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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT GUTIERREZ, Defendant and Appellant.	B233166 (Los Angeles County Super. Ct. No. BA359036)

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

Jennifer A. Mannix, 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, Stephanie A. Miyoshi and Robert C. Schneider, Deputy Attorneys General, for Plaintiff and Respondent.

Robert Gutierrez appeals from the judgment entered upon his conviction by jury of second degree murder (Pen. Code, § 187, subd. (a)).[1] The jury found to be true the allegations that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subds. (b)(1)(C) & (e)(1)) and that appellant personally used a firearm within the meaning of section 12022.53, subdivisions (b), (c) and (d). The trial court sentenced appellant to an aggregate state prison term of 40 years to life. Appellant contends that (1) there is insufficient evidence to support the murder conviction, (2) the trial court erred in instructing the jury on the natural and probable consequences theory because (a) there was insufficient evidence to support the instruction, (b) the instruction violates due process, and (c) the instruction violates equal protection, (3) the trial court erred in failing to instruct the jury that malice aforethought is an element of murder, (4) the natural and probable consequences doctrine improperly allows a murder conviction where the prosecutor proves only that a defendant aided and abetted a misdemeanor, bypassing proof of malice, and (5) the natural and probable consequences doctrine should be repudiated because it abrogates the statutory element of malice and violates the separation of powers.

We affirm.

FACTUAL BACKGROUND

The shooting

On June 20, 2008, near midnight, Leonardo Reyes (Leonardo) and his two sons, nine-year-old Leonardo, Jr., (Junior) and 11-year-old Rudy (Rudy), took a walk in the area of 1750 South Westmoreland, in the City of Los Angeles. As they were walking, appellant, whom Rudy and Junior knew from the neighborhood as "Info," came out of an alley across the street and approached them, asking Leonardo where he was from. Leonardo and his sons kept walking and did not answer.

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

Appellant had a knife in his hand which he put into his pocket. He punched Leonardo in the back, and a fight ensued. Junior thought that Leonardo was winning. A few minutes into the fight, a second unidentified man (unidentified man), wearing a blue shirt, exited the same alley as appellant had, crossed the street, and joined the fight against Leonardo. It appeared to Rudy that the man "ran and he helped . . . his friend." Appellant and the man continued hitting Leonardo for a couple of minutes. Appellant then disengaged from the fight, approached the boys and kicked Rudy, who landed on his head. Appellant laughed and rejoined the fight.

At some point, the unidentified man told appellant to step aside. Appellant complied, the unidentified man moved closer to Leonardo, took a gun from his waist area and shot Leonardo. He told appellant, "Let's get out of here." They ran together back to the same alley from which they had come.

Leonardo died from a single gunshot wound to the chest.

Gang evidence

Los Angeles Police Officer George Diego testified as a gang expert. He opined that appellant was a current, active member of the Cuatro Flats gang, based upon appellant's self-identification as such, his association with members of that gang, his dress and his gang tattoos, and his identification by others as a member. His monikers included "Info," among others.

Cuatro Flats was a southern gang with blue as its gang color. Its primary criminal activities included graffiti, drug sales, robbery, possession of firearms, criminal threats and murder. Its territory, which was bordered on all sides by rival gangs, included the location where Leonardo was shot. Gangs control their territory by "hitting up people," that is, by asking them, "Where are you from," a request for the gang affiliation of the person to whom the question is directed. There is no satisfactory answer to the question and to ignore it is to show disrespect. Gang members demand respect for themselves and their gang. The question is a prelude to a confrontation and informs the person that he is in the gang's territory.

Gangs expect their members to put in work for the gang. Putting in work enhances a gang member's status within the gang. Such work can include being a lookout, backing up a fellow gang member, or committing serious crimes, such as murder. It is common for gang members to commit crimes in tandem in order to have "backup" in case a gang member cannot handle a situation by himself or to have one act as a lookout. Gang members commonly carry weapons. A gang member would not go out late at night without knowing what kind of weapon his fellow gang member was carrying and what the fellow gang member was willing to do if something happened. A gang member would not "hit up" someone and ask where he is from unless there was a gun to back him up in case the person questioned was an armed rival gang member.

DISCUSSION

I. Sufficiency of the evidence

A. Contention

Appellant was convicted of second degree murder as an aider and abettor of an assault, of which the murder was the natural and probable consequence. He contends that there is insufficient evidence to support his conviction. He argues that there was insufficient evidence that (1) he aided and abetted the murder, or (2) that the murder was the natural and probable consequence of appellant's assault. Appellant goes even further and argues that he did not even aid in the target assault, as he was alone when he began the assault on Leonardo, and the unidentified man joined the assault in progress. Therefore, he argues, "the jury convicted appellant without any showing that he harbored the requisite malice [and] . . . the natural and probable consequence theory was an improper and invalid theory of murder liability." This contention lacks merit.

B. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]" (*People v. Bolin* (1998) 18

Cal.4th 297, 331.) We resolve all conflicts in the evidence and questions of credibility in favor of the verdict, and indulge every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.) This standard of review is the same in cases involving circumstantial evidence. (*People v. Stanley* (1995) 10 Cal.4th 764, 792.)

C. Elements of second degree murder

Second degree murder is the unlawful killing of a human being with malice aforethought that is not willful, deliberate and premeditated. (§§ 187, subd. (a), 189; *People v. Nieto Benitez* (1992) 4 Cal.4th 91, 102.) Malice may be express or implied. (§ 188; *People v. Nieto Benitez, supra,* at p. 102.) Express malice exists when there is a "deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) Implied malice exists "'when no considerable provocation appears, . . . when the circumstances attending the killing show an abandoned and malignant heart,'" or when one deliberately commits an intentional act naturally dangerous to human life knowing "'that his conduct endangers the life of another and who acts with conscious disregard for life.'" (*People v. Lasko* (2000) 23 Cal.4th 101, 107; *People v. Martinez* (2003) 31 Cal.4th 673, 684; § 188.) Implied malice may be, and usually must be, proved by circumstantial evidence. (*People v. James* (1998) 62 Cal.App.4th 244, 277; see also *People v. Lashley* (1991) 1 Cal.App.4th 938, 945.)

D. Aider and abettor culpability for natural and probable consequences

"All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission . . . are principals in any crime so committed." (§ 31.) A person is liable for aiding and abetting when, (1) with knowledge of the unlawful purpose of the perpetrator and (2) with the intent or purpose of committing, or encouraging, or facilitating the commission of the crime, that person (3) by act or advice aids, promotes,

encourages, or instigates the commission of the crime. (*People v. Gibson* (2001) 90 Cal.App.4th 371, 386.)

The test of whether a person aided or abetted in the commission of an offense is "whether the accused in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures." (*People v. Villa* (1957) 156 Cal.App.2d 128, 134.) It is not necessary that the primary actor expressly communicates his criminal purpose to the defendant, as that purpose may be apparent from the circumstances. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531–532 (*Nguyen*).) In fact, aiding and abetting can be committed "'on the spur of the moment,'" that is, as instantaneously as the criminal act itself. (*Id.* at p. 532.) But mere presence at the scene of the crime and failure to take steps to prevent it do not establish one as an aider and abettor. (*People v. Luna* (1956) 140 Cal.App.2d 662, 664.) It is merely one circumstance to be considered along with the accused's companionship and conduct before and after the offense. (*People v. Laster* (1971) 18 Cal.App.3d 381, 388; see also *In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

An aider and abettor is guilty not only of an offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. (*People v. Hickles* (1997) 56 Cal.App.4th 1183, 1194; *People v. Prettyman* (1996) 14 Cal.4th 248, 289–290 (*Prettyman*).) An aider and abettor is guilty of all offenses that are the natural and probable consequence of the target offense. In determining whether the nonintended crime is the natural and probable consequences of the intended crime, we do not consider whether the aider and abettor actually foresaw the additional crime, but whether, judged objectively, it was reasonably foreseeable. (*Prettyman*, *supra*, at pp. 261–262.) To trigger application of the natural and probable consequences doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed. (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1055.) Whether one offense is the natural and probable consequence of another depends on the specific facts of each case, including the conduct of both the

perpetrator and the aider and abettor and all of the circumstances which surround the incident. (*Nguyen*, *supra*, 21 Cal.App.4th at p. 531.)

Our Supreme Court explained the intent required for the natural and probable consequences doctrine, as follows: "'[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. His 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 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.' [Citation.]" (*Prettyman*, *supra*, 14 Cal.4th at p. 261.)

E. Evidence supporting conviction

Appellant myopically focuses his argument on his actions in isolation, arguing that acting alone all he did was start a fist fight with Leonardo. There is no evidence, he claims, that he intended to shoot and kill Leonardo, that he knew the full extent of the unidentified man's criminal purpose, that he shared that intent, or that he gave aid or encouragement with the purpose of facilitating the murder.

But when the full range of evidence is considered, including the impressive array of circumstantial evidence, substantial evidence establishes that appellant was both a perpetrator and aider and abettor of the assault on Leonardo because (1) he and the unidentified man were fellow gang members engaging in a coordinated attack on Leonardo, or (2) even if he did not know the unidentified man, at some point during the assault, they began acting in concert, and (3) Leonardo's murder was a natural and probable consequence of the assault. Contrary to appellant's argument, if the murder was a natural and probable consequence of the assault, appellant did not have to share the unidentified man's murderous intent.

