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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MARRIN HUGHES et al.,

Defendants and Appellants.

A131963

(Alameda County  
Super. Ct. Nos. 159734A, 159734B)

Defendants Marrin Hughes and Louis Sanders were each convicted of two counts of first degree murder in connection with two shooting deaths. Several witnesses placed Sanders at the scene and identified him as the shooter of the first victim, but only one witness, a 13-year-old boy, connected Hughes to the murders. The boy, who was well-acquainted with the defendants and the victims, testified he saw Hughes emerge to gun down the second victim immediately after Sanders shot the first victim. Both defendants contend there is insufficient evidence to support their convictions as an accomplice to the murders they were not accused personally of committing. In addition, the defendants raise several purported instructional errors and other issues. We affirm.

## I. BACKGROUND<sup>1</sup>

In an information filed November 4, 2008, defendants were charged jointly with the murders of Jabari Harris and Luis Coria (Pen. Code,<sup>2</sup> § 187), and each defendant was charged individually with possession of a firearm by a felon (§ 12021, subd. (a)(1)). The murders were alleged to be serious and violent felonies. (§§ 667.5, subd. (c); 1192.7, subd. (c)(1).) In association with the murder of Harris, Hughes was alleged to have been armed with a firearm (§ 12022, subd. (a)(1)), and Sanders was alleged to have personally used and discharged a firearm (§§ 12022.7, subd. (a); 12022.53, subds. (b), (c), (d); 12022.5, subd. (a)). The reverse allegations were made with respect to the murder of Coria. The information also alleged special circumstances based on multiple murders (§ 190.2, subd. (a)(3)), one prior felony conviction for Hughes and two prior felony convictions for Sanders, and a prior prison term for Hughes (§ 667.5, subd. (b)).

The evidence presented at trial demonstrated that in 2007, victim Jabari Harris regularly sold drugs in the vicinity of 45th Avenue and Bancroft Avenue in Oakland, working with three associates. One was victim Luis Coria, the second was in jail at the time of the murders, and the third was a friend of Coria. Harris attempted to monopolize the sale of drugs in the area, regularly confronting other would-be sellers who were not a part of his team. One witness described Harris as “real aggressive” and “want[ing] to fight” when he confronted others attempting to sell drugs in the neighborhood without his approval.

Defendants are longtime acquaintances and, perhaps, cousins. At some time in 2007, each began selling drugs in the area claimed by Harris. During the month prior to the killings, Harris had found Hughes attempting to sell drugs in the area “two or three times.” On those occasions, Harris and Hughes “exchanged words.” Although Hughes

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<sup>1</sup> In this background section, we recount the evidence relating to defendants’ claims of insufficiency of the evidence. We set out the evidentiary and procedural matters relating to defendants’ remaining legal arguments when addressing those arguments in the discussion section.

<sup>2</sup> All statutory references are to the Penal Code unless otherwise indicated.

was verbally defiant, when confronted he left the area rather than challenge Harris. In the same time period, Harris had similar confrontations with Sanders.

Three witnesses told police that, on September 11, 2007, they saw Sanders argue with and then kill Harris, shooting him once in the head.<sup>3</sup>

Only one witness tied Hughes to the killings. S.C. was 13 years old at the time and lived with his mother and sisters in a second-floor apartment on Bancroft Avenue. S.C. regarded Harris as a big brother, seeing him every day, spending time with him, and receiving small amounts of money from him. S.C. was familiar with defendants from seeing them in the neighborhood almost every day for “months” before the killings, and Hughes’s brother was dating S.C.’s mother at the time. Both defendants had visited S.C.’s home and were free to come and go from the apartment. S.C. was aware of regular “conflict or friction” between Harris and Sanders. He also watched Harris confront Hughes a few days before the killings and tell Hughes he “couldn’t be out there on the block no more.”

On the day of the killings, S.C. arrived home from school between 4:30 and 5:00 p.m. S.C. stopped to talk to Sanders and two others person on the corner across the street from his apartment. As they spoke, Sanders left, “went to the side of a building,” and returned with a gun. When one of the others present asked Sanders if he would sell the gun, Sanders declined, saying he “needed it.” After a few minutes, S.C. went home. Between 5:30 and 6:00 p.m., S.C., watching from the balcony of the apartment, saw Harris arrive in his car. S.C. went outside and they walked to the store together. They returned to the apartment building between 6:30 and 7:00 p.m. Harris told S.C. to go inside because it was getting late, and S.C. complied. Soon after, Sanders walked into S.C.’s mother’s apartment, “told everybody to stay in the house and don’t come outside,” pulled the gun from his waistband, and left.

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<sup>3</sup> Two of these witnesses recanted their statements to police at trial, but the statements were admitted as evidence.

Two minutes later, S.C. went onto the balcony of the apartment. Looking down, he saw Sanders and Harris arguing in front of the apartment. Coria was nearby. As part of his testimony, S.C. marked the location of these persons on a photograph. The photograph, taken from the vantage point of the balcony, shows a fence alongside a sidewalk, with an open gate in the fence. Harris and Sanders were standing on the sidewalk, just outside the gate. Coria was a few feet away, also on the sidewalk.

After a few minutes of argument, Harris answered his cell phone and turned away from Sanders. At that instant, from six feet away, Sanders pulled out his gun and shot Harris. Sanders immediately walked to the fallen Harris and began rummaging through his pockets. Simultaneously, S.C. noticed Hughes appear from the side of the apartment building, inside the fence. He was moving toward the open gate, in the general direction of Coria, with gun in hand. Hughes shot Coria, who had begun running away, twice in the back. After Coria fell, Hughes moved closer to him, fired more shots, and ran off.<sup>4</sup> When Coria collapsed, he was lying in the street, only a few feet from Harris's position on the sidewalk.

The jury convicted both defendants on all counts and found true all allegations, including the special circumstance allegation. They were sentenced to life imprisonment without the possibility of parole.

## **II. DISCUSSION**

### ***A. Defendants' Joint Arguments***

#### ***1. The Aiding and Abetting Convictions***

While neither defendant challenges the sufficiency of the evidence to support his conviction of the murder he was accused of committing personally, each contends the

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<sup>4</sup> In discussing the evidence against him, Hughes stresses that the forensic medical examiner concluded all of Coria's gunshot wounds were inflicted from the front or side, in conflict with S.C.'s testimony. S.C.'s testimony was bolstered, however, by the police discovery of several bullet casings inside the fence, in the location from which, S.C. testified, Hughes initially opened fire. There was no testimony suggesting Sanders was in this location that night.

evidence was insufficient to convict him as an aider and abettor of the other defendant's killing.<sup>5</sup>

“Principals include those who ‘aid and abet’ in the ‘commission of a crime.’ [Citation.] ‘Aider and abettor liability is premised on the combined acts of all the principals, but on the aider and abettor’s own mens rea.’ [Citation.] We have defined the required mental states and acts for aiding and abetting as: ‘(a) the direct perpetrator’s actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor’s mens rea—knowledge of the direct perpetrator’s unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor’s actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.’ ” (*People v. Thompson* (2010) 49 Cal.4th 79, 116–117.) “[A]n aider and abettor must act ‘with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.’ [Citation.] In other words, an aider and abettor of a specific intent crime shares the perpetrator’s specific intent when he or she knows of the perpetrator’s criminal purpose and aids, promotes, encourages, or instigates the perpetrator with the intent of encouraging or facilitating the commission of the crime.” (*People v. Houston* (2012) 54 Cal.4th 1186, 1224.) To incur aider and abettor liability, the defendant’s knowledge of the intent of the perpetrator and his or her own intent to assist must be formed before or during the commission of the crime. (*People v. Williams* (1997) 16 Cal.4th 635, 675.)

