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Opinion following transfer from Supreme Court

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. SAVIRANT SINGH ATHWAL, Defendant and Appellant.	F084358 (Super. Ct. No. MCR058031B) **OPINION**

APPEAL from a judgment of the Superior Court of Madera County. Ernest J. LiCalsi, Judge.

Sylvia W. Beckham, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters and Charles C. Ragland, Chief Assistant Attorney General, Michael P. Farrell and Kimberley A. Donohue, Assistant Attorney General, Julie A. Hokans, Ivan P. Marrs, and Galen N. Farris, Deputy Attorneys General, for Plaintiff and Respondent.

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INTRODUCTION

In 2017, appellant Savirant Singh Athwal (appellant) planned and executed an armed robbery of a convenience store. He committed this robbery with his cousin and codefendant, Amritraj Singh Athwal (Amritraj). During the robbery, appellant was unarmed. However, he directed Amritraj to use a firearm. During the robbery, Amritraj shot a clerk to death.

In 2022, a jury convicted appellant of first degree murder (Pen. Code, § 187, subd. (a)),[1] finding true that the murder was committed during a robbery (§ 190.2, subd. (a)(17)). Appellant was sentenced to life in prison without the possibility of parole (LWOP).

Appellant appealed, arguing that insufficient evidence showed he acted with reckless indifference to human life. He also raised claims of instructional and cumulative errors. Finally, he asserted that, because he is statutorily ineligible for a youth offender parole hearing, he has been denied equal protection under the law.

In May 2024, we rejected appellant's arguments and affirmed his judgment.[2] (*People v. Athwal* (May 7, 2024, F084358) [nonpub. opn.].)

In July 2024, the California Supreme Court granted appellant's petition for review. The high court deferred further action pending consideration and disposition of *People v. Emanuel* (2025) 17 Cal.5th 867 (*Emanuel*).

In September 2025, the California Supreme Court transferred this matter back to us with directions to vacate our decision and reconsider the cause in light of *Emanuel*.

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[1] All future references to statutes are to the Penal Code unless otherwise noted.

[2] In case No. F084396, we addressed issues that Amritraj raised, affirming his judgment.

On September 25, 2025, we vacated our prior opinion and set a briefing schedule. The parties filed supplemental briefs with us regarding *Emanuel* and its impact on appellant's judgment.

Emanuel reaffirmed that participation in a typical armed robbery, standing alone, does not establish the mental state necessary to hold a nonshooter liable for first degree felony murder. (*Emanuel, supra,* 17 Cal.5th at p. 884.) Rather, the record must contain evidence that the defendant was aware of, and willingly involved in, the violent manner in which the offense was carried out, and that he consciously disregarded the significant risk of death that his actions created. (*Ibid.*)

After considering *Emanuel* and reviewing the record under the substantial-evidence standard, we again conclude that the jury could reasonably find beyond a reasonable doubt that appellant held his own reckless indifference to human life. Viewed in the light most favorable to the judgment, the record provides ample evidence that appellant was aware of and willingly involved in the violent manner in which this robbery was committed, and he consciously disregarded the significant risk of death his actions created. (*Emanuel, supra,* 17 Cal.5th at p. 884.) Appellant did not merely participate in a robbery that unexpectedly became lethal. Instead, he was the mastermind of this crime, directed a severely impaired accomplice to bring and display a firearm to compel compliance, and took no steps to limit how that weapon should be used. When lethal force was unmistakably introduced through gunfire inside a small store against a compliant victim, appellant chose not to disengage but to continue the robbery and flee with the stolen property. Despite previously working with the clerk and hearing the final shots fired, appellant did not return to check on the clerk's condition. From these circumstances, substantial evidence supports the jury's finding of reckless indifference to human life, and a reasonable jury could find beyond a reasonable doubt the elements necessary to convict. Accordingly, we affirm the conviction for first degree murder

(§ 187, subd. (a)) and the true finding on the robbery-murder special circumstance allegation (§ 190.2, subd. (a)(17)). We also reject appellant's remaining claims.

BACKGROUND

At trial, certain facts became undisputed for the jury. Appellant and his younger cousin, Amritraj, robbed a convenience store together. Appellant had planned this robbery and Amritraj was the shooter who killed the clerk, Dharampreet Singh Jassar. Appellant was 24 years old when this crime occurred, and Amritraj was 21 years old.

In the day leading up to this crime, appellant and Amritraj imbibed a substantial amount of alcohol. They also both smoked marijuana, took Xanax pills, and they each ingested cocaine. Appellant's drug consumption on the day of the robbery was not unusual for him.

Amritraj did not testify at trial. During closing argument, Amritraj's trial counsel made voluntary intoxication the foundation of his defense. His counsel asserted that, because of his extreme intoxication, Amritraj had been unable to form the mental states necessary for first degree murder. Amritraj's counsel asked the jury to find Amritraj guilty of second degree murder.

Appellant testified at trial. He admitted he had planned this robbery, and both he and Amritraj had stolen property from the store. However, he told the jurors that they never had a plan to injure the clerk. Unlike Amritraj, appellant's counsel did not rely on voluntary intoxication when arguing this matter to the jurors. Instead, appellant's counsel admitted that appellant had planned the robbery, and he was its "mastermind." Appellant's counsel asserted to the jurors that Amritraj had unexpectedly killed Jassar, and the evidence showed that Amritraj had committed premeditated first degree murder. Appellant's counsel asked the jurors to find appellant not guilty of felony murder.

In rendering its verdicts, it is apparent the jurors rejected both appellant's and Amritraj's positions. The jury convicted both appellant and Amritraj of first degree

murder. We summarize the material facts that support appellant's verdict. We provide additional details later in this opinion when relevant to the issues raised.

I. The Plan to Rob the Store.

Prior to planning this robbery, appellant had worked a short time at the convenience store where this crime took place. This store is located in Madera County. In 2017, the store closed at 11:00 p.m. Appellant knew that, at closing time, there were fewer customers inside the store. Appellant also knew that, at closing time, whoever was on duty would be removing cash from the registers.

In 2017, appellant was drinking alcohol daily, using marijuana, and taking Xanax. He would occasionally imbibe cocaine. On November 12, 2017, appellant and Amritraj drank whiskey and beers together, and they smoked marijuana. They both ingested Xanax. Appellant formed an idea to rob the store. He made it clear to the jury that he alone planned this robbery.

Amritraj was visiting appellant from out of town when the plan was formed. Appellant noticed that Amritraj had brought handguns with him, a .38-caliber and a .22-caliber. Appellant instructed Amritraj to use a gun to scare the clerk. It was appellant's idea to use a gun during this robbery to assist them in "getting the stuff" so they could "get out of there." They did not discuss firing the gun during the planned robbery. Appellant decided to bring zip ties in case he had to secure the clerk.

On November 12, 2017, appellant and Amritraj drove to the store at night. However, they did not rob it that night. According to appellant, there was too much activity around the store, so they aborted the plan.

Appellant slept that night. However, he believed Amritraj was awake all night. The next day, they started drinking alcohol in the early afternoon. They shared a bottle of whiskey and a 12-pack of beer. They also smoked marijuana and imbibed Xanax. They still planned to rob the store.

On November 13, 2017, appellant and Amritraj drove back to the store using Amritraj's truck. Before heading to the store, appellant removed the back license plate from the truck and possibly the front plate, too. Just before driving to the store, they both ingested cocaine. Appellant admitted at trial that he took the cocaine to "get back up again" prior to the robbery.

Appellant again brought zip ties in case he needed to secure the clerk on duty. Appellant knew that Amritraj had his .38-caliber gun with him. Appellant knew the .22-caliber was available in the truck, but appellant did not use it.

On the night they committed these crimes, appellant and Amritraj arrived at the store at about 10:50 p.m.

II. The Killing.

This robbery and murder were captured on the store's surveillance system. The video was played for the jury.