1. Aiding and abetting the assault

Appellant argues that he "acted alone and the unidentified male intervened after the fact. The unidentified man's actions were not the natural and probable consequence of appellant's assault because his appearance and possession and use of a gun were not reasonably foreseeable under the specific facts of this case." We disagree.

There was substantial circumstantial evidence that the attack was coordinated by fellow gang members and that appellant knew that the unidentified man was armed. The gang expert testified that appellant was an active, current member of the Cuatro Flats gang, as he had admitted membership, had gang tattoos, associated with Cuatro Flats gang members and was identified by other members of that gang as a member. The attack on Leonardo took place in Cuatro Flats gang territory near midnight. When appellant attacked Leonardo, he asked him where he was from, which, as the gang expert explained, signified that a gang-motivated confrontation was about to occur.

Both appellant and the unidentified man came out of the same alleyway, the unidentified man a matter of minutes after appellant. The unidentified man was wearing a blue shirt, the Cuatro Flats gang color, in that gang's territory late at night. It defies credulity that any non-Cuatro Flats gang member would be so brazen, clearly inviting an attack by that gang.

The unidentified man joined the attack on Leonardo only after it appeared that appellant was losing. Rudy perceived that the two attackers were not acting independently but that the unidentified man intervened to help his friend. The gang expert corroborated Rudy's observation. He testified that gang offenses are usually committed by more than one gang member. A second member is required to act as a lookout or to assist the perpetrator in the event a situation arises that the initial perpetrator is unable to handle. The expert explained that it is unlikely that a gang member would precipitate a confrontation with someone on the street without knowing that there were

adequate weapons to prevail if the victim put up a fight.[2] Gang members out protecting their territory, as the expert explained, are unlikely to "hit up" someone unless there was a gun to back them up, as they would not know if the target of their actions was an armed rival gang member. Here, Cuatro Flats gang territory was bordered by rival gangs.

As the People point out, after the unidentified man joined the fight, appellant was sufficiently comfortable that Leonardo was being handled by the unidentified man that appellant disengaged from the fight to kick Rudy. When the unidentified man told appellant to move, appellant did so without objection or asking any questions, supporting the inference that appellant was fully aware of what the unidentified man was about to do. Both men were perpetrators in the gang attack, as well as aiders and abettors. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1120 (*McCoy*) ["When two or more persons commit a crime together, both may act in part as the actual perpetrator *and* in part as the aider and abettor of the other, who also acts in part as an actual perpetrator"].) If appellant did not know the unidentified man, it would be an extremely improbable coincidence that two unprovoked males would independently attack the same man innocently walking with his two young boys at midnight.

After the shooting, the unidentified man said to appellant, "Let's get out of here," and the two men ran together back to the same alley from which they had come. This provides further support that they were working together to commit a gang murder. (*People v. McDaniels* (1980) 107 Cal.App.3d 898, 904 ["Among the factors which may be considered in making the determination of aiding and abetting [is]: . . . *conduct before and after the offense.*" (Italics added)].)

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[2] "[P]rior knowledge that a fellow gang member is armed is not necessary to support a defendant's murder conviction as an aider and abettor." (*People v. Medina* (2009) 46 Cal.4th 913, 921 and cases cited therein.)

Even if appellant did not know the unidentified man, appellant still aided and abetted in the physical assault on Leonardo. At some point after the unidentified man joined appellant in fighting Leonardo, they began to act in concert. Appellant left the fight to hit Rudy, while the unidentified man continued the battle. Appellant then returned to assist the unidentified man. Appellant stopped fighting and moved away from Leonardo when the unidentified man asked him to do so and fled with him after the shooting. While appellant may not have known of the unidentified man's intention before that man joined the fight, he certainly did after the man joined and they appeared to work together. Aiding and abetting can be committed "'on the spur of the moment,'" that is, as instantaneously as the criminal act itself. (*Nguyen, supra,* 21 Cal.App.4th at p. 532.) Though appellant argues that there was no evidence that the two men agreed to fight Leonardo, it is not necessary that the primary actor expressly communicates his criminal purpose to the defendant, as that purpose may be apparent from the circumstances, as it is here. (*Id.* at pp. 531–532.)

