecution's case. The prosecutor explained that because Danny Guerrero previously had been found with one of the guns that had been used in the White murder, she anticipated the

defense would argue he committed the White murder, rather than the defendants. To rebut that argument, she intended to use the firearms evidence found in 2006 to help establish Danny Guerrero's role as "gun guy" for CV70. Evidence showing the number of firearms he held, including some that were modified, was relevant to showing his role and dispelling the impression that because one of the murder weapons was found in his possession, he must have been involved in the crime. The testimony was not unduly prejudicial because it was brief and did not discuss any potential link between the firearms and crimes committed by CV70. Moreover, its focus was on Danny Guerrero, not actions of Guerrero or his codefendants.

**D. Harmless Error**

Even if the trial court had erred in admitting the gang evidence, the error would not have required reversal. The evidence presented at trial included testimony of three eyewitnesses to the events leading up to White's murder, including testimony that Guerrero supplied the revolver used in the shooting and was in the Tahoe that chased White and Buckhalter and then drove the shooters away from the scene. Where there is "'at least such an equal balance of reasonable probabilities as to leave the court in serious doubt as to whether the error affected the result,'" the error is prejudicial. (*People v. Mower* (2002) 28 Cal.4th 457, 484.) Here, there is no such balance because given the evidence of Guerrero's involvement in the murder, no reasonable jury would have reached a different result even absent any improperly admitted gang evidence. (See *Chapman v. California* (1967) 386 U.S. 18, 24 [reversal is required under the federal Constitution unless the error was harmless beyond a reasonable doubt]; *People v. Watson* (1956) 46

Cal.2d 818, 836 [state law error requires reversal only if it is reasonably probable that the error had an effect on the verdict].)

## II. Instruction on Natural and Probable Consequences

The prosecution argued that even if Guerrero and Enciso did not intend to kill White but only intended Toledo and Contreras to point a gun at somebody and either shoot or not shoot—either of which would constitute assault with a firearm—each of them would still be guilty of murder as an aider and abettor under the natural and probable consequences doctrine. In accordance with that theory, the trial court instructed the jury with CALCRIM No. 403, which explained Guerrero could be found guilty of murder if "a reasonable person in the defendant's position would have known that the commission of murder was a natural and probable consequence of the commission of the assault with a firearm." The jury returned a verdict finding Guerrero guilty of first degree murder.

However, in *People v. Chiu* (2014) 59 Cal.4th 155, our Supreme Court held that an "aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine," because a perpetrator's distinguishing mental state for first degree murder, as opposed to second degree murder, which includes willfulness, premeditation, and deliberation, "is uniquely subjective and personal," i.e., not subject to vicarious adoption by an aider and abettor. (*Id.* at pp. 158-159, 166.) Therefore, aiders and abettors may be convicted of first degree premeditated murder only "based on *direct* aiding and abetting principles." (*Id.* at p. 166, italics added.)

Respondent concedes that in light of *Chiu*, the court's instruction was error. We agree.

"When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*People v. Chiu*, *supra*, 59 Cal.4th at p. 167.) For example, an error may be held harmless "'if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well.'" (*People v. Chun* (2009) 45 Cal.4th 1172, 1204.) Guerrero's first degree murder conviction "must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that [he] directly aided and abetted the premeditated murder." (*People v. Chiu*, *supra*, 59 Cal.4th at p. 167.)

Here, nothing in the record permits us to conclude beyond a reasonable doubt that the jury based its first degree murder verdict on a valid aider and abettor theory. The verdict only shows the jury found Guerrero guilty of first degree murder and found true the gang and gun allegations.

Respondent argues that the instructional error was harmless because the record gave no indication that the jury focused on the natural and probable consequences theory, and the evidence established that Guerrero directly aided and abetted the premeditated murder of White. Respondent asserts that the record shows "the jury must have based its first degree murder verdict" on a direct aiding and abetting theory. These arguments fail. The record need not affirmatively show the jury relied on the natural and probable consequences theory for the error to be prejudicial. Further, however strong the evidence may have been that Guerrero directly aided and abetted White's murder, the

record does not establish beyond a reasonable doubt that the jury's verdict was based on that evidence and theory. Because nothing makes it impossible to conclude the jury convicted under the natural and probable consequences doctrine, the error was not harmless.

The appropriate remedy is to reverse the first degree murder conviction and "allow[] the People to accept a reduction of the conviction to second degree murder or to retry the greater offense. . . . If the People choose to retry the case, they may seek a first degree murder conviction under a direct aiding and abetting theory." (*People v. Chiu*, *supra*, 59 Cal.4th at p. 168.) On remand, therefore, the prosecution shall have the option to retry Guerrero for first degree murder, or to accept a modification of the judgment to reflect a conviction for second degree murder. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Guerrero in accordance with the modified judgment.