“ ‘In reviewing a challenge to the sufficiency of the evidence, we do not determine the facts ourselves. Rather, we “examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the

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<sup>5</sup> In his opening and reply briefs, Hughes discusses at length the purported lack of evidence tying him to the shooting of Coria. Despite these discussions, we do not understand Hughes to argue that the evidence was *legally* insufficient to support his conviction for that shooting. To the extent Hughes intended to make such an argument, we find the S.C. testimony adequate to support the conviction.

defendant guilty beyond a reasonable doubt.” [Citations.] We presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence. . . . “[I]f the circumstances reasonably justify the jury’s findings, the judgment may not be reversed simply because the circumstances might also reasonably be reconciled with a contrary finding.” [Citation.] We do not reweigh evidence or reevaluate a witness’s credibility.’ ” (*People v. Houston, supra*, 54 Cal.4th at p. 1215.) “Evidence of a defendant’s state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction. [Citations.] ‘Whether the evidence presented at trial is direct or circumstantial, . . . the relevant inquiry on appeal remains whether *any* reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt.’ ” (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208.)

Both defendants argue there is no evidence to support a finding they were aware of each other’s intent prior to the killings. While we agree there is no *direct* evidence of their knowledge, there was sufficient circumstantial evidence to allow the jury to conclude beyond a reasonable doubt that defendants were acting according to a preexisting plan to cooperate in the killing of Harris and Coria. The defendants were longtime acquaintances, and both had suffered harassment in their attempts to sell drugs in the neighborhood of 45th Avenue and Bancroft Avenue by Harris’s aggressive defense of his claimed territory.<sup>6</sup> There was direct evidence Sanders had formed the intent to shoot Harris well before he confronted him on the sidewalk. The conversation in which Sanders said he needed his gun occurred over an hour prior to the killing. Sanders’s warning to the occupants of S.C.’s mother’s apartment just prior to the shooting confirmed that intent. Sanders then shot Harris in plain view of Harris’s colleague, Coria, and immediately bent over and searched Harris’s pockets, apparently unconcerned about the prospect of retaliation from Coria. Instantly after Sanders shot Harris, Hughes came from a relatively hidden location, yet near an open gate, well-positioned to shoot

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<sup>6</sup> We agree with defendants there was no evidence to suggest they were dealing drugs in concert. There was evidence, however, that both had been frustrated at times by Harris’s attempts to monopolize the drug trade in the neighborhood.

Coria as he was running away. To allow such a prompt reaction, Hughes's gun must have been loaded and ready for firing as Sanders and Harris argued.

If one accepts S.C.'s testimony, which was "reasonable, credible and of solid value," any interpretation of the evidence other than concerted action was implausible. To find defendants were acting independently, the jury would have had to conclude Hughes coincidentally happened to be standing behind the fence with a loaded gun in his hand when Sanders began to argue with Harris. Unless Hughes was anticipating trouble between Sanders and Harris, there was no reason for him to have his gun prepared for firing, let alone to be standing in a comparatively hidden location near the two arguing men. Given the speed with which he reacted to the Harris shooting, the conclusion is nearly inescapable that Hughes was anticipating it.

Hughes also argues there was no evidence to establish an act on his part to assist Sanders in killing Harris. As suggested above, however, the jury could have concluded Hughes placed himself behind the fence, gun loaded and ready, to make sure Coria did not interfere in the killing, retaliate against Sanders afterward, or serve as a witness to the killing.<sup>7</sup> In turn, Sanders's killing of Harris allowed Hughes to act aggressively against Coria without concern for interference from Harris.

Sanders claims the evidence shows the shootings were spontaneous and unrelated, nothing more than "an outburst of shootings amidst a group of mostly armed and intoxicated friends and associates all involved with drugs, including an apparent bully engaged in another outburst." As discussed above, however, Sanders's conduct prior to the killing suggested his shooting of Harris was anything but spontaneous, and Hughes's positioning and his quick response to the Harris shooting also defeat the conclusion his shooting of Coria was unrelated to Sanders's crime.

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<sup>7</sup> Hughes argues his killing of Coria could not have been an act to assist in the killing of Harris because it occurred after Harris had been shot. While it is by no means clear that an act in assistance must occur prior to the crime to support aider and abettor liability, particularly if the act was planned in advance, we need not resolve this issue. Hughes's positioning and arming of himself occurred prior to the shooting of Harris.

In arguing for an absence of evidence of prior intent, Sanders relies heavily on *Juan H. v. Allen* (9th Cir. 2005) 408 F.3d 1262 (*Juan H.*). As our Supreme Court has characterized *Juan H.*, “the defendant, a juvenile, was at home with his family when someone fired two shots into the trailer in which he lived. [Citation.] An hour and a half later, the defendant and his brother confronted two men with whom they had a history of conflict at the trailer park, and who were associated with a rival gang. [Citation.] The defendant’s brother asked the two men whether they had fired the shots, and the men replied they knew nothing about the incident. [Citation.] The defendant’s brother then pulled out a shotgun and fired at both men, killing one of them. [Citation.] [¶] The Ninth Circuit granted Juan H.’s federal petition for writ of habeas corpus, ruling that the record contained insufficient evidence to support the conclusions that Juan H. knew his brother planned to commit the first degree murders or that Juan H. acted in a way intended to encourage or facilitate the killings. [Citation.] The court further held that, even assuming the element of knowledge, the record contained no evidence that Juan H. did or said anything before, during or after the shooting from which a reasonable fact finder would infer a purpose to aid and abet in the murders. [Citation.] Specifically, the court held no reasonable fact finder could conclude that by standing, unarmed, behind his brother, Juan H. provided ‘backup,’ in the sense of adding deadly force or protecting his brother, in a deadly exchange.” (*People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 296–297.)

In contrast to *Juan H.*, there was ample circumstantial evidence here, as discussed above, from which the jury could conclude the defendants were aware of each other’s intent prior to the shootings. Further, they could readily be found to have provided “backup,” each eliminating a potentially deadly threat to the other.

Finally, Sanders argues the evidence was insufficient to demonstrate he harbored the specific intent to kill Coria necessary to support a finding of multiple murder special circumstances. For the reasons discussed above, the evidence was sufficient to demonstrate the necessary intent.

## ***2. Accomplice Liability Instructions***

With respect to accomplice liability, the trial court gave CALCRIM Nos. 400 and 401. The latter states the four general requirements of aiding and abetting liability, including the defendant's prior knowledge of the perpetrator's intent to commit the crime and the defendant's own intent to aid and abet the commission of the crime. The instruction effectively repeats the intent requirement in a sentence stating that a person aids and abets a crime "if he or she knows of the perpetrator's unlawful purpose" and "specifically intends to" aid the perpetrator's commission of "that crime." Immediately thereafter, the trial court delivered CALCRIM Nos. 500, 520, and 521, regarding homicide and the elements of first and second degree murder.

Sanders contends the trial court's instructions on accomplice liability were inadequate because they "indicate[d] automatic guilt of whatever (premeditated) crime the perpetrator commits without regard to whether the accomplice acted with something less than the perpetrator's premeditation." Sanders relies on recent decisions that criticize the standard jury instructions on aiding and abetting for failing to make clear that an aider and abettor's criminal liability must be judged by the aider and abettor's own mental state, not the mental state of the perpetrator. (See *People v. Nero* (2010) 181 Cal.App.4th 504, 513–517 (*Nero*); *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1164–1165 (*Samaniego*)). As these cases point out, in some circumstances an accomplice may be guilty of a lesser or greater crime than the perpetrator because of differences in their respective mental states. While the CALCRIM instructions no longer preclude such a result, they do not expressly address the possibility, either.<sup>8</sup>

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<sup>8</sup> The specific problem identified in *Nero* and *Samaniego* was a phrase in CALCRIM No. 400 stating that a defendant is "equally" guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator who committed it. (*Nero, supra*, 181 Cal.App.4th at p. 517; *Samaniego, supra*, 172 Cal.App.4th at p. 1163.) At some point the word "equally" was deleted from CALCRIM No. 400, and the trial court used the updated version of the instruction. (See 1 Judicial Council of Cal., Jury Instns. (2012) CALCRIM No. 400, p. 167.) The specific issue from those cases was therefore not present here.