Appellant cites *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262 and *U.S. v. Andrews* (9th Cir. 1996) 75 F.3d 552 as factually supporting his contention that there is insufficient evidence that he aided and abetted the unidentified man. We find neither of these cases compelling, as the unique facts of this case present a much different scenario. Cases involving aiding and abetting turn on the particular facts of each case. (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5 ["Whether a person has aided and abetted in the commission of a crime is a question of fact"]; *People v. Herrera* (1970) 6 Cal.App.3d 846, 852.) We conclude that under the facts presented appellant aided and abetted in the assault on Leonardo.

2. Aiding and abetting the murder/natural and probable consequences

As above stated, there was substantial evidence that the attack on appellant was a preplanned, gang attack by collaborating gang members protecting their territory. Given that appellant's assault took place in his gang's territory, was preceded by the challenging question, "Where you from," that murder was one of the frequent crimes committed by the Cuatro Flats gang and the expert's testimony that appellant would not have precipitated such a confrontation without knowing that a fellow gang member was acting as backup and was armed, there was substantial evidence that appellant's initial attack on Leonardo was part of a planned attempt to stop Leonardo so as to hurt or kill him. This conclusion was further buttressed by the matter-of-fact manner in which appellant stepped aside so that the unidentified man could shoot Leonardo.

Further, even if appellant did not know that the unidentified man would shoot Leonardo and intend to aid in that crime, there is substantial evidence that the murder was a natural and probable consequence of his assault on Leonardo. In determining whether that is the case, we apply an objective test of whether, in all of the circumstances presented, it is reasonably foreseeable that a murder might result from the attack. (*Prettyman*, *supra*, 14 Cal.4th at pp. 260, 262.) A gang member confronting a person in gang territory that is bordered by rival gangs, late at night, with the provocative question, "where you from," knows that the person might be an armed rival gang member. The evidence also supports an inference that appellant initiated the attack knowing that an armed fellow gang member was nearby to come to his assistance if he needed it. These facts suggest that it was reasonably foreseeable that this gang confrontation could lead to a shooting and killing of the victim. Additionally, when appellant moved away from Leonardo when the unidentified man told him to do so, it was reasonably foreseeable what was about to happen.

Appellant argues that there was insufficient evidence to support his conviction because the "prosecutor failed to prove that appellant shared the murderous intent of the shooter." For this proposition, he relies on *McCoy*, which concluded that an aider and

abettor's guilt for an intended crime "is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*McCoy, supra*, 25 Cal.4th at p. 1117.) But *McCoy* did not involve the natural and probable consequences doctrine. It reached its conclusion only for aiders and abettors of a target offense and expressly stated, "Nothing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the natural and probable consequence doctrine." (*Ibid*.) Its analysis was only to apply "when guilt does not depend on the natural and probable consequences doctrine. . . ." (*Id*. at p. 1118.)

We explained the difference between aider and abettor culpability for a target offense and an unintended offense in *People v. Canizalez* (2011) 197 Cal.App.4th 832, 852, as follows: "Aider and abettor culpability under the natural and probable consequences doctrine for a nontarget, or unintended, offense committed in the course of committing a target offense has a different theoretical underpinning than aiding and abetting a target crime. Aider and abettor culpability for the target offense is based upon the intent of the aider and abettor to assist the direct perpetrator commit the target offense. By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. [Citation.] Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime."

II. Instructional error

A. Insufficient evidence to support natural and probable consequences instruction

1. Background

The trial court instructed the jury on aiding and abetting and natural and probable consequences in accordance with CALCRIM Nos. 400,[3] 401[4] and 403,[5] over defense counsel's objection to the natural and probable consequences instruction. The prosecutor argued the natural and probable consequences theory in closing.

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[3] CALCRIM No. 400 as given states: "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 guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator. [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

[4] CALCRIM No. 401 as given states: "To prove that the 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 all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude that 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 was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

[5] CALCRIM No. 403 as given states: "Before you may decide whether the defendant is guilty of murder, you must decide whether he is guilty of the crime of assault. [¶] To prove that the defendant is guilty of murder, the People must prove that: [¶] 1. The defendant is guilty of an assault; [¶] 2. During the commission of the assault, a coparticipant in that assault committed the crime of murder; AND [¶] 3. Under all of

2. Contentions

Appellant contends that the trial court erred in instructing the jury on the natural and probable consequences theory of liability. He argues that there was insufficient evidence to support that instruction because this case did not involve a fight between two groups of gang members. There was no evidence the unidentified man was a gang member, that appellant knew the unidentified man planned to join the fight or was even in the area, or that he possessed and planned to use a gun. This contention lacks merit.