Amritraj entered the store first. Immediately upon entering, Amritraj held out his handgun and he advanced quickly toward Jassar, who was the clerk on duty. No customers were inside the store.[3]

Appellant entered the store about eight seconds behind Amritraj. Both had on hooded sweatshirts, they had their faces covered, and they wore gloves. Amritraj was not wearing shoes (but he was wearing socks), his pants were on backwards, and his sweatshirt was inside-out.

Appellant retrieved keys from Jassar. For about 20 seconds, appellant attempted to lock the store's front door, but he was unsuccessful. While attempting to lock the front doors, a vehicle approached the store, which scared appellant. That vehicle pulled away. Appellant assumed that law enforcement was going to be summoned in a minute or two.

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[3] The owner of the store testified that no firearms were provided to the clerks. Appellant agreed that, when he worked there, no gun was available for the clerk to use in defense.

He agreed that this meant they "needed to escalate force" and have Jassar at gunpoint so they could get everything quickly.

Appellant went behind the store's counter, and he took cash from an open safe. Amritraj picked up a money pouch. During this time, Amritraj was standing very close to Jassar while threatening Jassar with the gun. Jassar was compliant at all times.

Because he had previously worked there, appellant knew that boxes of cigarettes were kept inside the store's office, which was unlocked. Appellant went inside the office, and he retrieved boxes containing about 60 cartons of cigarettes.

While appellant was inside the office, Amritraj moved to the opposite side of the counter from Jassar. Amritraj pointed his gun in the general direction of Jassar, and he fired it once. The shot hit the countertop in front of Jassar, and the bullet ricocheted into the ceiling.[4] At no time was Jassar threatening Amritraj or offering any signs of resistance.

Appellant came out of the office carrying the cigarettes. He said to Amritraj, "What the hell[?]" Appellant jogged across the store to the front door. Jassar was cowering behind the counter with his hands up. Amritraj met appellant at the front door, and Amritraj held open the door so appellant could exit with the boxes.

As appellant neared the front door, Amritraj held the gun up in Jassar's general direction. Appellant did not tell Amritraj to put the gun away or even to put it down. Instead, appellant told him that they needed to "go" and get "out of here." Just as appellant walked through the door, Amritraj cocked the hammer of his revolver and he aimed the gun toward Jassar, who was still crouching behind the counter but also starting to stand up to watch them exit. Just after appellant walked out of the store, Amritraj took a step toward the counter, and he leaned forward. Amritraj fired twice. He was about 12 to 15 feet from Jassar, who was partially cowering behind the counter. A shot struck

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[4] Law enforcement later recovered that bullet.

Jassar in his head. Immediately after firing the fatal shot, Amritraj attempted to fire the gun again, but it appears his gun was empty because it did not discharge when he pulled the trigger. Jassar collapsed behind the counter and Amritraj exited the store. It does not appear that Amritraj saw Jassar collapse; Jassar was obscured by the counter and numerous objects on the counter.

Jassar was killed by a single gunshot to his head. The bullet was recovered inside him. The bullet was consistent with a .38-caliber.

The robbery lasted about one minute and 24 seconds from the time Amritraj first entered the store until the time he exits the store after fatally shooting Jassar. Approximately 14 seconds passed from the time Amritraj fired the first shot until Amritraj fired the fatal shot just after appellant exited the store.

III. Appellant and Amritraj Are Arrested.

After exiting the store, appellant and Amritraj drove to a hotel where they had parked appellant's vehicle. Appellant asked Amritraj why he had fired the gun. According to appellant, Amritraj said he had tried to scare the clerk so he would not call the police.

At the hotel parking lot, they split about $600 taken from the store. Appellant planned on selling the stolen cigarettes.

A security guard at the hotel interacted with appellant and Amritraj. Because they did not have a room at that hotel, the guard asked them to leave the hotel parking lot. Amritraj appeared very intoxicated, with eyes that were "super glazed, dilated." Amritraj asked the security guard "crazy questions," including if the guard was "gay." In contrast, appellant's demeanor seemed normal.

After splitting the cash and talking for a while, appellant and Amritraj drove away in their respective vehicles. The security guard called 911 and reported that Amritraj appeared to be a drunk driver. Later that night, Amritraj drove his truck off the road. At

about 1:32 a.m. that same night, he was arrested on suspicion of driving under the influence. Law enforcement found a loaded .22-caliber handgun under the seat of his truck. An unloaded .38-caliber handgun was recovered from the center console. Law enforcement subsequently realized he might be connected with this robbery and homicide. Testing established that Amritraj's .38-caliber handgun was used to kill Jassar.

On the night of the robbery, appellant drove to San Jose, California. From the news, appellant learned that Jassar had died. Appellant did not turn himself into authorities because he was scared. He discarded the stolen cigarettes after he could not find a buyer.

Appellant was arrested about a month after this crime. He initially lied to law enforcement. He claimed he had nothing to do with this murder. He claimed that Amritraj had acted alone and Amritraj must have targeted that store because he (appellant) had previously worked there. Appellant told law enforcement that Amritraj had been using drugs, and he was not there "mentally."

At trial, appellant claimed that he had decided to tell the truth because a death had occurred. He admitted that he had lied to law enforcement. He told the jurors that he had testified truthfully.

Appellant emphasized to the jurors that there was never an intention to shoot the clerk when they planned this robbery. He claimed he never thought Amritraj would discharge the firearm. He explained that he had told Amritraj to just "flash the gun" and scare the clerk. They had never discussed firing the gun.

IV. Appellant's Relevant Statements to the Jury.

At trial, appellant testified that, when he and Amritraj arrived at the store on the second night to commit this robbery, he recognized Jassar's vehicle parked outside the store. Appellant had worked with Jassar. They had previously exchanged text messages. When the robbery was underway, appellant recognized Jassar.

At trial, appellant agreed that Amritraj was in "bad shape" on the night this crime occurred. Amritraj had not slept the night before. Appellant admitted that, on the day of this crime, Amritraj had consumed more drugs than he had and Amritraj was under the influence of drugs more than appellant. Appellant agreed that Amritraj had been "struggling" to do his part during the robbery.

At trial, appellant agreed that taking drugs can make a person more erratic and not think clearly. He admitted that pointing a loaded gun at someone is dangerous. He also admitted it is dangerous if someone is impaired, and they have a loaded gun. He agreed that Amritraj had not been in his right "mindset" on the night of this crime. Appellant admitted that Amritraj should not have had a loaded gun that night. Appellant testified that he was used to Amritraj "being in that mental state all the time so it was nothing new to me." Appellant told the jury that their drug use that day had impacted their judgments.

Appellant claimed he did not know that Amritraj's gun was loaded until it was fired during the robbery. When he was inside the office retrieving the cigarettes, appellant heard Amritraj fire the first shot. He told the jurors that, at the time, he had assumed Amritraj had fired a warning shot. When he exited the office, appellant saw that Jassar was alive behind the counter holding his hands up. Appellant admitted to the jurors that firing a gun inside a building is dangerous.

At trial, appellant admitted that he had been the leader of this robbery and Amritraj followed him. Appellant agreed that, if he would have told Amritraj to put the gun away, Amritraj would have complied. Appellant agreed that, if he would have told Amritraj to not shoot the gun, Amritraj would have complied. He also agreed that, if he would have told Amritraj to use an unloaded gun, Amritraj would have complied. Appellant agreed with the idea that his inaction resulted in Amritraj shooting Jassar. However, appellant told the jurors that he and Amritraj "were not using our best judgment" that night and they were "on a totally different amount of drugs." Appellant testified that he was not "thinking straight" that night and, looking back with a clear head,

he agreed the situation was dangerous. He claimed that, at the time, he was under the influence and he "wasn't thinking straight."