Hughes makes a similar argument, contending the court’s accomplice liability instructions permitted the jury to find him guilty of the killing of Harris without a finding he acted with the intent to kill Harris.<sup>9</sup>

We decline to weigh in on the controversy over the CALCRIM instructions because, in this case, any deficiency in the standard instructions was harmless under both *Chapman v. California* (1967) 386 U.S. 18 (*Chapman*) (harmless beyond a reasonable doubt) and *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) (reasonable probability of a more favorable outcome), for the same reasons it was found harmless in *Samaniego*. As in *Samaniego*, the jury was instructed with the murder and special circumstances multiple-murder instructions. As *Samaniego* noted, “The error here is harmless beyond a reasonable doubt because the jury necessarily resolved these issues against appellants under other instructions. [Citation.] [¶] The jury necessarily found that appellants acted willfully with intent to kill. It was instructed regarding the multiple-murder special circumstance in accordance with CALCRIM No. 702 [requiring the jury to find intent to kill for a multiple-murder special circumstance]. The jury found the special circumstance to be true, thereby necessarily finding that each appellant had the specific intent to kill. The jury was also instructed that appellants acted willfully if they intended to kill. (CALCRIM No. 521.) Hence, the jury also found that appellants acted willfully. [¶] The jury also necessarily found that appellants acted deliberately and with premeditation [under CALCRIM No. 401, which requires an accomplice to be aware of the intent of the perpetrator]. . . . [¶] It would be virtually impossible for a person to know of another’s intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required.” (*Samaniego*, *supra*, 172 Cal.App.4th at pp. 1165–1166.)

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<sup>9</sup> Sanders and Hughes failed to object or seek clarification of the instructions as given. In the absence of a showing the alleged error affected their “substantial rights,” their arguments are forfeited. (*People v. Valdez* (2012) 55 Cal.4th 82, 151; § 1259.) We address the argument on its merits to preclude any claim the failure to object constituted ineffective assistance of counsel.

The same logic applies here. The jury could not have found the defendants were aware of each other's intent to kill Sanders and Coria and chose to aid each other without also finding the necessary premeditation. Any error in the standard instructions was harmless.

While recognizing the jury necessarily found he acted with intent to kill under the special circumstances instruction, Hughes argues this was insufficient because the jury was not required by that instruction to find he formed the intent to kill before the fatal wounds were inflicted. While the argument is plausible in theory, it is untenable on the evidence at trial. Harris was killed before Coria. Hughes could not have formed the intent to kill Harris only after seeing him shot in the head. In order to conclude Hughes acted with awareness of Sanders's intent and with the intent to kill, the jury necessarily found Hughes formed that intent prior to the killing of Harris.<sup>10</sup>

### **3. Sentencing Hearing**

Ten days prior to sentencing, Hughes sent a letter to the trial judge discussing witness statements and photographs that, he argued, demonstrated Coria's body had originally fallen next to Harris's body and had been moved before the formal police investigation. Evidence that Coria was shot near Harris would have supported a conclusion Sanders killed both victims. Hughes stated cryptically, "It appears that his body has been moved about 7–15 feet away from the car, and placed directly in front of the light pole. Quoting investigator Wilson of the Alameda County Coroner's Office."<sup>11</sup>

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<sup>10</sup> Notably, the cases cited by Hughes in support of his argument address crimes other than murder. (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039 [burglary]; *People v. Cooper* (1991) 53 Cal.3d 1158, 1160–1161 [robbery].) The third case cited by Hughes, *People v. Rutkowsky* (1975) 53 Cal.App.3d 1069, while it does address a murder conviction, says nothing about the timing of intent to kill. It merely states that two witnesses could not have been accomplices because there was no evidence they knew the crime was going to be committed or that they encouraged it. (*Id.* at p. 1072.)

<sup>11</sup> There is no indication who Wilson was, how Hughes knew of his purported comment, or the context in which that comment was made. No one named Wilson testified at trial.

Hughes also noted he “brought these issues up to my attorney during trial” but did not receive a satisfactory response.

The letter closed as follows: “[T]hese are all factors that point to my innocence and by law it is your duty that you hear all facts and weigh all evidence in a case and regardless of verdict if there is a doubt and evidence that is conflicting you can exercise your power to set aside a verdict of guilt because of witnesses[’] lack of knowledge of the crime and insufficient evidence to prove guilt beyond a reasonable doubt. (In ref. to p.c. 1385) [¶] If all the facts are looked over carefully, all will see that I, Marrin Hughes, am not guilty but 100% innocent of all charges.”

At sentencing, Hughes’s counsel made an oral motion for a continuance, noting Hughes’s family was in the process of retaining private counsel to file a motion for a new trial. Counsel explained he had not requested the continuance earlier because he had not been told of the family’s intent. Addressed by the court directly, Hughes explained his family was in the process of refinancing the family home to raise a retainer fee for a private attorney, although the prospective attorneys had not yet been hired. He believed the new trial motion would be ready within four to six weeks. In the course of the discussion, the court acknowledged receiving and reading Hughes’s letter.

Sanders joined the request for a continuance, explaining, “I’m asking for a retrial based on the ineffective assistance of counsel.”<sup>12</sup> Counsel for Sanders told the court he had not made a formal motion for a new trial because “I just received notice” of Sanders’s intent and opined, “what my client says is a fruit of writ of habeas corpus [*sic*], not a motion for a new trial.”

Sanders asked the court for permission to “read into the record why I want to file ineffective assistance of counsel, why I’m asking for a retrial.” Given leave, Sanders said his attorney had prejudiced him by failing to call a witness, Janae Morgan, who could

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<sup>12</sup> In a postconviction interview with the probation officer, recounted in the probation report, Sanders had expressed dissatisfaction with the criminal justice system, contended he was not given a fair trial, and declared his intention to “file a motion for ineffective assistance of counsel.”

have “had a positive effect that could have changed the outcome of the jury’s verdict in favor of [the] defense case.” Despite noting his attorney’s purported ineffective assistance, Sanders did not ask to have a new attorney appointed. The court noted the failure to procure favorable testimony was a strategic decision better suited to a writ of habeas corpus than a motion for a new trial, since the latter is “limited to things that occurred on the record.”

The court denied the joint requests for a continuance as untimely. In explaining the denial, the court noted the large number of community members assembled, which the court estimated at 85 persons, the substantial preparation by the court and counsel, and the failure to request the continuance earlier. The court also found Hughes’s proposal to be “very speculative,” since he had yet to retain an attorney.

Following the pronouncement of sentence, Hughes reiterated the points made in his letter. Responding, the court said, “Well, I certainly think you are entitled to your point of view on the evidence. . . . I’m comfortable with the evidence that was presented and the verdict that was rendered[.] [I]t appears to me to be correct. And I’m convinced beyond a reasonable doubt that it’s correct.”

**a. Failure to Inquire Regarding Sanders’s Claim of Ineffective Assistance of Counsel**

Sanders contends the trial court erred in failing to conduct an adequate inquiry into his claim of ineffective assistance under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*).

The need for a hearing under *Marsden* arises “[w]hen a defendant seeks to discharge his appointed counsel and substitute another attorney, and asserts inadequate representation.” (*People v. Richardson* (2009) 171 Cal.App.4th 479, 484.) A request for substitution of appointed counsel can be made both before and after trial. “[T]he standard expressed in *Marsden* and its progeny applies equally preconviction and postconviction.” (*People v. Smith* (1993) 6 Cal.4th 684, 694.) When an appropriate request is made, “the trial court must permit the defendant to explain the basis of his contention and to relate specific instances of the attorney’s inadequate performance.

[Citation.] “Although no formal motion is necessary, there must be ‘at least some clear indication by defendant that he wants a substitute attorney.’ ” ( *People v. Richardson*, at p. 484; see also *People v. Lucky* (1988) 45 Cal.3d 259, 281, fn. omitted [“a trial court’s duty to permit a defendant to state his reasons for dissatisfaction with his attorney arises when the defendant in some manner moves to discharge his current counsel”].)