3. Duty to instruct

In criminal cases, "'"even in the absence of a request, the trial court must instruct on the general principles of law relevant to the issues raised by the evidence. [Citations.] The general principles of law governing the case are those principles closely and openly connected with the facts before the court, and which are necessary for the jury's understanding of the case."'" (*People v. Breverman* (1998) 19 Cal.4th 142, 154.) The duty to instruct, sua sponte, on general principles closely and openly connected with the facts before the court encompasses an obligation to instruct on the natural and probable consequences doctrine "when the prosecution has elected to *rely* on the 'natural and probable consequences' theory of accomplice liability and the trial court has determined that the evidence will support instructions on that theory." (*Prettyman, supra,* 14 Cal.4th at p. 269; *People v. Hoang* (2006) 145 Cal.App.4th 264, 273.)

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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. [¶] A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault, then the commission of the murder was not a natural and probable consequence of the assault. [¶] To decide whether crime of assault and murder was committed, please refer to the separate instructions that I will give you on those crimes."

4. Evidentiary support for instruction

As we discussed in part IE, *ante*, there was sufficient evidence to support appellant's conviction based upon the natural and probable consequences doctrine. Even where the aider and abettor does not know that the other person has a gun or intended to use it, instruction on natural and probable consequences theory is proper.[6] For those reasons, the trial court did not err in instructing sua sponte on the natural and probable consequences doctrine.

B. Unconstitutionality—due process

1. Contention

Appellant contends that the trial court violated his right to due process by instructing the jury that it could find him guilty of murder under the natural and probable consequences doctrine, which "fail[s] to require the jury to determine appellant's actual mental state when he committed the assault." First, he argues that the *Ireland*[7] merger doctrine, which establishes that an assaultive felony cannot be the predicate felony for application of the second degree felony-murder rule, is also applicable to the natural and probable consequences doctrine so as to require proof of an aider and abettor's malice. Second, he argues that *McCoy* requires that his culpability for murder on an aiding and abetting theory must be based on his individual mens rea.

We find neither argument persuasive and therefore find no due process violation.

2. *The Ireland merger doctrine is inapplicable*

The second degree felony-murder rule "posit[s] the existence of malice aforethought in homicides which are the direct causal result of the perpetration or attempted perpetration of *all* felonies inherently dangerous to human life." (*Ireland*, *supra,* 70 Cal.2d at p. 538.) Giving the second degree felony-murder instruction in a murder prosecution has the effect of relieving the jury of having to find malice

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6 See footnote 2, *ante*.

7 *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*).

aforethought, one of the elements of murder. (*Ibid.*) To allow use of the felony murder rule to all felonies inherently dangerous to human life would extend "the operation of that rule 'beyond any rational function that it is designed to serve.' [Citation]" (*id.* at p. 539) and would "effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault—a category which includes the great majority of all homicides." (*Ibid.*) *Ireland* therefore held "that a second degree felony-murder instruction may not properly be given when it is based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged." (*Ibid*.)

In *People v. Chun* (2009) 45 Cal.4th 1172 (*Chun*), our Supreme Court rejected a claim that the second degree felony-murder rule violated the constitutional separation of powers, finding that rule to be nothing more than a judicial interpretation of the meaning of the statutory words "abandoned[-]and[-]malignant[-]heart" implied malice, rather than a judicially created crime. (§ 188.) *Chun* reaffirmed the *Ireland* merger rule, concluding that any assaultive felony merges with the resulting homicide.[8] (*Chun, supra,* at p. 1200.)

Appellant argues that under the *Ireland* merger rule, "a person who perpetrates an assault which results in a death is liable for murder *only if* the prosecutor proves that he *either intended to kill or that he killed with a conscious disregard for life.* The same requirements, [he argues,] must hold true for aiders and abettors charged with murder under the natural and probable consequence theory. If a person aids and abets an assault and a murder results, then the prosecutor must prove that the aider and abettor intended to kill or that he harbored a conscious disregard for life. A failure to require proof of these statutory elements violates due process principles." We disagree.

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[8] *Ireland* does not explicitly indicate whether the merger rule is of constitutional dimension or simply a pragmatic one designed to limit second degree felony murder.

On numerous occasions, even in capital murder cases, our Supreme Court has rejected challenges that the natural and probable consequences doctrine violates due process by eliminating the prosecution's obligation to prove malice. Most recently, in *People v. Letner* (2010) 50 Cal.4th 99, 184–185 (*Letner*), a death penalty case, the court stated: "Finally defendants contend the application of the natural-and-probable-consequences doctrine in a capital case is a violation of due process because it permits the jury to convict the defendant of the substantive charges and special circumstance allegations 'without a need to decide if he had the otherwise requisite intent,' . . . in violation of the Eighth Amendment. We have rejected these contentions, and decline to revisit our prior decisions. [Citations.]" (See also *People v. Richardson* (2008) 43 Cal.4th 959, 1021 ["'[W]e reject the premise of [defendant's] argument that the application of the natural and probable consequences doctrine in capital cases unconstitutionally predicates murder on liability on mere negligence. Liability as an aider and abettor requires knowledge that the perpetrator intends to commit a criminal act together with the intent to encourage or facilitate such act; in a case in which an offense that the perpetrator actually commits is different from the originally intended crime, the natural and probable consequences doctrine limits liability to those offenses that are reasonably foreseeable consequences of the act originally aided and abetted'"].)