Appellant admitted that, as he was exiting the store, he saw Amritraj raise the gun. However, appellant would not admit that Amritraj was pointing the gun at Jassar. Appellant heard the final two shots after he walked out of the store. He did not return to check on Jassar's condition. According to appellant, he had assumed Amritraj had fired more warning shots, and he was focused on fleeing. He never thought Jassar had been injured. He told the jury that he had been doing drugs all day that day. He said his mind was fogged, he was impaired, and he had been scared. He said all shots were just a warning to scare Jassar, and they had never planned to injure anyone.

DISCUSSION

I. Substantial Evidence Supports the Murder Conviction and the Jury's True Finding Regarding the Special Circumstance Allegation.

Murder is the unlawful killing of a person "with malice aforethought." (§ 187, subd. (a).) Murder committed in the perpetration of a robbery is murder in the first degree. (§ 189, subd. (a).)

Following passage of Senate Bill No. 1437 (2017–2018 Reg. Sess.) (Senate Bill No. 1437), malice may not be imputed to a person based solely on his participation in a crime.[5] (§ 188, subd. (a)(3).) When death occurs during the perpetration of certain

[5] This murder occurred in 2017. Senate Bill No. 1437 was effective January 1, 2019. It amended both the felony-murder rule and the natural and probable consequences doctrine to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life. (*People v. Strong* (2022) 13 Cal.5th 698, 707–708; § 189, subd. (e)(1)–(3).) At the trial in 2022, the prosecutor did not rely on the natural and probable consequences doctrine to establish appellant's liability for murder. Instead, only a theory of first degree felony murder was presented to the jury to decide appellant's guilt.

enumerated felonies, including robbery, a participant in that underlying felony is liable for murder only if one of the following is proven:

(1) The person was the actual killer;

(2) The person was not the actual killer, but with the intent to kill, aids and abets the actual killer in the commission of murder in the first degree; or

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life as described in section 190.2, subdivision (d). (§ 189, subd. (e)(1)–(3).)

Section 190.2, subdivision (d), provides that "every person, not the actual killer, who, with reckless indifference to human life and as a major participant" aids or abets an enumerated felony, including robbery, that results in death may be convicted of special circumstance murder and sentenced to death or LWOP.

A. *The definition of "reckless indifference to human life."*

The "major participant" and "reckless indifference" requirements derive from *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*) and *Enmund v. Florida* (1982) 458 U.S. 782. Together, these opinions define the constitutional limits of felony-murder liability for a nonkiller. *Tison* held that major participation combined with reckless indifference to human life made it constitutionally permissible to impose the death penalty on nonkillers. (*Tison*, at p. 158.) *Enmund* held that participation without such mental culpability—like a getaway driver who has no intention in participating or facilitating a murder—does not. (*Enmund*, at p. 798.)

Appellant concedes that "ample evidence" shows he was a major participant in the underlying robbery. We agree. Thus, the sole issue before us is whether substantial evidence supports the jury's finding that he acted with reckless indifference to human life within the meaning of sections 189, subdivision (e)(3), and 190.2, subdivision (d).

Reckless indifference to human life has a subjective and an objective element. (*People v. Clark* (2016) 63 Cal.4th 522, 617 (*Clark*).) For the subjective element, "[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed," and he or she must consciously disregard "the significant risk of death his or her actions create." (*People v. Banks* (2015) 61 Cal.4th 788, 801; see *Clark,* at p. 617.) As to the objective element, " '[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor's conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation.' " (*Clark,* at p. 617, fn. omitted, quoting Model Pen. Code, § 2.02, subd. (2)(c).)

Awareness of a foreseeable risk of death that is inherent in any violent felony is insufficient to establish reckless indifference to human life. Instead, the defendant must knowingly create a " 'grave risk of death.' " (*Banks, supra,* 61 Cal.4th at p. 808, quoting *Tison, supra,* 481 U.S. at p. 157.) Our high court cautions that merely planning an armed robbery or knowing a confederate is armed during a robbery are insufficient. (*Clark, supra,* 63 Cal.4th at pp. 617, 623.)

B. *Emanuel.*

In *Emanuel*, the defendant was convicted of felony murder following a fatal shooting committed by his codefendant that occurred during the commission of a robbery perpetrated by the defendant and the codefendant. (*Emanuel, supra,* 17 Cal.5th at p. 874.) After statutory changes to the definition of murder, the defendant sought resentencing in the trial court. The lower court denied the petition, concluding that, although there was no evidence the defendant had known his codefendant was armed or likely to use lethal force, the defendant should have "acted to 'prevent' the shooting as the robbery unfolded." (*Id.* at p. 881.) In the court's view, the defendant " 'created' the

situation by participating in the robbery" and had an affirmative obligation to do more than flee when the shots were fired. (*Ibid.*) The appellate court affirmed on similar grounds, concluding that the defendant's participation in planning the robbery and his failure to intervene demonstrated reckless indifference to human life. (*Ibid.*)

The Supreme Court reversed, explaining that the reckless-indifference inquiry must center on the defendant's subjective mental state and not on whether, in hindsight, the defendant could have taken additional steps to prevent the killing. (*Emanuel, supra,* 17 Cal.5th at pp. 891–892.) The high court reiterated that a " ' "garden-variety armed robbery" ' " standing alone, does not establish the requisite mental state. (*Id.* at p. 884.) Rather, the record must show that the defendant "was aware of and willingly involved in the violent manner in which the felony was committed and consciously disregarded the significant risk of death that his or her actions created." (*Id.* at p. 895.) *Emanuel* instructs that a failure to restrain a confederate during the commission of the robbery cannot be assigned undue weight unless the evidence shows the defendant had a meaningful opportunity to act and an awareness of an impending risk of lethality. (*Id.* at p. 892.)

C. *The standard of review.*

When considering a challenge to the sufficiency of the evidence to support a conviction, we review the record in the light most favorable to the judgment and decide whether it contains substantial evidence from which a reasonable finder of fact could make the necessary finding beyond a reasonable doubt. The evidence must be reasonable, credible and of solid value. We presume every inference in support of the judgment that the finder of fact could reasonably have made. We do not reweigh the evidence or reevaluate witness credibility. We cannot reverse the judgment merely because the evidence could be reconciled with a contrary finding. (*People v. D'Arcy*

(2010) 48 Cal.4th 257, 293.) This same standard is used to test the sufficiency of the evidence for a special circumstance allegation. (*Clark*, *supra*, 63 Cal.4th at p. 610.)

D. *The relevant factors to consider.*

An appellate court considers the totality of the circumstances to determine whether a defendant acted with reckless indifference to human life. (*In re Scoggins* (2020) 9 Cal.5th 667, 677.) Our high court has provided approximately seven factors as guidelines. However, no single factor is necessary and, likewise, no single factor is necessarily sufficient. (*Emanuel, supra,* 17 Cal.5th at pp. 885–887, 889; *Clark*, *supra*, 63 Cal.4th at pp. 618–623.)

In *Emanuel*, our high court clarified that lower courts should consider the presence or absence of evidence relating to each relevant factor on its own merits before considering the evidence in its totality. (*Emanuel, supra*, 17 Cal.5th at p. 888). After reviewing the individual factors, the totality of the circumstances must be analyzed to determine whether the defendant acted with reckless indifference. (*Id.* at p. 885.)

We turn to the various factors.

1. The duration of the robbery.

The entire offense—from the moment Amritraj first entered the store until the fatal shot was fired—lasted less than 90 seconds. Approximately 14 seconds passed from the time Amritraj fired the first shot while appellant was in the store gathering the cigarettes until Amritraj fired the fatal shot just after appellant exited the store.

Emanuel explains that a lengthy interaction may heighten risk, but a short, rapidly escalating event typically does not. (*Emanuel, supra,* 17 Cal.5th at p. 892.) Given the short duration of this crime, this factor does not support a finding of reckless indifference.

2. The number of weapons used.

Only one firearm was employed during this robbery, the .38-caliber that Amritraj used to kill Jassar. Appellant had access to a second gun (Amritraj's .22-caliber firearm),

but he chose to remain unarmed during the crime. The presence of a single weapon, rather than multiple firearms, limited the potential for crossfire or escalation among the participants. Appellant's decision to remain unarmed weighs against a finding that he held a reckless indifference to human life.