## III. Instruction That a Perpetrator and an Aider and Abettor Are "Equally Guilty"

The trial court instructed the jury on aiding and abetting principles with CALCRIM Nos. 400 and 401, and instructed on murder with CALCRIM Nos. 520 and 521.[2] The court used the 2009 version of CALCRIM No. 400, which included the following language: "A person is equally guilty of the crime whether he or she committed it personally or aided and abetted the perpetrator

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[2] As discussed previously, the court also instructed the jury on the natural and probable consequences doctrine, with CALCRIM No. 403. It further instructed on general homicide principles and other related concepts, such as provocation.

who committed it."[3] Guerrero neither objected to the instruction as given nor requested a modification to it. During deliberations, the jury sent out questions requesting the testimony of one alibi witness and the two neighborhood resident eyewitnesses, and "the testimony of Melina Rodriguez regarding Jose Enciso owning a blue Tahoe and Danny Guerrero owning a blue Tahoe, possibly at the same time."

Guerrero argues the trial court prejudicially erred in instructing the jury that the perpetrator and the aider and abettor were equally guilty. He asserts that the issue was not forfeited by his failure to object, or that this court should review the issue despite that failure. We agree the issue was forfeited, but we conclude that even had it not been, the court did not prejudicially err in giving the instruction.

"Generally, '"[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."'" (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1163.) Courts examining the issue have generally concluded that CALCRIM No. 400 and the analogous CALJIC No. 3.00 provide a correct statement of the law "in all but the most exceptional circumstances." (*Id.* at p. 1165; *People v. Mejia* (2012) 211 Cal.App.4th 586, 624; *People v. Loza* (2012) 207 Cal.App.4th 332, 351; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118; *People v. Canizalez*, *supra*, 197 Cal.App.4th at p. 849; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 518 ["even in unexceptional circumstances

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[3] The 2010 version of CALCRIM No. 400 omitted the word "equally." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 847 & fn. 14.)

CALJIC No. 3.00 and CALCRIM No. 400 can be misleading"].) Thus, if Guerrero thought the instruction was incomplete or misleading under the specific circumstances, he should have objected or sought clarification. Because he did not, he forfeited the issue. (See *People v. Lopez*, *supra*, at pp. 1118-1119; *People v. Canizalez*, *supra*, at p. 849.)

Guerrero contends alternatively that his counsel was ineffective in failing to object to the jury instruction. To succeed on a claim of ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficient performance prejudiced the defendant—i.e., that it is reasonably probable that but for counsel's deficient performance, the proceeding's outcome would have been different. (*People v. Lopez* (2008) 42 Cal.4th 960, 966.) As discussed below, Guerrero did not show he was prejudiced by the instructions as given, and thus has not established his counsel rendered ineffective assistance.

Even if Guerrero had not forfeited his claim with respect to CALCRIM No. 400, the claim lacks merit, as we conclude any error was harmless even under the stringent standard articulated in *Chapman v. California*, *supra*, 386 U.S. at page 24.

When jury instructions are challenged, "we view the challenged instruction in the context of the instructions as a whole and the trial record to determine whether there is a reasonable likelihood the jury applied the instruction in an impermissible manner." (*People v. Houston* (2012) 54 Cal.4th 1186, 1229.)

Guerrero argues the "equally guilty" language in CALCRIM No. 400 precluded a finding that he was guilty of a lesser crime than Toledo. But the jury was also instructed that to find Guerrero guilty of aiding and abetting a crime, it had to find

Guerrero knew that the perpetrator intended to commit the crime, and Guerrero intended to aid and abet him in committing that crime. The jury was further instructed that to find Guerrero guilty of first degree murder, it had to find that he acted willfully, deliberately, and with premeditation. Thus, even if CALCRIM No. 400 was misleading as to the finding of intent, these other instructions clarified that the jury must consider Guerrero's mental state.