In addition, as appellant concedes, the California Supreme Court has "repeatedly endorsed the natural and probable consequences doctrine." Accepting appellant's argument that the *Ireland* merger rule is applicable to the natural and probable consequences doctrine would, in two ways, have the effect of eliminating that doctrine, ignoring our Supreme Court's precedents. First, if appellant must show murderous intent, then the natural and probable consequences doctrine is inapplicable, as an aider and abettor cannot have a murderous intent if the resulting murder was not intended by him or her at all. Second, the natural and probable consequences doctrine allows an aider and abettor of an intended crime to be convicted of an unintended crime if the crime is reasonably foreseeable. Intended offenses that make an unintended murder foreseeable

are likely to be only assaultive-type crimes, to which the merger doctrine would be applicable, as it is difficult to hypothesize a reasonably foreseeable murder with a nonassaultive target crime. Hence, for this reason also application of the merger doctrine to the natural and probable consequences doctrine would de facto emasculate the latter doctrine contrary to the dictates of the highest court in this state.

Two appellate courts have decided the precise issue before us. In *People v. Karapetyan* (2006) 140 Cal.App.4th 1172 (*Karapetyan*), the defendant contended that the trial court erred in instructing the jury that an aider and abettor to assault could be found guilty of murder if the death was a natural and probable consequence of the assault. The defendant argued that finding murder based on aiding and abetting an assault under the natural and probable consequences doctrine is really just felony murder barred by *Ireland*. The Court of Appeal rejected this contention, stating: "[T]he natural and probable consequences doctrine operates independently of the second degree felony-murder rule. [Citation.] The natural and probable consequences doctrine does not merge all assaults into the felony-murder rule. Rather, it is a theory of liability for murder that applies when the assault has the foreseeable result of death. For aider and abettor liability, it is the intention to further the acts of another that creates criminal liability and not the felony-murder rule. [Citation.] . . . [¶] '. . . The law's policy is simply to extend criminal liability to one who knowingly and intentionally encourages, assists, or influences a criminal act of another, if the latter's crime is naturally and probably caused by (i.e., is the natural and probable consequence of) the criminal act so encouraged, assisted, or influenced.' [Citation.] Accordingly, the logical and legal impediments to felony-murder liability discussed in *Ireland* are inapplicable and do not limit the liability of an aider and abettor. [Citation.]" (*Karapetyan*, *supra*, at p. 1178; see also *People v. Gonzalez* (2011) 52 Cal.4th 254, 300 (*Gonzalez*) [simple assault can serve as the target offense for murder liability under the natural and probable consequences doctrine].)

Appellant argues that since the natural and probable consequences doctrine is inapplicable, the jury must determine appellant's liability for murder on a direct aiding and abetting theory and that *McCoy* requires that an aider and abettor's individual mens rea, independent of that of the direct perpetrator, must reflect an intent to murder. Because we conclude that the natural and probable consequences doctrine is not inapplicable, and as discussed in part IE2, *ante*, *McCoy* is not applicable to that doctrine, we reject this argument.

Appellant contends that, in *People v. Concha* (2009) 47 Cal.4th 653, the Supreme Court extended *McCoy*'s reasoning to murder cases arising under the natural and probable consequences doctrine. *Concha*, however, was a provocative act murder case. That decision did not involve the natural and probable consequences doctrine and is therefore not relevant here. (See *People v. Banks* (1993) 6 Cal.4th 926, 945 ["'"an opinion is not authority for a proposition not therein considered."' [Citations.]"].)

C. Unconstitutionality-equal protection

Appellant contends that the natural and probable consequences instruction violates equal protection. He argues that the aiding and abetting and natural and probable consequences theories permit disparate and inequitable treatment of the aider and abettor and the direct perpetrator. The aider and abettor in an assaultive crime is culpable for a murder that ensues if the murder was the natural and probable consequence of the commission of the assault. But the direct perpetrator of the same assaultive crime cannot be held liable for the murder if a death should result unless he possesses either an actual intent to kill or a conscious disregard for life. He argues that "no rational purpose is served by allowing the prosecution to more easily convict an aider and abettor of murder who merely participated in an assault, than it is to convict the direct perpetrator of an assault that results in murder." This contention is without merit.