In *People v. Sanchez* (2011) 53 Cal.4th 80, the Supreme Court addressed the common practice of appointing “conflict” counsel when a *Marsden* request is made. In the course of its decision, the court reiterated that a *Marsden* hearing is required only when “there is ‘at least some clear indication by defendant,’ either personally or through his current counsel, that defendant ‘wants a substitute attorney.’ ” (*Id.* at pp. 89–90.) In a footnote, the court expressly disapproved a series of cases decided by the appellate court to the extent they “incorrectly implied that a *Marsden* motion can be triggered with something less than a clear indication by a defendant” or his counsel that the defendant “ ‘wants a substitute attorney.’ ” (*Id.* at p. 90, fn. 3.) In these disapproved cases, the court had implicitly, if not explicitly, held that a defendant’s expressed desire to make a new trial motion or motion to withdraw a plea on the basis of claimed ineffective assistance of counsel, without more, should be treated as triggering *Marsden* hearing requirements. (E.g., *People v. Mejía* (2008) 159 Cal.App.4th 1081, 1086 [although defendant made no request for substitute or even “conflict” counsel, court nevertheless concluded he made a *Marsden* motion because he “instructed his counsel to move for a new trial largely on the basis of his counsel’s performance at trial and that his counsel so informed the trial court”].)

No duty under *Marsden* to inquire into Sanders’s claim of ineffective assistance of counsel arose here because Sanders never gave a “clear indication” that he wanted to replace his appointed counsel. On the contrary, there was no suggestion Sanders wanted a new attorney. Instead, he twice stated that the relief he sought in connection with his claim of ineffective assistance was a “retrial.” Sanders may have refrained from seeking new counsel because, the motion having been made at a sentencing hearing, counsel’s representation was nearly at an end. Whatever the reason, however, Sanders’s failure to

request substitute counsel, or even to suggest he desired a new attorney, rendered *Marsden* inapposite.

**b. Hughes's Letter**

Hughes contends the trial court failed to “properly address” what he characterizes as the new trial motion in his letter to the court.

A defendant may make a motion for a new trial on grounds, among others, that the verdict was contrary to the evidence or that new evidence had been found. (§ 1181, subds. 6, 8.) Such a motion may be made at any time up to the pronouncement of judgment, and the trial court must decide a timely motion for a new trial prior to pronouncing judgment. (§ 1182.) If the trial court fails to decide a timely motion for a new trial prior to judgment, the defendant must be granted a new trial. (§ 1202; *People v. Braxton* (2004) 34 Cal.4th 798, 810 (*Braxton*).)

Although the trial court did not rule on the request in Hughes's letter before pronouncing sentence, we decline to order the grant of a new trial pursuant to section 1202 for two reasons. First, the letter was not a motion for a new trial. At no point in the letter did Hughes request a new trial or cite the statutes governing a request for a new trial. Rather, he characterized himself as innocent and requested that the trial court “set aside” the verdict, citing as authority section 1385, which allows the court to dismiss a criminal action in the interests of justice. A section 1385 motion can be made before, during, or after trial, and the court has the power under section 1385 to grant a postconviction acquittal on grounds, among others, of insufficiency of the evidence. (*People v. Hatch* (2000) 22 Cal.4th 260, 268.) From all appearances, Hughes's letter was intended as a motion for acquittal under section 1385. Further, the trial court appears to have treated the letter in this manner. When addressing the letter following the pronouncement of sentence, the court noted that it found the evidence sufficient: “I'm comfortable with the evidence that was presented and the verdict that was rendered[.] [I]t

appears to me to be correct. And I'm convinced beyond a reasonable doubt that it's correct."<sup>13</sup>

Second, even if the motion was intended as a motion for a new trial, Hughes forfeited his right to a new trial under section 1202 when he failed to request a ruling on the letter prior to the pronouncement of sentence. "If the trial court's failure to hear or rule on the new trial motion appears to be inadvertent, the defendant must make some appropriate effort to obtain the hearing or ruling. [Citations.] . . . [¶] This is an application of the broader rule that a party may not challenge on appeal a procedural error or omission if the party acquiesced by failing to object or protest under circumstances indicating that the error or omission probably was inadvertent." (*Braxton, supra*, 32 Cal.4th at p. 813.) Prior to the pronouncement of sentence, Hughes mentioned his letter to the court, but he neither characterized it as a motion for a new trial nor requested a ruling on it. On the contrary, he and his attorney requested a continuance to permit a different attorney retained by his family to file a *future* motion for a new trial. Under these circumstances, the trial court understandably failed to treat Hughes's letter as a motion for a new trial. To be entitled to relief under section 1202, Hughes was required to bring the oversight to the court's attention. (*Braxton*, at p. 813.) When he did not, he forfeited his right to relief under that statute.

Hughes argues we should make allowance for his lack of sophistication in making the motion. While we might agree if the nature of his letter had been ambiguous, it was not. The letter was quite clearly and expressly a request for an acquittal rather than a new trial. Yet even if we were to grant Hughes some legal leeway, the automatic award of a new trial under section 1202 comes only if the trial court is given fair warning about its failure to rule on a motion for a new trial. No such warning was provided.

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<sup>13</sup> Hughes does not argue, and has cited no authority suggesting, the trial court was required to rule on a section 1385 motion prior to pronouncing sentence.

#### **4. Correction of the Abstract of Judgment**

Both defendants claim two errors in the abstracts of judgment: the setting of their two life terms to run consecutively, rather than concurrently, and the failure to award actual custody time. The Attorney General concedes the errors. We will direct the entry of new abstracts of judgment making the life sentences concurrent and awarding appropriate custody time.

#### **B. Sanders's Individual Arguments**

##### **1. Evidence of Hughes's Jailhouse Call**

The prosecution questioned S.C. about a telephone call he received around the time of the preliminary hearing in this matter.<sup>14</sup> S.C. testified that he was called at home, prior to finishing his preliminary hearing testimony. Although the caller identified himself as “Lou,” Sanders’s nickname, S.C. recognized Hughes’s voice. As S.C. characterized it, Hughes told him “to tell everybody that he had nothing to do with it.” Prior to S.C.’s testimony about the substance of this call, the court had instructed the jury that the evidence could be considered only in connection with Hughes, not Sanders. The court had earlier denied a motion by Sanders’s counsel alternatively for severance or to redact the reference to “Lou” under Evidence Code section 352.

Sanders argues the trial court, in refusing to sever or redact the reference to “Lou,” erred and denied him due process and the right of confrontation under *People v. Aranda* (1965) 63 Cal.2d 518 (*Aranda*), partially abrogated by constitutional amendment as stated in *People v. Fletcher* (1996) 13 Cal.4th 451, 465, *Bruton v. United States* (1968) 391 U.S. 123 (*Bruton*), and *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

*Aranda* and *Bruton* effectively prohibit the introduction in a joint criminal trial of a statement by one codefendant that “inculpates” (*Bruton, supra*, 391 U.S. at p. 137) or “implicates” (*Aranda, supra*, 63 Cal.2d at p. 530) the other defendant. In both cases, one defendant confessed to a law enforcement officer that he and the other defendant

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<sup>14</sup> We explain the circumstances and content of this call in more detail in a subsequent section.

committed the crimes of which they were jointly accused. (*Bruton*, at p. 124; *Aranda*, at p. 522.)

We find *Bruton* and *Aranda* inapplicable here because Hughes's identification of himself as Sanders did not in any way inculcate or implicate Sanders in the killings. Hughes did not say or even suggest that Sanders had committed the crimes. He merely falsely identified himself as Sanders in a telephone call relating to the crimes. The misidentification did not even, as Sanders contends, confirm Hughes's prior acquaintance with Sanders, since by the time of the telephone call the two had been named in the same information. In any event, when the statement does not directly implicate a codefendant, a limiting instruction may be sufficient to prevent undue prejudice. (*People v. Fletcher* (1996) 13 Cal.4th 451, 468.) Here, it was.