Further, there was no prejudice because the evidence did not support a finding that Guerrero was guilty of a lesser form of homicide than Toledo.[4] Rodriguez testified that Guerrero provided a revolver to Toledo and then left the house with him; shortly afterward, Rodriguez heard gunshots, and later she learned one of two Black men, who may have been spray painting, was killed. Buckhalter testified White crossed out CV70 graffiti, and soon afterward, he saw Guerrero, Enciso, and others in a Tahoe, with Guerrero in the front passenger seat. A neighborhood resident saw the Tahoe speeding in the direction that two Black men were running, and saw a weapon in the hand of the front passenger. Another resident saw a Black man being chased by two Hispanic men to a house near hers, saw one of the

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[4] This conclusion is not inconsistent with our holding in the prior section that the trial court's instructing on the natural and probable consequences doctrine was prejudicial error. That instruction allowed the possibility that the jury found Guerrero guilty of first degree murder on the natural and probable consequences theory, a result prohibited by *People v. Chiu*, *supra*, 59 Cal.4th at page 166. A defendant may, however, be convicted of first degree murder based on direct aiding and abetting principles. Whether any prejudice resulted from error in those instructions is a separate matter.

Hispanic men shooting up the driveway where the Black man had run, and then saw at least one of the Hispanic men get into a dark blue SUV, which drove away.

Moreover, evidence was presented that the motive for the murder was retaliation, both for past shootings of CV70 members and affiliates by associates of NBP members, and for White's painting over CV70 graffiti that morning. Indeed, Rodriguez stated Guerrero was present at one of the past shootings.

Guerrero argues he was prejudiced by the "equally guilty" language because the evidence of his guilt was not strong. He notes Rodriguez was not sure which day Guerrero gave Toledo a gun, and Buckhalter did not see Guerrero during or after the shooting, and could not identify all passengers in the Tahoe. He further suggests the jury showed it was undecided about Guerrero's guilt by asking for Rodriguez's testimony. But if the jury had read the evidence as Guerrero urges, it would have concluded Guerrero was not involved in the shooting and found not guilty at all. It did not do so, instead convicting him of first degree murder. Also, the jury asked only for one portion of Rodriguez's testimony, about Enciso and Danny Guerrero possibly having blue Tahoes at the same time, and none of the other jury questions suggested any confusion about the aiding and abetting instructions.

This case is distinguishable from *People v. Loza* and *People v. Nero*, on which Guerrero relies. In *People v. Loza*, the jury asked whether the aider and abettor's state of mind should be considered, showing the jury was confused, but the court provided no further instructions or clarification; the Court of Appeal found counsel's error in failing to object to the "equally guilty" language in CALCRIM No. 400 was prejudicial ineffective

assistance of counsel because the evidence that she aided and abetted premeditated murder was weak. (*People v. Loza*, *supra*, 207 Cal.App.4th at pp. 340, 349, 356.)

In *People v. Nero*, the jury's confusion was even more pronounced, as it asked repeated questions about whether the aider and abettor could bear less responsibility than the perpetrator even if found guilty of aiding and abetting; the trial court merely repeated its prior instruction that each principal is equally guilty. (*People v. Nero*, *supra*, 181 Cal.App.4th at pp. 511-513.) The Court of Appeal concluded the trial court erred in not explaining that an aider and abettor may be guilty of a lesser offense, and found the error prejudicial because the evidence suggested the aider and abettor may have been minimally involved in the murder, may have urged her codefendant to stop his attack on the victim, and may have been under a heat of passion or provocation. (*Id.* at pp. 518-519.)

Here, there was neither a suggestion the jury was confused nor evidence that would support an inference Guerrero's mental state was different from Toledo's.

In sum, the evidence allows no inference that Guerrero had any intention other than to aid and abet White's murder. Nor did the evidence allow an inference that Guerrero was involved in the incident but acted without the willfulness, premeditation, and deliberation required for first degree murder. In fact, the evidence of premeditation and deliberation was strong: Guerrero provided a gun to Toledo in advance, he was in the car looking for and chasing White and Buckhalter, and he and Enciso kept the car where the shooters could return to it and leave the scene of the shooting. Further, under a direct aiding and abetting theory of murder, it "would be virtually impossible for a person to know

of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*People v. Samaniego*, *supra*, 172 Cal.App.4th at p. 1166.)

Accordingly, in the context of the complete jury instructions and in the absence of evidence that Guerrero intended to commit a crime other than first degree murder, we conclude there was no prejudicial error in the trial court's instructing the jury that a perpetrator and an aider and abettor are equally guilty of the crime.

**DISPOSITION**

The judgment of the trial court is reversed. On remand, the prosecution shall have the option to retry Guerrero for first degree murder, or to accept a modification of the judgment to reflect a conviction for second degree murder. If the prosecution elects to accept the modification of the judgment, the trial court shall resentence Guerrero in accordance with the modified judgment.

NOT TO BE PUBLISHED.

CHANEY, Acting P. J.

We concur:

JOHNSON, J.

LUI, J.