1. Equal protection principles

"'"The concept of equal protection of the laws compels recognition of the proposition that persons similarly situated with respect to the legitimate purpose of the law receive like treatment."'" (*People v. Applin* (1995) 40 Cal.App.4th 404, 409.) Consequently, "'[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.' [Citations.]" (*People v. Hofsheier* (2006) 37 Cal.4th 1185, 1199.) "Under the equal protection clause, we do not inquire 'whether persons are similarly situated for all purposes, but "whether they are similarly situated for purposes of the law challenged."' [Citation.]" (*Id.* at pp. 1199–1200.)

"In resolving equal protection issues, the United States Supreme Court has used three levels of analysis. Distinctions in statutes that involve suspect classifications or touch upon fundamental interests are subject to strict scrutiny, and can be sustained only if they are necessary to achieve a compelling state interest. Classifications based on gender are subject to an intermediate level of review. But most legislation is tested only to determine if the challenged classification bears a rational relationship to a legitimate state purpose." (*Hofsheier, supra,* 37 Cal.4th at p. 1200.)

2. Inapplicability of equal protection

We need not conduct a full equal protection analysis, including a determination of which standard of scrutiny is applicable, because we conclude that an aider and abettor guilty of murder under the natural and probable consequences theory and the direct perpetrator of the murder in the course of committing an assaultive crime *are not similarly situated.* The different doctrines of felony murder and accomplice liability for consequential offenses do not have the same theoretical underpinnings.

As discussed in part IIB2, *ante,* the natural and probable consequences doctrine "operates independently of the second degree felony-murder rule" and has a different theoretical underpinning. (*Karapetyan, supra,* 140 Cal.App.4th at p. 1178.) Unlike the second-degree felony-murder rule, "it is a theory of liability for murder that applies when

the assault has the foreseeable result of death. For aider and abettor liability, it is the intention to further the acts of another that creates criminal liability and not the felony-murder rule." (*Ibid.*) "'The law's policy is simply to extend criminal liability to one who knowingly and intentionally encourages, assists, or influences a criminal act of another, if the latter's crime is naturally and probably caused by (i.e., is the natural and probable consequence of) the criminal act so encouraged, assisted, or influenced.' [Citation.] Accordingly, the logical and legal impediments to felony-murder liability discussed in *Ireland* are inapplicable and do not limit the liability of an aider and abettor. [Citation.]" (*Ibid*.)

As we stated in part IIB2, *ante*, were we to conclude that equal protection requires application of the merger doctrine to the natural and probable consequences, we would effectively repudiate the latter doctrine, contrary to the dictates of the California Supreme Court.

D. The trial court erred in failing to instruct on malice aforethought

1. Contentions

Appellant contends that the trial court failed to properly instruct the jury on the requirement of malice for second degree murder, depriving appellant of his Fifth and Fourteenth Amendments right to due process and his Sixth Amendment right to a jury trial. He argues that "[t]he law required the prosecution to prove that appellant harbored the requisite malice for a murder conviction. But the aiding and abetting and natural and probable consequence theories lessened the prosecutor's burden of proof by circumventing that determination." The People contend that appellant forfeited this contention by failing to raise it in the trial court.

We agree that this claim has been forfeited, but conclude that even had it not been forfeited, we would reject it.

2. Forfeiture

Generally, a party forfeits any challenge to a jury instruction that was correct in law and responsive to the evidence if the party fails to object in the trial court. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163.) This rule does not apply, however, if the instruction was an incorrect statement of the law (*People v. Franco* (2009) 180 Cal.App.4th 713, 719), or if the instructional error affected the defendant's substantial rights. (§ 1259.) "'"Ascertaining whether claimed instructional error affected the substantial rights of the defendant necessarily requires an examination of the merits of the claim—at least to the extent of ascertaining whether the asserted error would result in prejudice if error it was." [Citation.]'" (*People v. Franco, supra,* at p. 719.) As we discuss below, the failure to instruct on the required proof of malice aforethought was not an error of law, and did not therefore affect appellant's substantial rights.[9] Therefore this claim was forfeited.

3. No requirement to instruct on malice aforethought

This claim is simply another effort by appellant to have us repudiate the natural and probable consequences doctrine. We decline, and are not permitted, to do so. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.) To require that the jury find that appellant acted with malice aforethought with respect to the unintended murder is to reject the natural and probable consequences doctrine which our Supreme Court has repeatedly reaffirmed. (See, i.e., *Letner, supra,* 50 Cal.4th at pp. 184–185; *Gonzalez, supra,* 52 Cal.4th at p. 300; *Prettyman, supra,* 14 Cal.4th 248.) As previously stated, because an aider and abettor did not know that the perpetrator was going to commit the

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9 The trial court did actually instruct on the requirement of malice aforethought to prove murder, in accordance with CALCRIM No. 520. However, the natural and probable consequences instruction allowed the jury an alternative avenue for finding appellant guilty of murder without considering whether he acted with malice aforethought.

nontarget offense, the aider and abettor could not intend to commit it with malice aforethought.