3. Appellant's knowledge of Amritraj's propensity for violence.

Prior to this robbery, there is no evidence that Amritraj had a propensity for violence. Accordingly, nothing under this factor supports a finding of reckless indifference.

4. Appellant's knowledge that a gun would be used.

Unlike the defendant in *Emanuel*, appellant personally orchestrated the use of the firearm that was used to kill Jassar. At trial, appellant testified that he did not know the firearm was loaded until Amritraj fired the first shot. However, the jury was not required to accept that testimony. Appellant instructed Amritraj to use the gun to scare the clerk on duty. A reasonable inference may be drawn that appellant understood Amritraj would bring a loaded and operable firearm.

Our high court holds that the mere fact a defendant knows a gun will be used in an underlying felony is not, by itself, sufficient to establish reckless indifference. (*Clark, supra,* 63 Cal.4th at p. 618.) Here, however, the jury could reasonably view appellant's role in planning this robbery around the display of the firearm, and directing its use to compel compliance, as materially more than simple passive awareness. Appellant's intention to make a gun a primary tool in this robbery is probative of his subjective acceptance of the grave risk of death the plan created. Viewed in the light most favorable to the verdict, this factor weighs in favor of finding that appellant acted with a reckless indifference.

5. Appellant's efforts to minimize the risk of violence.

Our high court holds that a defendant's apparent efforts to minimize the risk of violence can be relevant to the reckless indifference analysis, and an appellate court should consider whether those efforts go towards supporting or failing to support the jury's finding of reckless indifference to human life. (*Clark, supra,* 63 Cal.4th at p. 622.)

Appellant contends he took the following steps to minimize a risk of violence: (1) postponing the robbery until the next night to reduce bystanders; (2) bringing zip ties; (3) Amritraj's lack of a known history of violence; (4) planning a coordinated, quick robbery; and (5) trying to lock the front door. According to appellant, these efforts weigh in his favor. We disagree.

A reasonable inference may be drawn that appellant scheduled the robbery for the next night near closing time not to protect potential bystanders but, instead, to increase his chance of success while maximizing the amount of cash in the register. Likewise, appellant's possession of zip ties does not reflect concern for Jassar's well-being. Preparing to restrain a clerk demonstrates an intent to maintain control during the offense, not to limit the danger created by arming a severely impaired accomplice. Appellant's attempt to lock the door would not have assisted Jassar. Instead, locking the door would have trapped Jassar inside the store with two assailants, heightening rather than diminishing the potential for lethal confrontation.

The jury was not required to view any of appellant's actions as reducing a risk of violence. To the contrary, a reasonable inference may be drawn that appellant took no affirmative steps to minimize the obvious danger his plan created. At trial, appellant admitted that (1) having an impaired person point a loaded gun at someone is dangerous; (2) Amritraj had not been in his right "mindset" on the night of this crime; and (3) Amritraj should not have had a loaded gun that night.

Appellant's admissions are significant. From them, reasonable inferences may be drawn that appellant understood before entering the store that he was arming a

confederate who lacked the stability or judgment to safely control a firearm. Appellant nonetheless proceeded with a plan that depended on the display of that firearm to obtain compliance from the clerk. Appellant did not instruct Amritraj to keep the gun unloaded, to avoid pointing it at anyone, or to refrain from firing it. The evidence supports a conclusion that appellant's plan increased, rather than mitigated, the likelihood that lethal force would be used. Contrary to appellant's position, the evidence under this factor weighs in favor of finding reckless indifference to human life.

6. Appellant's presence at the scene.

Appellant was present inside the store throughout the robbery. He personally observed the escalating circumstances.

At the start of the robbery, appellant attempted to lock the front door. While doing so, he saw a vehicle approach the store and he became concerned that law enforcement might be summoned. Rather than reassessing the danger or abandoning the robbery, appellant agreed at trial that the concern of police intervention meant they "needed to escalate force" by keeping Jassar at gunpoint so they could obtain the property quickly. This trial admission is inconsistent with any intent to minimize harm. It reflects a willingness to heighten the threat posed to Jassar when the situation became more volatile. A rational jury could view this moment as demonstrating that appellant recognized the danger his plan had created and he chose to increase, rather than limit, the level of risk.

Appellant watched Amritraj threaten Jassar with the gun. While inside the office retrieving cigarettes, appellant heard the first gunshot—an unmistakable signal that lethal force had entered the encounter. Appellant ran towards the door to exit the store. As he reached the doorway to leave, he saw Amritraj raise the gun in Jassar's general direction. Seconds later, he heard two additional shots just after he exited the store.

Appellant's proximity to the unfolding violence permits a reasonable inference that he subjectively appreciated the gravity of the risk as the situation escalated. His presence at the scene of this crime supports a finding of his own reckless indifference.

7. Appellant's opportunity to restrain the crime or aid the victim.

Emanuel cautions that courts must not place undue weight on what more a defendant might have done to prevent violence once a crime is underway, particularly where events unfold rapidly. (*Emanuel*, *supra*, 17 Cal.5th at p. 891.) The relevant inquiry is not whether the defendant did enough to stop the shooter's unplanned act of violence, but whether the evidence supports a finding that the defendant acted with the requisite mens rea. Efforts at restraint serve as only one of several factors that should be assessed under the totality of the circumstances to decide whether the defendant acted with reckless indifference to human life. (*Ibid*.)

Viewed through that lens, the jury could reasonably infer that appellant's conduct after the first gunshot reflected his subjective acceptance of a known, grave risk of death. Appellant heard the initial gunshot fired inside the store—an unmistakable signal that lethal force had been employed—and was thereby made aware that the robbery had escalated beyond the mere display of a firearm and that the risk to Jassar's life had materially changed. Appellant nevertheless chose to proceed with the robbery rather than disengage. At trial, he admitted that he was in charge of the robbery and that Amritraj would have listened to him. From these circumstances, a reasonable jury could infer that appellant recognized both the gravity of the risk and his ability to influence his accomplice, yet he consciously accepted the risk and chose to complete the robbery.

Appellant contends that, because he did not see Amritraj fire the first shot but merely heard it, it is not fair to conclude that he shared in Amritraj's actions and mental state. This argument is unpersuasive. A reasonable jury could infer that the situation had escalated dramatically once Jassar, whom appellant had observed being compliant, was

subjected to gunfire inside the store. Even without visually witnessing that first shot, appellant was fully aware that lethal force had been introduced when there had been no apparent necessity for it. From these circumstances, a reasonable inference may be drawn that appellant appreciated the grave risk of death that existed, and he consciously disregarded it.

Appellant argues he was a "restraining influence" during this robbery because he told Amritraj to leave after the first shot occurred. According to appellant, his conduct was "nearly identical" to the situation in *Emanuel*, where the defendant encouraged his accomplice to leave the scene. Appellant contends that his conduct during the robbery should negate a finding of reckless indifference.

Appellant's position lacks merit. In *Emanuel*, the defendant told his accomplice that they should " 'go' " after the victim refused to relinquish the marijuana without payment but before the fatal shot occurred. (*Emanuel*, *supra*, 17 Cal.5th at pp. 886, 896.) Here, by contrast, appellant heard a gunshot fired inside a confined store after personally seeing that Jassar had been compliant. Despite the clear escalation of violence, appellant continued the robbery, fled with the stolen goods, and saw Amritraj raise the gun as he was leaving the store. He then heard two additional shots. Appellant never checked on Jassar's condition. From all of this, a reasonable jury could infer that appellant recognized a grave risk of death had entered the encounter, and he accepted that risk to secure the stolen property. These circumstances sharply distinguish this case from *Emanuel*.

Consistent with the analytical approach outlined in *Emanuel*, we do not impose any requirement that appellant should have restrained Amritraj or rescued Jassar. Nor do we place dispositive weight on what more appellant might theoretically have done in a rapidly unfolding situation. The significance of appellant's conduct lies in what his response, viewed in context, reveals about his state of mind. A rational jury could reasonably conclude that appellant accepted the use of lethal violence to complete the

robbery and escape, thus demonstrating that appellant consciously disregarded a known and substantial risk to human life. The evidence under this factor supports a finding of reckless indifference.

E. *The totality of the circumstances.*

Appellant concedes that two factors support the verdict: (1) his decision to direct a severely intoxicated accomplice to bring a gun into the store and (2) his failure to render aid in case Jassar had been injured by the second or third shots. He argues, however, that most of the factors from *Clark* weigh against a finding of his reckless indifference. We disagree. Substantial evidence supports the jury's verdict. A rational jury could conclude beyond a reasonable doubt that appellant recognized the grave risk of death that existed, and he consciously disregarded that risk.

We consider the *Clark* factors together and in context to determine whether substantial evidence supports the jury's findings that appellant acted with reckless indifference to human life. In evaluating the *Clark* factors and the totality of the circumstances, we do not impose an affirmative duty on appellant to intervene, restrain his accomplice, or render aid in a rapidly unfolding and dangerous situation. Rather, the question is whether the jury could reasonably infer from appellant's conduct that he subjectively appreciated and consciously disregarded the grave risk to human life his participation in the robbery created.

Viewed in the light most favorable to the judgment, the record provides ample evidence that appellant was " ' "aware of and willingly involved in the violent manner" ' " in which this robbery was committed, and he consciously disregarded " ' "the significant risk of death" ' " his actions created. (*Emanuel, supra,* 17 Cal.5th at p. 884.) Appellant did not merely participate in a robbery that unexpectedly became lethal. Instead, he was the mastermind of this crime, directed a severely impaired accomplice to bring and display a firearm to compel compliance, and took no steps to

limit how that weapon should be used. When lethal force was unmistakably introduced through gunfire inside a small store against a compliant victim, appellant chose not to disengage but to continue the robbery and flee with the stolen property. Despite previously working with Jassar and hearing the final shots fired, appellant did not return to check on Jassar's condition. From these circumstances, substantial evidence supports the jury's finding of reckless indifference to human life, and a reasonable jury could find beyond a reasonable doubt the elements necessary to convict. Consequently, we affirm both the murder conviction and the special circumstance finding.

II. Appellant Has Forfeited His Claim of Instructional Error Regarding Voluntary Intoxication and Any Alleged Error Is Harmless.

During trial, the prosecution asked the court to instruct the jurors on the doctrine of voluntary intoxication. Appellant's counsel informed the court that, even if he was not intending to argue voluntary intoxication for appellant, substantial evidence supported such an instruction for both defendants.

The court agreed to instruct the jury regarding voluntary intoxication. For appellant, the jurors were told to consider whether his intoxication impacted his ability to aid and abet a robbery and/or whether he intended to commit robbery. The jurors were told they could not consider evidence of voluntary intoxication "for any other purpose."

Appellant and Amritraj presented very different defenses to the jury. During closing argument, Amritraj made voluntary intoxication the cornerstone of his defense.[6] His counsel asserted to the jurors that Amritraj was so impaired he was unable to form the intent necessary for felony murder, or to premeditate and deliberate this killing. Amritraj's counsel claimed that Amritraj had been a "tool" for appellant, who planned

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[6] For Amritraj, the jurors were told to consider whether his intoxication impacted his ability to aid and abet a robbery; whether he acted with an intent to kill; whether he premeditated and deliberated a murder; whether he intended to commit robbery; and/or whether he intended to discharge a firearm.

everything. The jury was asked to find Amritraj not guilty of first degree murder and, instead, convict him of second degree murder.

Appellant's defense did not rely on voluntary intoxication. Although appellant testified he was impaired when he committed this robbery and he was not using his best judgment that day because of drugs, his counsel never requested instruction on voluntary intoxication, and his counsel did not argue this defense to the jury. Instead, appellant's counsel admitted to the jurors that appellant had planned the robbery, and he was the "mastermind" behind it. Appellant's counsel asserted that Amritraj had unexpectedly killed Jassar with his own premeditation and deliberation. According to appellant's counsel, appellant had no way of preventing this death, and he had no notice that Amritraj might use deadly force. Appellant's counsel asked the jurors to find appellant not guilty of felony murder and, instead, find Amritraj liable for first degree murder.

Appellant contends that instructional error occurred regarding voluntary intoxication. He asserts the jurors should have been directed to consider his intoxication in deciding whether he acted with a reckless indifference to human life. He seeks reversal of his judgment.

The parties disagree whether a "reckless indifference to human life" is a general intent crime, a specific intent crime, or whether it integrates a third mental state, such as "knowledge" of a grave risk of death. A general criminal intent applies when the definition of a crime consists of only the description of a particular act, without reference to intent to do a further act or achieve a future consequence. In contrast, when the definition refers to a defendant's intent to do some further act or achieve some additional consequence, the crime is deemed to be one of specific criminal intent. (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1127.) Our high court has acknowledged that these two categories—general and specific criminal intent—are potentially confusing and simplistic because "some crimes have other required mental states such as knowledge[]." (*Ibid*.)

How a crime is classified is key to whether voluntary intoxication can be used as a defense. Evidence of voluntary intoxication is admissible only regarding "whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b).) In general, evidence of voluntary intoxication is inadmissible to negate the existence of a general criminal intent, but it may negate a specific criminal intent.[7] (*People v. Atkins* (2001) 25 Cal.4th 76, 81–82.) Voluntary intoxication may also negate an alleged aider and abettor's liability because intoxication may explain a lack of knowledge that a perpetrator intended to commit a criminal act. (*People v. Mendoza*, *supra*, 18 Cal.4th at p. 1130.) In addition, aiding and abetting requires a "specific" criminal intent, for which evidence of voluntary intoxication is admissible.[8] (*Mendoza*, at p. 1131.) This is true "whether the intended crime itself requires a general or specific intent on the part of the perpetrator." (*Id.* at p. 1132.)

Respondent takes the position that voluntary intoxication cannot be used as a defense to a charge of reckless indifference to human life because this does not require a specific criminal intent. In contrast, appellant asserts that "reckless indifference" has a knowledge component, which may be impacted by his voluntary intoxication.

We need not resolve the parties' disputed points regarding how the mens rea for this crime should be classified. Instead, we agree with respondent that appellant has

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[7] "Before 1981, intoxication was generally relevant to the defense of diminished capacity." (*People v. Mendoza, supra,* 18 Cal.4th at p. 1125.) After 1981, the defense of diminished capacity was abolished, and voluntary intoxication was relevant to the question whether a defendant "*actually* had the necessary mental state for the charged offense." (*Ibid.*)

[8] Our high court notes that, for purposes of aiding and abetting, the accomplice's mental state cannot be "mechanically" divided into "knowledge and intent." (*People v. Mendoza, supra,* 18 Cal.4th at p. 1131.) Therefore, the "knowledge" element of aiding and abetting is treated as " 'akin' " to a specific criminal intent. (*Ibid.*)

forfeited this claim in failing to raise it below. Moreover, this record amply demonstrates that any alleged instructional error is harmless.

A. *This claim is forfeited.*

Voluntary intoxication is a " 'pinpoint' " instruction, which must be given on request when there is sufficient evidence supporting the theory. (*People v. Saille* (1991) 54 Cal.3d 1103, 1120.) A "pinpoint" instruction does not trigger a trial court's sua sponte duty to instruct because it does not involve a general principle of law. (*Ibid*.)

We agree with respondent that appellant has forfeited this claim. Appellant never requested instruction on voluntary intoxication. Further, he never objected to the instructional language given to the jury regarding voluntary intoxication, a point which appellant concedes in his opening brief.

To overcome forfeiture, appellant contends that the disputed instructions were legally erroneous, so appellate review is appropriate despite his counsel's failure to object. He asserts that the voluntary intoxication instructions were "incorrectly worded" (boldface & capitalization omitted) in that they "*expressly precluded*" the jury's consideration of his intoxication on the issue of his reckless indifference to human life. He also argues the voluntary intoxication instructions impacted his substantial rights, so this court may review this claim under the authority of section 1259.[9] He relies on *People v. Townsel* (2016) 63 Cal.4th 25 (*Townsel*).

We reject appellant's arguments. The instructions given were correct and appellant's substantial rights were not impacted.

The instructions at issue are CALCRIM Nos. 404 and 625. With CALCRIM No. 404, the jurors were instructed to consider whether appellant's intoxication impacted his ability to know that Amritraj intended to commit robbery and whether appellant

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[9] Under section 1259, an appellate court may review a jury instruction given even though no objection was made in the lower court, "if the substantial rights of the defendant were affected thereby."

intended to aid and abet the robbery. With CALCRIM No. 625, the jurors were informed they could consider evidence, if any, of appellant's voluntary intoxication only in a limited way. In relevant part, the jurors were told they could consider this evidence in deciding if appellant "intended to commit robbery." The jurors were instructed they could "not consider voluntary intoxication for any other purpose."

These instructions were correct. Under the Penal Code, evidence of voluntary intoxication is admissible "solely" on the issue of whether a defendant "formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 29.4, subd. (b).) The Penal Code does not authorize admission of voluntary intoxication to a charge that a defendant acted with reckless indifference to human life. (§ 29.4, subd. (a).)

Robbery is a specific intent crime. (*In re Milton* (2022) 13 Cal.5th 893, 900.) Evidence of appellant's voluntary intoxication was admissible regarding whether or not he intended to commit robbery. (§ 29.4, subd. (b).) Likewise, the jury could consider voluntary intoxication in deciding whether appellant had the knowledge and intent necessary to aid and abet the robbery. (See *People v. Mendoza*, *supra*, 18 Cal.4th at pp. 1131–1132.) Thus, the jury was correctly instructed it could consider evidence of appellant's voluntary intoxication in deciding if he intended to commit robbery and/or if he intended to aid and abet the robbery. The Penal Code prohibited the jury from considering such evidence for any other issues. (§ 29.4, subds. (a) & (b).)

When a trial court gives a correct jury instruction, a defendant must request any additional or qualifying language in order to preserve the issue for appeal. (*People v. Welch* (1999) 20 Cal.4th 701, 757.) A defendant may not complain on appeal that an instruction, correct in law and responsive to the evidence, was too general or incomplete if he did not request appropriate clarifying or amplifying language. (*People v. Buenrostro* (2018) 6 Cal.5th 367, 428; *People v. Hillhouse* (2002) 27 Cal.4th 469, 503.) A trial court does not have a sua sponte duty to revise or improve upon an accurate statement of law

without a request from counsel, and failure to request clarification of an otherwise correct instruction forfeits the claim of error on appeal. (*People v. Whalen* (2013) 56 Cal.4th 1, 81–82.)

If appellant believed the instruction on voluntary intoxication should have applied to his alleged reckless indifference to human life, he was required to raise that concern below. Instead, appellant's counsel never requested any instruction on voluntary intoxication, he never objected to the instructional language given, and appellant's counsel never raised this defense when arguing to the jury. Appellant's counsel readily admitted to the jurors that appellant had planned and committed robbery. As such, it was impliedly admitted to the jurors that, despite his intoxication, appellant was able to, and he actually did, form a specific criminal intent. Thus, appellant's substantial rights were not impacted, and we decline to apply section 1259 in this situation.

Finally, appellant's reliance on *Townsel* is misplaced. In *Townsel*, the defendant presented expert testimony to the effect he was intellectually disabled. (*Townsel*, *supra*, 63 Cal.4th at p. 57.) Instructional error occurred because the trial court erroneously prohibited the jury from considering the intellectual disability evidence for some of the allegations. (*Id.* at pp. 57–58.) Despite the defendant's failure to raise these issues below, the high court agreed it was appropriate to review the alleged instructional error under the authority of section 1259. (*Townsel*, *supra*, at pp. 59–60.) In part, the defendant's counsel had argued the mental disability evidence to the jury. (*Id.* at p. 63.) The high court found error under both state law and the federal Constitution. (*Id*. at p. 64.)

Townsel is distinguishable. Appellant's counsel made a tactical decision to not raise voluntary intoxication to the jury. Thus, unlike what occurred in *Townsel*, the alleged instructional error here did not impact appellant's substantial rights. He may not argue for the first time on appeal that a correct legal instruction was too general or incomplete and needed clarification. (*People v. Buenrostro*, *supra*, 6 Cal.5th at p. 428;

People v. Hillhouse, *supra*, 27 Cal.4th at p. 503.) Accordingly, section 1259 is inapplicable, and this claim is forfeited. We also conclude that, even if this claim is not forfeited, it fails due to a lack of prejudice.

B. *Any alleged error is harmless.*

The parties dispute the appropriate standard of review regarding prejudice. According to appellant, we must apply *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*). Under *Chapman*, respondent bears the burden to establish beyond a reasonable doubt that the alleged error did not contribute to the verdict. (*Id.* at p. 24.) In contrast, respondent contends prejudice is reviewable under *People v. Watson* (1956) 46 Cal.2d 818 (*Watson*). Under *Watson*, we ask whether it is reasonably probable appellant would have received a more favorable result in the absence of the alleged error. (*Id.* at p. 836.) Both parties argue that, even if the competing standard of review is used, their position is still correct.

We agree with respondent that *Watson* applies. This is an issue of alleged state-law error. (See *People v. Mendoza*, *supra*, 18 Cal.4th at pp. 1134–1135 [applying *Watson* standard for allegedly defective instructions on intoxication].) In any event, however, we can declare that this alleged error is harmless under either standard.

During the first day of deliberations, the jury sent a request to the court asking for a more in-depth explanation of how voluntary intoxication applies. The court referred the jury back to the original instructions. Appellant contends that the jury's note "tends to establish" the jury believed the intoxication evidence "and viewed it was important to the case."

We disagree that the jury's note had any bearing on appellant's defense. We likewise reject his assertion that he suffered prejudice.[10]

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[10] The court read CALCRIM No. 625 to the jury twice after the prosecutor noted a change in wording that was required. Appellant contends that reading this instruction

Amritraj made voluntary intoxication the cornerstone of his defense. In contrast, and despite his claims on appeal, appellant did not rely on voluntary intoxication as a defense below. Appellant's trial counsel never requested these instructions, and he did not argue this defense to the jury. Appellant's trial counsel made a clear tactical decision when he admitted to the jurors that appellant had planned and committed robbery. Appellant's counsel asserted to the jurors that Amritraj had unexpectedly killed Jassar with his own premeditation and deliberation. According to defense counsel, appellant had no way of preventing this murder.

In admitting that he planned and committed robbery, appellant impliedly admitted that he formed the specific intent necessary for that crime. In finding appellant guilty of felony murder, the jury necessarily rejected any suggestion that appellant's alleged intoxication prevented him from forming the specific intent needed to establish robbery, which was the underlying felony supporting the theory of felony murder. Because the jury found that appellant was able to form a specific criminal intent, we reject his argument that the jury may have believed appellant was unable to form a reckless indifference to human life due to his intoxication. In short, appellant was not prejudiced.

The evidence in no way demonstrates or even reasonably suggests that, due to intoxication, appellant was unable to hold a subjective awareness that his actions created a grave risk of death. To the contrary, it was appellant's idea to rob the store, and it was appellant's idea that Amritraj should scare the clerk with a firearm. Appellant admitted at trial that ingesting drugs can make a person more erratic. He agreed that he was "doing better" than Amritraj on the night they committed this crime. Appellant admitted to the jury that Amritraj was not in the right mental state that night, and Amritraj should not have been armed with a loaded gun.

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twice "heightened" the degree of prejudice. We reject appellant's position because he did not suffer any prejudice from the court instructing the jury with CALCRIM No. 625.

Appellant heard Amritraj fire the first shot, and he knew that firing a gun inside a building is dangerous. Appellant admitted that, if he had told Amritraj to put the gun away, Amritraj would have complied. Appellant admitted that his inaction resulted in Amritraj shooting Jassar.

Finally, we reject appellant's claim that this alleged instructional error reduced the prosecution's burden of proof or denied him a fair trial. Nothing prevented appellant from presenting a meaningful defense. His trial counsel made a tactical decision to not rely on voluntary intoxication.

The jury was told that appellant was presumed innocent, and the prosecutor bore the burden to prove beyond a reasonable doubt that he was guilty. The jurors were instructed that, to prove that appellant was guilty of first degree murder under a theory of felony murder, the prosecutor had to prove that (1) appellant committed, or aided and abetted, robbery; (2) appellant intended to commit or intended to aid and abet the perpetrator in committing robbery; (3) if appellant did not personally commit robbery, then a perpetrator, whom appellant was aiding and abetting, committed robbery; (4) while committing robbery, the perpetrator caused the death of another person; (5) appellant was a major participant in the robbery; and (6) when appellant participated in the robbery, he acted with reckless indifference to human life. The jurors were instructed that to return a verdict of guilty they all had to agree on guilt. Based on the murder verdict, the jury rejected appellant's claim that he had not acted with a reckless indifference to human life.

The jurors were informed that, if they found appellant guilty of first degree murder, they had to decide whether the prosecutor had proven true the special circumstance allegation. The jurors were told that the prosecutor bore the burden to prove beyond a reasonable doubt that the special circumstance murder allegation was true. The jurors were instructed that they had to find the special circumstance allegation not true if the prosecutor did not establish beyond a reasonable doubt that appellant either

(1) acted with an intent to kill or (2) was a major participant in the robbery who acted with reckless indifference to human life.

Based on this record, appellant received a fair trial, and the alleged instructional error did not reduce the prosecution's burden of proof. In light of the evidence, the instructions provided, and the arguments from counsel, it is not reasonably probable appellant would have received a more favorable outcome had the jury been instructed to consider voluntary intoxication on the issue of his reckless indifference to human life. (See *Watson*, *supra*, 46 Cal.2d at p. 836.) Likewise, respondent has established beyond a reasonable doubt that this alleged error did not contribute to the verdict. (See *Chapman*, *supra*, 386 U.S. at p. 24.) The record reveals this alleged error was unimportant in relation to everything else the jury considered on the issue in question. (*Yates v. Evatt* (1991) 500 U.S. 391, 403, disapproved on other grounds in *Estelle v. McGuire* (1991) 502 U.S. 62, 72, fn. 4.) In other words, the guilty verdict actually rendered in this trial was surely unattributable to the alleged error. (*Sullivan v. Louisiana* (1993) 508 U.S. 275, 279.) Consequently, any alleged instructional error is harmless, and this claim fails.

III. Substantial Evidence Did Not Support an Instruction Regarding Second Degree Murder.

At trial, the prosecutor proceeded against appellant solely on a theory of felony murder. Earlier charging documents had alleged that appellant had committed both murder (count 1) and robbery (count 2). However, the first amended information omitted the robbery charge.

The court instructed the jury on the elements necessary to find appellant guilty as an accomplice of first degree murder based on a theory of felony murder. The jury was never instructed it could consider whether appellant was guilty of second degree murder.

Unlike appellant, the trial court did instruct the jury to consider second degree murder for Amritraj. However, for Amritraj, the prosecution proceeded under two theories of first degree murder: (1) Amritraj committed murder with premeditation and

deliberation; and (2) Amritraj committed felony murder. When based on malice aforethought, second degree murder is a lesser included offense of first degree murder. (*People v. Blair* (2005) 36 Cal.4th 686, 745, overruled on other grounds in *People v. Black* (2014) 58 Cal.4th 912, 919.)

Appellant contends that his judgment must be reversed. According to appellant, the court erred because it prohibited the jury from considering whether he was guilty of second degree murder. He argues that the jury was given "an all-or-nothing choice" when deciding his liability.

The parties dispute whether or not second degree murder was a necessarily lesser included offense for the murder charged against appellant. Respondent asserts that the trial court did not err because, under the elements test, second degree murder is not a necessarily lesser included offense of felony murder. In contrast, appellant contends that, under the accusatory pleading test, the trial court was obligated to instruct the jury on second degree murder. The first amended information alleged that appellant and Amritraj "did unlawfully, and with malice aforethought murder Dharampreet Singh Jassar, a human being" in violation of section 187, subdivision (a). The pleading also alleged that this murder triggered section 190.2 because it occurred during a robbery. Because the charging document alleged malice, appellant asserts the court erred in not instructing the jury on second degree murder.

The California Supreme Court has declined to decide whether second degree murder is a lesser included offense of felony murder. (*People v. Westerfield* (2019) 6 Cal.5th 632, 717.) We need not resolve that issue here. Instead, this claim fails because, even if second degree murder is a lesser included offense of felony murder, substantial evidence did not exist requiring its instruction as to appellant.

A. *A court's duty to instruct on lesser included offenses.*

A trial court must instruct the jury on lesser included offenses of the charged crime if substantial evidence supports the conclusion that the defendant committed a lesser included offense and not a greater offense. (*People v. Gonzalez* (2018) 5 Cal.5th 186, 196.) No obligation to instruct on a lesser included offense occurs if the evidence, if accepted by the trier of fact, " 'would absolve the defendant of guilt of the greater offense but not of the lesser.' " (*People v. Souza* (2012) 54 Cal.4th 90, 116.) Absent substantial evidence, a trial court does not err in refusing to instruct a jury on a lesser included offense of murder. (*People v. Cunningham* (2001) 25 Cal.4th 926, 1008–1009.)

In other parts of his appeal, appellant argues the evidence did not demonstrate he acted with a reckless indifference for human life, which was necessary to convict him of aiding and abetting felony murder. (§ 189, subd. (e)(3).) In this claim, however, he takes an alternative approach, and he contends that substantial evidence shows he arguably acted with a "conscious disregard" for human life when he committed this robbery. The "conscious disregard" standard is used to establish an accomplice's liability for second degree murder under a theory of implied malice. (*People v. Curiel* (2023) 15 Cal.5th 433, 466–467; see also CALCRIM No. 526.)

We reject appellant's position that the trial court was obligated to instruct the jury regarding his potential liability as an accomplice for second degree murder. We summarize the requirements to establish an accomplice's liability for second degree murder before we explain how substantial evidence is lacking for such an instruction.

B. *The requirements to establish an accomplice's liability for second degree murder.*

A participant in the perpetration of certain enumerated felonies, including robbery, in which death occurs is liable for murder only if one of the following is proven:

(1) The person was the actual killer.

(2) The person was not the actual killer but, with the intent to kill, aided and abetted the actual killer in the commission of murder in the first degree.

(3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in section 190.2, subdivision (d). (§ 189, subd. (e)(1)–(3).)

Under direct aiding and abetting principles, an accomplice is guilty of a murder perpetrated by another if the accomplice aids the commission of that offense with knowledge of the direct perpetrator's unlawful intent, and the accomplice intends to assist the perpetrator in achieving that crime. (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

When an accomplice directly aids and abets a murder, the accomplice must possess malice aforethought. (*People v. Gentile* (2020) 10 Cal.5th 830, 844–845, citing *People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) Malice can be express or implied. (§ 188, subd. (a).) "Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature." (*Id.*, subd. (a)(1).)

An aider and abettor may be liable for murder under a theory of implied malice where he aids in the commission of the life-endangering act, he had knowledge that the perpetrator intended to commit the act, he intended to aid the perpetrator in the commission of the act, he had knowledge that the act was dangerous to human life, and he acted in conscious disregard for human life. (*People v. Curiel*, *supra*, 15 Cal.5th at pp. 466–467.)

C. *The evidence does not demonstrate or even reasonably suggest appellant held his own malice.*

As the perpetrator of Jassar's death, Amritraj's life-endangering act was his discharge of the firearm. In contrast to appellant, the evidence overwhelmingly supported an instruction on second degree murder as to Amritraj because Amritraj demonstrated clear malice when he aimed his firearm at Jassar multiple times and fired. However, no evidence of any malice, either express or implied, exists for appellant.

Appellant testified that he never intended for anyone to be hurt during the robbery. He made it clear that there was no plan Amritraj would fire the gun. Appellant told the jury that he thought Amritraj had only fired warning shots and appellant never knew Jassar had been injured.

The evidence shows appellant acted with a reckless disregard for human life when he intentionally introduced the risk of violence by directing his severely impaired accomplice to wield a gun as a tool of intimidation. Appellant continued the robbery after witnessing and hearing clear signs of escalating lethal force. However, nothing demonstrates appellant assisted Amritraj in shooting Jassar. As such, there is no evidence appellant held his own implied malice as an aider and abettor. (See *People v. Curiel*, *supra*, 15 Cal.5th at pp. 466–467.) Thus, substantial evidence is lacking from which the jury could reasonably conclude appellant committed second degree murder but not first degree felony murder. Accordingly, the trial court had no duty to instruct the jury to consider second degree murder as to appellant, and this claim fails.

IV. Cumulative Error Did Not Occur.

Appellant raises a claim of cumulative error. He contends that, even if we reject his claims above, reversal of his judgment is still required because he suffered a fundamentally unfair trial. He asserts the prosecutor dropped a robbery charge to force the jury into an "all-or-nothing choice" to decide his guilt for murder. He argues that his conviction for murder is "most logically explained" by the alleged combination of instructional errors that occurred. He maintains it is at least reasonably probable he would have obtained a better result if the jury had not been precluded from considering his "extreme intoxication" regarding his subjective awareness of any grave risk to life, and if the jury had been permitted to consider if he only committed second degree murder.

"Under the 'cumulative error' doctrine, errors that are individually harmless may nevertheless have a cumulative effect that is prejudicial." (*In re Avena* (1996) 12 Cal.4th 694, 772, fn. 32.) A claim of cumulative error is essentially a due process claim. (*People v. Rivas* (2013) 214 Cal.App.4th 1410, 1436.) The test is whether the defendant received a fair trial. (*Ibid.*)

We reject this claim of cumulative error because we have denied all appellant's individual claims. (*People v. Bradford* (1997) 14 Cal.4th 1005, 1057 [cumulative prejudice argument rejected because each individual contention lacked merit or did not result in prejudice].) Taking all appellant's claims into account, we are satisfied he received a fair trial regarding his guilt.

V. Hardin Resolves Appellant's Equal Protection Claim.

"California's youth offender parole statute offers opportunities for early release to certain persons who are incarcerated for crimes they committed at a young age." (*People v. Hardin* (2024) 15 Cal.5th 834, 838 (*Hardin*); see §§ 3051, 4801.)

Appellant was 24 years old when he committed this robbery in which Amritraj murdered Jassar. Because he was sentenced to LWOP for committing special circumstance murder, appellant is ineligible for a youth offender parole hearing (§ 3051, subd. (h).) However, other individuals are eligible for such a hearing, including juveniles under the age of 18 who are sentenced to LWOP, and those who did not receive LWOP but who were 25 years of age or younger when they committed their controlling offense. (§ 3051, subd. (b)(1)–(4).)

Appellant asserts that his rights to equal protection under the United States Constitution have been violated.[11] He contends that, for purposes of section 3051, there is no rational basis for distinguishing him from other youth offenders. He argues his

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[11] In relevant part, the Fourteenth Amendment of the federal Constitution declares that no state shall "deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., 14th Amend.)

judgment should be conditionally reversed and his sentence modified to direct he must be granted parole eligibility after serving 25 years in prison.[12]

Our Supreme Court has issued an opinion which resolves appellant's equal protection claim adversely for him.

In *Hardin*, *supra*, 15 Cal.5th 834, the defendant argued that section 3051 violates equal protection by treating young adult offenders sentenced to LWOP for special circumstance murder differently from other young adult offenders serving parole-eligible life sentences for other crimes. (*Hardin*, at p. 841.) A majority of the justices stated that its task was limited to determining whether the defendant had "shown that the Legislature's decision to expand youth offender parole hearings to most young adult offenders, while excluding [the defendant] and others similarly situated, violates equal protection under a rational basis standard." (*Id.* at p. 866.) After reviewing cases, it was apparent to the majority that the law treats special circumstance murder differently, and those defendants are eligible for the most severe punishment. (*Id.* at pp. 859–860.) It was difficult for the majority "to see how the Legislature that enacted section 3051 could have acted irrationally in singling out special circumstance murder as a particularly culpable offense." (*Id*. at p. 860.) According to the majority, it was "not irrational for the Legislature to exclude from youth offender parole eligibility those young adults who have committed special circumstance murder, an offense deemed sufficiently culpable that it merits society's most stringent sanctions."[13] (*Hardin*, at p. 864.)

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[12] Section 3051 grants a youth offender parole hearing for a person who committed a controlling offense before that person had attained 18 years of age and for which the person received LWOP. In such a situation, the person is eligible for release on parole during the 25th year of incarceration. (§ 3051, subd. (b)(4).)

[13] The *Hardin* majority noted that the equal protection challenge that it resolved was not raised under the California Constitution, which also guarantees equal protection of the law. (Cal. Const., art. I, § 7, subd. (a).) However, the majority saw no reason to believe a different result would occur if this issue was analyzed under the state Constitution. (*Hardin*, *supra*, 15 Cal.5th at p. 847, fn. 2.)

In a lengthy dissent, Justice Liu concluded that the Legislature did not articulate why it excluded some persons from receiving a youth offender parole hearing, and he believed the court should not impute "a purpose that the Legislature never had." (*Hardin*, *supra*, 15 Cal.5th at p. 887 (dis. opn. of Liu, J.).) Justice Liu would hold that the exclusion " 'fails to exhibit any fair and reasonable relationship to the stated legislative objective.' " (*Id*. at p. 888.)

Justice Evans also dissented, arguing that the exclusion "fails any mode of rational basis review." (*Hardin*, *supra*, 15 Cal.5th at p. 898 (dis. opn. of Evans, J.).) In part, Justice Evans was concerned that the LWOP exclusion "bears the taint of racial prejudice and perpetuates extreme racial disparities plaguing our juvenile and criminal justice systems." (*Ibid.*)

After *Hardin* was issued on March 4, 2024, we directed the parties to brief its impact in this matter. Appellant acknowledges that the majority opinion in *Hardin* has "rejected" the equal protection claim which he had raised in his opening brief. Appellant also concedes that this court is bound to follow the majority holding in *Hardin*. However, appellant respectfully requests that, although this court is bound under stare decisis, this court should "take the dissenting opinions into consideration" and, at a minimum, call upon the Legislature to "reconsider" its decision to exclude youth offenders from parole eligibility for committing a special circumstance murder.

We decline to comment further on the dissenting opinions in *Hardin*. Under the doctrine of stare decisis, we are required to follow the majority holding. (See *Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455.)

There is no need to call upon the Legislature to reconsider section 3051. The *Hardin* majority made it clear the Legislature is free to reconsider this issue. (*Hardin*, *supra*, 15 Cal.5th at pp. 865–866.) However, there is no showing "that the legislative policy choices reflected in current law are irrational and therefore impermissible as a

matter of equal protection." (*Id*. at p. 840.) Accordingly, an equal protection violation does not exist, and this claim fails.

DISPOSITION

The judgment is affirmed.

LEVY, Acting P. J.

WE CONCUR:

FRANSON, J.

PEÑA, J.