Nor, for two reasons, is *Crawford* applicable. *Crawford* precludes the admission of an out-of-court "testimonial" statement when the declarant is unavailable for cross-examination. (See *People v. Lopez* (2012) 55 Cal.4th 569, 576 (*Lopez*).) Although *Crawford* did not attempt to define a "testimonial" statement, it suggested the rule applies when the statement was " 'made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.' " (*Crawford, supra*, 541 U.S. at p. 52.) While the court's subsequent attempts to define this concept have lacked unanimity (see *Lopez*, at pp. 576–582), the court appears to agree that "to be testimonial the out-of-court statement must have been made with some degree of formality or solemnity," normally because it is made in the course of a criminal investigation or prosecution (*id.* at p. 581). While it is possible, as Sanders contends, Hughes was aware his telephone call was being recorded and would be available for trial, his statement to S.C. was not made "with some degree of formality or solemnity" and is therefore not covered by the rule of *Crawford*. In addition, *Crawford* does not restrict the use of statements for a nonhearsay purpose. (*People v. Livingston* (2012) 53 Cal.4th 1145, 1163–1164 (*Livingston*).) Here, the only hearsay use of the statement would have been to prove that Sanders was the caller, contrary to the

prosecution's theory. Accordingly, its nonhearsay use here was not prohibited by *Crawford*.

Further, we find no error in the trial court's decision not to redact the reference to "Lou" from Hughes's statement. Evidence can be excluded under Evidence Code section 352 if its probative value is " 'substantially outweighed' " by the potential for undue prejudice or confusion. (*People v. Riccardi* (2012) 54 Cal.4th 758, 808–809.) We review a trial court's decision not to exclude evidence under section 352 for abuse of discretion. (*Riccardi*, at p. 809.) We find no abuse. Hughes's use of the name "Lou" was probative because it connected the call to the pending preliminary hearing and demonstrated Hughes's attempt to deceive, perhaps because he was aware the call could be recorded. The potential for undue prejudice was minimal because the misidentification did not tie Sanders to the crimes in any overt way, S.C. testified unequivocally the caller was Hughes, and the trial court gave a limiting instruction.

Even if we did not reach the foregoing conclusions, we would find no basis for reversing the judgment on the basis of the trial court's admission of Hughes's reference to "Lou" because it was harmless. As discussed above, Hughes's use of the name did little or nothing to implicate Sanders in the killings. At most, the reference suggested a prior relationship between Hughes, Sanders, and S.C., but there was other uncontested evidence that these three knew each other prior to the shootings. As a result, admission of the evidence was harmless under the standards of both *Chapman* and *Watson*.

## **2. *Photograph Inscriptions***

On the day following S.C.'s testimony, the prosecution called Oakland Police Sergeant George Phillips to testify about the investigation. In the days immediately after the killings, the police had not located any eyewitnesses and had not identified any suspects. A week after the killings, Phillips received a telephone call from a San Francisco police officer about a potential witness. Over a defense objection and subject to a limiting instruction that the testimony could not be considered for the truth of the matter asserted, Phillips testified the officer gave him the names of S.C. and his mother. Phillips then described his investigation over the next few days, interviewing S.C.'s

mother and tracking down additional witnesses. Because S.C.'s mother told him S.C. was in the closet when the shooting occurred, Phillips did not focus on S.C.

Two weeks after the killings, Phillips found on his desk an envelope from the same San Francisco police officer. In the envelope were four pictures. Two were of S.C.'s mother, and one was of S.C. Again over a defense objection and subject to the same limiting instruction, Phillips testified that, on the back of the photograph of S.C., was written, "The little boy that seen it all." The back of the fourth photograph, which turned out to be of Sanders, was inscribed, "suspect." Phillips testified he used these photographs to develop further witnesses and information. When, two months later, S.C.'s mother was arrested, Phillips used the leverage resulting from the arrest to persuade her to admit S.C. witnessed the shootings.

Sanders contends admission of the text of the notations on the backs of the two photographs, identifying S.C. as a witness and himself as a suspect, violated *Crawford*, denied him due process, and constituted legal error.

As noted above, *Crawford* precludes the admission of an out-of-court "testimonial" statement when the declarant is unavailable for cross-examination. To qualify as a testimonial, the statement must have been made with some degree of formality or solemnity. (*Lopez, supra*, 55 Cal.4th at p. 581.) Because there was no information provided about the anonymous, handwritten notations, other than that they found their way into the hands of a San Francisco police officer not otherwise involved in the investigation, we have no basis for finding they were made with the necessary formality or solemnity to qualify as "testimonial" under *Crawford*. In any event, " 'there are no confrontation clause restrictions on the introduction of out-of-court statements for *nonhearsay* purposes.' " (*Livingston, supra*, 53 Cal.4th at pp. 1163–1164.) As discussed below, these inscriptions were admitted only for nonhearsay purposes. Nor, as also discussed below, do we agree with Sanders's contention that the notations were "pivotal" evidence, making their admission a violation of due process. (*Id.* at p. 1163.)

We review the trial court's decision to admit the potential hearsay evidence under a limiting instruction for abuse of discretion. (*People v. Waidla* (2000) 22 Cal.4th 690,

722–723.) The texts were, of course, inadmissible hearsay only to the extent they were admitted for the purpose of proving the truth of the inscriptions. They could properly be admitted for a nonhearsay purpose, such as, in this case, explaining conduct. (See *Livingston, supra*, 53 Cal.4th at p. 1162 [“ ‘ “The statement is not hearsay, since it is the hearer’s reaction to the statement that is the relevant fact sought to be proved, not the truth of the matter asserted in the statement” ’ ”].) The facts sought to be proved, the course and explanation for the officer’s investigation, were relevant, and the trial court sought to mitigate any undue prejudice by giving the instruction limiting their use to nonhearsay purposes.

Further, the potential for undue prejudice was minimal. Although Sanders characterizes this evidence as “key” and “[going] to the heart of the defense,” it was anything but. The inscriptions provided no information about the crimes themselves. They merely suggested one person was a witness to the crime and characterized a defendant as a “suspect.” Further, the inscriptions were anonymous, and there was no testimony about their author or authors or the circumstances of their genesis. Even in the absence of the limiting instruction, the jury had no reason to believe the inscriptions were reliable or to give them any evidentiary weight, and no claim was made that the jury should do so. They were simply presented to explain the course of the investigation. Under these circumstances, we find no abuse of discretion.

In any event, admission of the texts from the photographs was harmless under both the *Chapman* and *Watson* tests. As to the reference to S.C. having “seen it all,” any bolstering of S.C.’s testimony would have been minimal. The inscription was anonymous, and there was no explanation of why the author believed S.C. to have been a witness. On that ground alone, it would have been given little weight. More important, the jury was able to evaluate the credibility of S.C.’s testimony for itself in viewing his testimony. As to the description of Sanders as a “suspect,” it would have had a similarly minimal impact, since the jury was presented with ample evidence relating directly to Sanders’s commission of the crimes.

### ***3. Special Circumstances Instructions***

The trial court used CALCRIM Nos. 700, 702, 705, and 721 to instruct the jurors on the requirements for determining the special circumstances allegation. CALCRIM No. 700 explains generally the burden of proof for a special circumstance allegation; CALCRIM No. 705 instructs the jury on the consideration of circumstantial evidence of a defendant's mental state; and CALCRIM No. 721 states that, when a defendant is charged with the special circumstance of having been convicted of more than one murder, the jury must find the defendant has been convicted of at least one charge of first degree murder and a second charge of either first and second degree murder.

The relevant part of CALCRIM No. 702, the focus of Sanders's argument, states, as delivered by the court: "If you decide that a defendant is guilty of first degree murder but was not the actual killer, then, when you consider the special circumstance of having been convicted of more than one murder in this case in violation of Penal Code section 190.2[, subdivision] (a)(3), you must also decide whether the defendant acted with the intent to kill. [¶] In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove that the defendant acted with the intent to kill."<sup>15</sup>

Sanders argues CALCRIM No. 702 is inadequate in this context because the jury could have construed the instruction as being satisfied if it found he acted with the intent to kill Harris, without determining his intent with respect to Coria.

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<sup>15</sup> The remainder of the instruction read: "The People do not have to prove that the actual killer acted with the intent to kill in order for this special circumstances to be true. If you decide that the defendant is guilty of first degree murder, but you cannot agree whether the defendant was the actual killer, then, in order to find this special circumstances true, you must find that the defendant acted with the intent to kill. [¶] If the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with the intent to kill for the special circumstances [of] having been convicted of more than one murder in this case in violation of Penal Code section 190.2[, subdivision] (a)(3) to be true. If the People have not met this burden, you must find this special circumstances has not been proved true for that defendant."

Reversal on the basis of an ambiguous jury instruction is required only if “there is [a] reasonable likelihood that the jury misconstrued or misapplied the instruction at issue.” (*People v. Romero* (2008) 44 Cal.4th 386, 416.) We find no reasonable likelihood, considering the instructions as a whole, the jury would have believed Sanders’s intent in killing Harris would have satisfied this instruction. As customized for the allegations of this prosecution, the first paragraph of CALCRIM No. 702 anticipates that at least two murders have been presented to the jury. That paragraph states that the instruction applies only if the jury has concluded the “defendant is guilty of first degree murder but was not the actual killer.” This immediately takes from consideration a murder as to which the jury found the defendant to be the “actual killer.” Only after this narrowing clarification does the instruction state, “In order to prove this special circumstance for a defendant who is not the actual killer but who is guilty of first degree murder as an aider and abettor, the People must prove that the defendant acted with the intent to kill.” The instruction’s unmistakable reference is to the defendant’s intent with respect to the murder in which he or she was not the actual killer. Further, as Sanders concedes, the prosecution argued intent to kill was required for both murders. There was no suggestion the jury could find the special circumstance true without finding Sanders had an intent to kill with respect to both shootings.

The jury was also unlikely to adopt Sanders’s suggested construction because it would have rendered CALCRIM No. 702 surplusage in these circumstances. The prosecution’s theory of the case was that each defendant personally committed one premeditated murder and was an accomplice with respect to the other murder. On the evidence presented, the jury could not have found that each defendant personally committed a murder without also finding he possessed the intent to kill with respect to that murder. Accordingly, if the defendant’s intent with respect to that murder was sufficient to permit the jury to find the special circumstance as to the murder for which he acted as an accomplice, there would have been no reason to give CALCRIM No. 702. The requisite intent for the special circumstance allegation would have been satisfied already, without regard to the defendant’s intent with respect to the murder for which he

acted as an accomplice. The instruction makes sense only if the jury was required to evaluate the defendant's intent with respect to the accomplice murder, separate and apart from his intent regarding the murder he personally committed. This would have been obvious to the jury, precluding their acceptance of Sanders's reading of the instruction. Accordingly, we find no basis for reversal on this ground.<sup>16</sup>

#### **4. Failure to Instruct on Voluntary Manslaughter**

Sanders contends the trial court erred in failing to instruct sua sponte on the lesser included offense of voluntary manslaughter based on unreasonable self-defense with respect to his shooting of Harris.

“ ‘The trial court is obligated to instruct the jury on all general principles of law relevant to the issues raised by the evidence, whether or not the defendant makes a formal request.’ [Citations.] ‘That obligation encompasses instructions on lesser included offenses if there is evidence that, if accepted by the trier of fact, would absolve the defendant of guilt of the greater offense but not of the lesser.’ ” (*People v. Rogers* (2006) 39 Cal.4th 826, 866.) In other words, the duty to instruct on lesser included offenses exists only if there is substantial evidence supporting a jury determination that the defendant “was in fact guilty only of the lesser offense.” (*People v. Parson* (2008) 44 Cal.4th 332, 348–349.) “ ‘As our prior decisions explain, the existence of “any evidence, no matter how weak” will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is “substantial enough to merit consideration” by the jury. [Citations.] “Substantial evidence” in this context is “ ‘evidence from which a jury composed of reasonable [persons] could . . . conclude[.]’ ” that the lesser offense, but not the greater, was committed.’ ” (*People v. Moyer* (2009) 47 Cal.4th 537, 553.)

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<sup>16</sup> We also note Sanders failed to object to or seek clarification of the instructions as given. In the absence of a showing the alleged error affected his “substantial rights,” the argument is forfeited. (*People v. Valdez, supra*, 55 Cal.4th at p. 151; § 1259.) We have addressed the argument on its merits to preclude any later claim the failure to object constituted ineffective assistance of counsel.

Unreasonable self-defense is “not a true defense but ‘a shorthand description of one form of voluntary manslaughter,’ obligating the trial court to instruct on it, sua sponte, as a lesser offense of murder ‘whenever the evidence is such that a jury could reasonably conclude that the defendant killed the victim in the unreasonable but good faith belief in having to act in self-defense.’ ” (*People v. Murtishaw* (2011) 51 Cal.4th 574, 594.)

Although two persons besides S.C. identified Sanders to police as Harris’s killer, only S.C. claimed to be looking at Sanders when the fatal shot was fired. The other two witnesses claimed to have turned toward Sanders and Harris only after hearing the shot. S.C. testified that before the shooting Harris and Sanders argued for “a few minutes.” Apparently in the midst of the argument, Harris answered his cell phone. In doing so, he “[t]ook his phone out of his pocket and turned away,” placing his back to Sanders. Sanders then took a gun from his waist and shot Harris. The forensic pathologist who conducted Harris’s autopsy testified he was killed by a single gunshot that entered above and behind his left ear, suggesting that he was killed either as he was turning away or after he had turned away.<sup>17</sup>

Noting S.C.’s testimony that Harris was shot after having answered his cell phone, Sanders argues the jury could have concluded, “If Harris did pivot to pull a phone in the midst of arguing, [Sanders] could interpret this as a furtive or deceptive act posing a risk to him” and shot Harris, perhaps thinking Harris was pulling a gun. Such an interpretation of the evidence, however, would have required the jury to disregard S.C.’s testimony that the shooting occurred only after Harris had pulled out his cell phone and, at a minimum, begun to turn away. Because the shooting was not an instantaneous reaction to Harris’s initial movements, Sanders would have recognized the cell phone by the time he had removed the gun from his waistband. The argument also ignores the vibration or ring tone that would have caused Harris to respond to his cell phone, which

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<sup>17</sup> At the preliminary hearing, S.C. had testified both that Sanders was facing Harris when the shot was fired and that Harris “was just turning around when [Sanders] pulled the gun.” The pathologist’s testimony appears to preclude the former.

presumably would have been perceptible to Sanders as well. There is simply no evidence, direct or circumstantial, to suggest the shooting occurred in response to a perceived threat.

It is, of course, always possible to speculate that the crime occurred differently from the manner suggested by the testimony presented at trial, but the potential for such speculation does not constitute substantial evidence to trigger the duty to instruct on a lesser included offense. (*People v. DePriest* (2007) 42 Cal.4th 1, 50–51.) Because there was no substantial evidence to support a finding of unreasonable self-defense, Sanders was not denied his constitutional right to have the jury determine factual issues by the trial court’s failure to instruct on the theory. (*People v. Moore* (2011) 51 Cal.4th 386, 408–409.)

### **5. Flight Instruction**

Sanders contends the trial court erred in instructing that flight could be considered evidence of awareness of guilt because there was insufficient evidence his leaving the scene constituted “flight.”

“A flight instruction is proper where the evidence shows a defendant departed the crime scene under circumstances suggesting his movement was motivated by a consciousness of guilt.” (*People v. McWhorter* (2009) 47 Cal.4th 318, 376.) “Evidence that a defendant left the scene is not alone sufficient; instead, the circumstances of departure must suggest ‘a purpose to avoid being observed or arrested.’ [Citations.] To obtain the instruction, the prosecution need not prove the defendant in fact fled, i.e., departed the scene to avoid arrest, only that a jury *could* find the defendant fled and permissibly infer a consciousness of guilt from the evidence.” (*People v. Bonilla* (2007) 41 Cal.4th 313, 328.)

One witness, Luis Villasenor, testified that as he was driving up 46th Avenue toward Bancroft Avenue the evening of the shooting, he heard about six shots in quick succession. About 30 seconds later, a person wearing distinctive gold-tipped dreadlocks, such as worn by Sanders, ran from the scene down 46th Avenue. There is no question Sanders, whom several witnesses placed at the scene at the time of the shooting, had left

before police arrived. Villasenor’s testimony is sufficiently suggestive of legal flight to support the instruction. Although Sanders is certainly correct there are other possible explanations for his movements, the evidentiary basis for the flight instruction requires sufficient, not uncontradicted, evidence. (*People v. Richardson* (2008) 43 Cal.4th 959, 1020.)

In any event, the flight instruction was harmless. Flight was a minor issue in the case, and under either the *Chapman* or *Watson* standards, it made no prejudicial difference to the outcome, given the nature of the remaining evidence.

#### **6. Reasonable Doubt Instruction**

On the topic of reasonable doubt, the trial court gave CALCRIM No. 220, which states: “Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. The evidence need not eliminate all possible doubt because everything in life is open to some possible or imaginary doubt.” The language of CALCRIM No. 220 is taken directly from Penal Code section 1096, which states, in part, reasonable doubt “ ‘is that state of the case, which . . . leaves the minds of jurors in that condition that they cannot say they feel an abiding conviction of the truth of the charge.’ ” CALCRIM No. 220 simply rephrases the statutory language in positive terms.

During closing argument, the prosecutor quoted the charge and offered commentary on the concept of “abiding conviction,” telling the jury, “When we get to this concept of abiding conviction beyond a reasonable doubt, recall that the definition of abiding, enduring, lasting, continuing. Definition of conviction to be convinced or to have a strong belief in. When you put them together what it comes out with is the concept if you have a strong belief and your state of being convinced, enduring, is lasting, it is proof beyond a reasonable doubt.”

Sanders contends the trial court’s instruction and the prosecutor’s subsequent commentary on reasonable doubt understated the degree of certainty required to support a belief beyond a reasonable doubt, thereby depriving him of a fair trial.

Sanders’s claim that the statute and instruction allow a finding of guilt with a lesser degree of proof than that required by the due process clause was rejected in *People*

*v. Davis* (1995) 10 Cal.4th 463 (*Davis*) with respect to the equivalent CALJIC instruction. (*Davis*, at p. 520.) While it is possible, as Sanders does, to find language in United States Supreme Court cases that can be interpreted to set a higher standard, our Supreme Court has held that the precise language is not critical. As the court held recently in this connection, “Regarding the presumption of innocence, the United States Supreme Court has declared that the federal due process clause does not require a trial court to use any particular phrase or form of words when instructing on this principle. (*Taylor v. Kentucky* [(1978) 436 U.S. 478,] 485.) We followed *Taylor* in *People v. Hawthorne* [(1992)] 4 Cal.4th 43 (*Hawthorne*), to conclude that so long as the court’s instructions to the jury express the substance of the presumption of innocence, it will satisfy the dictates of due process.” (*People v. Aranda* (2012) 55 Cal.4th 342, 355.)

As to the prosecutor’s commentary on the meaning of “abiding conviction,” no objection was raised in the trial court. A defendant’s claim of prosecutorial misconduct—in this case, misleading the jury on the law—“ ‘is not preserved for appeal if defendant fails to object and seek an admonition if an objection and jury admonition would have cured the injury.’ ” (*People v. Tully* (2012) 54 Cal.4th 952, 1010.) Sanders makes no persuasive case for disregarding this requirement.

Even if the issue of the prosecutor’s statements has been preserved for appellate review, we would find no basis for reversal, since we find no reasonable likelihood the jury misunderstood the concept of “reasonable doubt” as a result of those comments. (See *People v. Samayoa* (1997) 15 Cal.4th 795, 841 [when a claim of prosecutorial misconduct “focuses upon comments made by the prosecutor before the jury, the question is whether there is a reasonable likelihood that the jury construed or applied any of the complained-of remarks in an objectionable fashion”].) Sanders does not suggest how the true meaning of “abiding conviction” departs in any material way from the meaning ascribed by the prosecutor—a “strong belief” that is “enduring [or] lasting.” Sanders’s true dispute is with the language of section 1096 itself, but we are bound by *Davis* to find the statute adequately states the constitutional standard.

Because we find no actual error in Sanders’s trial, we find no prejudice due to the cumulative effect of error.

**C. Hughes’s Individual Arguments<sup>18</sup>**

**1. Failure to Transcribe Jury Instructions**

Counsel for both defendants stipulated that the reporter need not transcribe the trial court’s reading of the jury instructions and that a written copy of the instructions would suffice for purposes of the appellate record. Prior to reading the instructions, the court provided the jurors with a written copy of them.<sup>19</sup> Following the reading of the instructions, none of the attorneys objected or otherwise suggested the court’s reading deviated from the written copy provided to the jury and placed in the appellate record. It was later noted that during the reading of the instructions the trial court avoided reading an error in the written instructions. The parties stipulated to a correction of the written instructions, consistent with the court’s reading.

Hughes contends his attorney’s stipulation constituted ineffective assistance of counsel because it failed to provide an adequate record for appeal, citing California Rules of Court, rule 8.320(c)(4), which states that a reporter’s transcript must contain “[a]ll instructions given orally.” We decline to address the merits of the argument because Hughes fails to show any prejudice from the stipulation. (*People v. Hernandez* (2011) 53 Cal.4th 1095, 1105 [“a defendant claiming the ineffective assistance of counsel is required to show both that counsel’s performance was deficient and that counsel’s errors prejudiced the defense”].) Despite his claim the appellate record is inadequate, Hughes has not identified any argument, meritorious or not, that he was prevented from making on appeal as a result of the stipulation. There is no reason to believe the court’s reading deviated materially from the written copy of the instructions, and we have accepted that

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<sup>18</sup> Sanders also joins these legal claims, to the extent they apply to the circumstances of his conviction.

<sup>19</sup> The copy of the jury instructions in the clerk’s transcript contains a cover page stating, “READ AND SENT TO THE JURY ON FEBRUARY 1, 2011.”

copy as an accurate record of the court's instructions, per the parties' stipulation.<sup>20</sup> (See *People v. DeFrance* (2008) 167 Cal.App.4th 486, 495–496.)

Hughes argues the stipulation was prejudicial per se because it “deprive[d him] of counsel during a critical stage of the proceedings” by producing an inadequate appellate record. (E.g., *United States v. Cronin* (1984) 466 U.S. 648, 658.) Hughes was, of course, not deprived of counsel; his attorney was present and able to note for the record if the oral instructions departed in any way from the written instructions. Further, notwithstanding California Rules of Court, rule 8.320(c)(4), the appellate record was not inadequate in any meaningful way. We would have been required to accept the written version of the instructions as authoritative for purposes of the appeal, even if there was evidence the court's oral instructions deviated from the written copy. (*People v. Rodriguez* (2000) 77 Cal.App.4th 1101, 1112–1113 [“ ‘It is generally presumed that the jury was guided by the written instructions.’ [Citations.] The written version of jury instructions governs any conflict with oral instructions”].)

## **2. Postcrime Conduct Instruction**

This argument requires a further explanation of the content and circumstances of the telephone call from Hughes to S.C. at the time of the preliminary hearing. S.C. and his mother had been relocated for their protection and were living in another state, and Hughes was in custody. During his initial appearance at the preliminary hearing, S.C. did not complete his testimony, and he returned to his new home with the understanding he would come back to California to complete his testimony at a later date. It was while he was at the new home, “shortly before” he was to return to complete his testimony, that he received the call from Hughes, who identified himself as “Lou.”

As S.C. characterized the call, Hughes told him “to tell everybody that he [presumably Hughes] had nothing to do with it.” In fact, Hughes did not literally tell S.C.

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<sup>20</sup> Hughes suggests there could have been a material discrepancy between the oral and written instructions that slipped by the court and all three attorneys. The suggestion is highly improbable and, more to the point, simple speculation. As such, it cannot support a finding of prejudice.

to say he had nothing to do with the crime. Rather, after asking S.C. whether he would be returning to California to testify in the upcoming hearing and receiving a noncommittal answer, Hughes said, “[W]hen they doing the . . . questions, man, just . . . let the people know . . . that, um, them people . . . up there, man, uh, they told you everything, uh, to talk about.” This is the only portion of the brief call in which Hughes overtly attempted to influence S.C.’s testimony.

During an investigation conducted after S.C. reported the call to a deputy district attorney, jail officials discovered the call to S.C. occurred in the course of a telephone call between Hughes and his girlfriend, Kristen Ford. A police officer described the call as a “three-way phone call,” used by inmates to prevent the recipient of the call from determining the originating number. A recording of the entire call was played to the jury, and a transcript was placed in the record.

At the beginning of the call, Hughes suggested to Ford that he had a telephone number for S.C. and remarked, “Man, I need to get through to him.”<sup>21</sup> After further conversation, during which Ford sought to discourage Hughes from making the call, he asked Ford to “[t]ransfer the phone and then do that for me? If—if you don’t, just . . . click over when he—if he picks up just click over. If he don’t, just hang it up.” Eventually, Ford phoned S.C.’s home, and the conversation described above between S.C. and Hughes occurred, with Ford remaining silently on the line. After S.C. ended the call, the conversation between Hughes and Ford continued. Ford asked, “Feel better now?” Hughes responded, apparently mocking S.C., “Yeah, man. Who this? I don’t know. Man, shit,” and commented S.C. was “[c]aught off guard,” later saying, “caught a motherfucker by surprise.”

In his closing, the prosecutor discussed the telephone call at length, arguing the conversation between Hughes and Ford before S.C. was joined suggested Ford had already attempted to influence S.C.’s testimony through his mother. Turning to the

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<sup>21</sup> A search of Hughes’s jail cell uncovered a piece of paper with S.C.’s out-of-state telephone number written on it.

conversation between Hughes and S.C., the prosecutor quoted Hughes’s request to S.C., arguing, “He’s trying to unduly influence [S.C.] to have [S.C.] not identify him in his role in these murders.” In turn, the defense argued Hughes had not attempted to intimidate S.C. and characterized the likely meaning of his request as, “They must have put you up to this. They must have told you what to say. When you come just tell them that.”

Over defense objection, the trial court delivered CALCRIM No. 371, which states, in part: “If a defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself.”<sup>22</sup>

Hughes contends the instruction was one-sided because it did not mention the defense’s theory of the meaning of the telephone call—that it was a plea for S.C. to tell the truth, reflecting Hughes’s awareness of his *innocence*.

Although the instruction did not mention the possibility of attempted intervention as evidence of innocence, we do not find it to have been impermissibly one-sided. Rather, under Hughes’s theory of the telephone call the instruction was simply

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<sup>22</sup> As delivered by the court, the full instruction read: “If a defendant tried to hide evidence or discourage someone from testifying against him, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If a defendant tried to create false evidence or obtain false testimony, that conduct may show that he was aware of his guilt. If you conclude that a defendant made such an attempt, it is up to you to decide its meaning and importance. However, evidence of such an attempt cannot prove guilt by itself. [¶] If someone other than a defendant tried to create false evidence, provide false testimony, or conceal or destroy evidence, that conduct may show that this defendant was aware of his guilt, but only if that defendant was present and knew about that conduct, or, if not present, authorized the other person’s actions. It is up to you to decide the meaning and importance of this evidence. However, evidence of such conduct cannot prove guilt by itself. [¶] If you conclude that a defendant tried to hide evidence, discouraged someone from testifying, or authorized another person to hide evidence or discourage a witness, you may consider that conduct only against that defendant. You may not consider that conduct in deciding whether the other defendant is guilty or not guilty.”

inapplicable. CALCRIM No. 371 does not suggest the jury may find an awareness of guilt merely on the basis of a defendant’s contact with a witness. Rather, the instruction applies only if the jury concludes the defendant attempted to “hide evidence or discourage someone from testifying against him” or “create false evidence or obtain false testimony.” In other words, CALCRIM No. 371 instructs that an awareness of guilt is potentially manifest only if the defendant *wrongfully* attempts to influence a witness’s testimony. Whether such conduct occurred is left entirely to the jury’s judgment.

Hughes’s counsel argued he was urging S.C. to tell the truth in the telephone call. In that case, the predicate for the instruction—an attempt to obtain false testimony or suppress truthful testimony—would not have been present. If the jury accepted Hughes’s interpretation, it would have had no reason to apply CALCRIM No. 371 at all. A CALJIC instruction conveying the same meaning has been upheld repeatedly.<sup>23</sup> (See *People v. Famalaro* (2011) 52 Cal.4th 1, 35–36, italics added [the instruction “merely allows the jury to decide, *if evidence of concealment exists*, what weight and significance it may have in the case”].)

Hughes relies primarily on *Cool v. United States* (1972) 409 U.S. 100 (*Cool*), which he claims “controls this case.” In *Cool*, a per curiam decision, the appellant was convicted of counterfeiting after her companion was arrested for passing counterfeit bills. After that arrest, the appellant was told to follow the police car carrying her companion to the station. At trial, a witness testified he saw a bag, which was later found to be filled with counterfeit bills, thrown from the appellant’s car window in the course of this drive. The companion admitted his guilt and provided an account fully exonerating the

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<sup>23</sup> CALJIC No. 2.06, approved by the court, states: “If you find that a defendant attempted to suppress evidence against [himself] [herself] in any manner, such as [by the intimidation of a witness] [by an offer to compensate a witness] [by destroying evidence] [by concealing evidence] [by \_\_\_\_\_], this attempt may be considered by you as a circumstance tending to show a consciousness of guilt. However, this conduct is not sufficient by itself to prove guilt, and its weight and significance, if any, are for you to decide.” We have found no published decision addressing the validity of CALCRIM No. 371.

appellant. (*Id.* at pp. 100–101.) The Supreme Court reversed the conviction on the basis of a long instruction on accomplice testimony that, the court held, effectively required the jury to disregard the companion’s testimony unless it was convinced beyond a reasonable doubt his story was true. (*Id.* at p. 103.)

In a footnote, the court noted another error that it also characterized as reversible. Immediately after the instruction mentioned above, the trial court informed the jury it could convict the appellant on accomplice testimony alone. The Supreme Court noted the instruction was confusing, since the only accomplice testimony was exculpatory, and it held the instruction to be “fundamentally unfair” because, “even if it is assumed [the companion’s] testimony was to some extent inculpatory,” the instruction “told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on that basis.” (*Cool, supra*, 409 U.S. at p. 103, fn. 4.)

We find *Cool* distinguishable. While the Supreme Court did not explain its reasoning in detail, we assume the instruction in *Cool* was found unfair precisely because the appellant was relying for her acquittal on the companion’s testimony. By informing the jury it could convict on the basis of that testimony but not, as the appellant urged, acquit, the instruction created the possibility of a misimpression regarding the use of the accomplice testimony. CALCRIM No. 371, in contrast, creates no risk of a misimpression. As discussed above, the instruction does not suggest the jury may infer an awareness of guilt merely from a defendant’s attempt to contact a witness; some type of wrongful conduct must be present. Further, the instruction in *Cool* mentioned using accomplice testimony only as evidence of guilt, without informing the jury it could use the evidence in any other manner. (*Cool, supra*, 409 U.S. at p. 103, fn. 4.) In contrast, CALCRIM No. 371 expressly tells the jury it is the ultimate arbiter of the “meaning and importance” of any evidence of an attempt to influence testimony. There could have been no misimpression that Hughes’s attempted intervention could be viewed only as evidence of an awareness of guilt, rather than innocence.

Because we find no actual error in Hughes’s trial, we find no prejudice due to the cumulative effect of error.

### III. DISPOSITION

The judgments are modified as follows: (1) each defendant's terms of life imprisonment will run concurrently, not consecutively; and (2) Sanders and Hughes are granted 1,130 and 1,129 days of custody credit, respectively. In all other respects, the judgments are affirmed. The trial court is directed to prepare amended abstracts of judgment and to forward certified copies to the Department of Corrections and Rehabilitation.

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Margulies, J.

We concur:

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Marchiano, P.J.

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Banke, J.