E. Natural and probable consequence of murder for aiding and abetting a misdemeanor

1. Contention

Appellant contends that the natural and probable consequence doctrine improperly allowed a murder conviction upon proof that he aided and abetted a misdemeanor, bypassing proof of malice or liability under the felony-murder rule. He argues that the trial court erred in instructing on the natural and probable consequence doctrine of murder, because commission of a simple assault is only a misdemeanor, justifying conviction of only the lesser included offense of involuntary manslaughter under section 192, subdivision (b). This contention is without merit.

2. Gonzalez *disposes of this contention*

There was no error in "bypassing" proof of malice by instructing on the natural and probable consequences doctrine. As discussed in part IIB2, that doctrine did not require the trial court to instruct the jury on malice aforethought because malice aforethought need not, and cannot, be proved when aider and abettor culpability is premised on the natural and probable consequences doctrine. (See part IID3, *ante*) The aider and abettor cannot harbor malice aforethought with respect to a murder the aider and abettor did not anticipate.

Appellant argues that instead of instructing the jury on murder under the natural and probable consequences doctrine, the trial court should have instructed on involuntary manslaughter because he committed a misdemeanor assault without malice aforethought and a death resulted. The fact that appellant aided and abetted in an assault did not preclude culpability for second degree murder under the natural and probable consequences doctrine, which has entirely different rationale. In *Gonzalez,* the Supreme Court rejected the contention that simple assault could not, as a matter of law, support liability for murder under the natural and probable consequences doctrine. (*Gonzalez,*

supra, 52 Cal.4th at p. 300; see also *People v. Medina, supra,* 46 Cal.4th 913 [neither the majority nor the dissent questioned that simple assault could serve as the target offense].) It merely stated that murder under that doctrine could not be based on "'"trivial activities."'" (*Gonzalez, supra,* at p. 299.)

The assault here was not a trivial activity. It was an attack by two men, one of whom was armed, on a father who was with his children. Appellant and the unidentified man were beating Leonardo and given the gang nature of the attack, it was clearly aimed at seriously injuring or killing him. This type of an attack justifies a murder conviction under the natural and probable consequences doctrine.

III. The natural and probable consequences doctrine should be repudiated

A. Contention

Appellant contends that the natural and probable consequences doctrine should be repudiated. He argues that it is a judicially-created, nonstatutory theory that is unconstitutional because it eliminates the statutory element of malice and violates the separation of powers, as the creation of all crimes has been dedicated by the California Constitution to the Legislature. We do not agree, and, in any event, we are constrained to follow the mandate of our Supreme Court, which has declined to abrogate the doctrine.

B. Our Supreme Court has endorsed the natural and probable consequences doctrine

As we discussed in part IID3, *ante,* the natural and probable consequences doctrine is not unconstitutional by reason of its failure to require proof of malice. Further, the *Chun* analysis of the separation of powers contention regarding the second degree felony-murder rule is applicable to the natural and probable consequences doctrine. (*Chun, supra,* 45 Cal.4th at pp. 1180–1188.)

In any event, our Supreme Court has ruled that the natural and probable consequences doctrine is "an 'established rule' of American jurisprudence" that has been "embrace[d]" in California. (*Prettyman, supra,* 14 Cal.4th at p. 260; see also *Gonzalez, supra,* 52 Cal.4th at p. 300). It has expressly rejected, even in a capital case, the

argument that the natural and probable consequences doctrine is unconstitutional because it abrogates the requirement of malice. (*Letner, supra,* 50 Cal.4th at pp. 184–185 ["Finally, defendants contend the application of the natural-and-probable-consequences doctrine in a capital case is a violation of due process because it permits the jury to convict the defendant of the substantive charges and special circumstance allegations 'without a need to decide if he had the otherwise requisite intent,' and would authorize 'a death sentence based on a vicarious negligence theory of liability,' in violation of the Eighth Amendment. We have rejected these contentions, and decline to revisit our prior decisions"].) We find no suggestion in Supreme Court's decisions of any intention of diluting or eliminating that doctrine. We may not ignore its pronouncements (*Auto Equity Sales, Inc. v. Superior Court, supra*, 57 Cal.2d at p. 455) and are therefore not free to repudiate the natural and probable consequences doctrine.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD