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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JASON WATTS,

Defendant and Appellant.

A137936

(Alameda County
Super. Ct. No. 166684)

Appellant Jason Watts was convicted of two counts of first degree murder (Pen. Code,¹ § 187) based on a variation of a drive-by shooting that claimed two lives. He was sentenced to two concurrent terms of life in prison without possibility of parole. He appeals based on insufficiency of the evidence, instructional error in answering the jury's questions during deliberations, ineffective assistance of counsel, and failure of the abstract to reflect actual presentence custody credits. In supplemental briefing Watts argues that both of his first degree murder convictions must be reversed under *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), which was decided while his appeal was pending.

Watts is correct that both first degree murder convictions must be reversed under *Chiu*, which held an aider and abettor cannot be convicted of first degree premeditated murder on a natural and probable consequences theory. (*Chiu, supra*, 59 Cal.4th at pp. 158–167.) There was sufficient evidence to sustain both of Watts's first-degree murder convictions as a direct accomplice, but because the jury was instructed on both theories,

¹ Statutory references, unless otherwise specified, are to the Penal Code.

and due to questions it asked during deliberations, we cannot determine which theory was used to arrive at each verdict. (*Id.* at pp. 167–168.) We therefore reverse both, to be replaced with second degree convictions unless the prosecution elects to retry Watts for first degree murder on a direct aiding and abetting theory. Aside from his entitlement to custody credits, Watts’s other claims of error do not entitle him to relief beyond that prescribed by *Chiu*.

I. BACKGROUND

A. The Evidence

On March 5, 2010, at about 2:30 p.m., Alisha Tackitt was walking her dogs near Chestnut Street and 30th Street in Oakland when she noticed a black car driving very slowly down Chestnut Street in the direction of 30th Street. The car was occupied by two young African American men wearing black sweatshirts with their hoods up.² The car suddenly pulled sharply over to the curb, the passenger alighted before the car stopped, and he began ducking between parked cars and then jogging down 30th Street toward Linden Street. The black car then turned onto 30th Street and proceeded slowly east toward Linden Street before Tackitt lost sight of it. When Tackitt heard four to ten gunshots, she took cover behind a parked car.

At the same time, Eugene Ellis was sitting on his front porch at 30th Street and Linden Street along with Victor Johns and a neighbor, John Jones (age 56). A young African American man wearing a black sweatshirt with the hood up approached on foot from the direction of Chestnut Street, said something to Johns, pulled a gun out from under his sweatshirt, and started shooting. Ellis reentered his house through a rear door and closed the door behind him. Johns ran down a side pathway toward the back of the house, and the shooter followed, firing multiple times at Johns and killing him. The shooter then returned to the front of the house, turned the gun on Jones, who was running

² Tackitt’s descriptions of the passenger’s height varied greatly. She described him at trial as an African American with a medium complexion, and tall (maybe as tall as 6’8”). In early statements she had described him as 5’8” to 5’10”. She said the passenger was thinner than, and had a darker complexion than, the driver.

from the scene toward Chestnut Street, and fired multiple times, including while Jones lay on the ground incapacitated.

The shooter then ran toward a black car that was driving slowly down 30th Street toward Chestnut Street. The car appeared to be “waiting for” the shooter. Henry Martinez, who lived across the street from Ellis, was working on his car outside his house when the shooting started and corroborated Ellis’s testimony about the events above. Martinez and the shooter made eye contact as the shooter ran from the scene. Martinez described him as a “kind of skinny,” dark-skinned African American in his “low twenties,” about six feet tall, weighing 180–185 pounds, with dreadlocks, wearing a black sweater with the hood up.³ Martinez also identified the black car as a Saturn based on having worked previously at a Saturn dealership and because “Saturn” was written on the lid of the trunk. Tackitt confirmed it was the same black car from which the shooter had alighted moments before.

A mail carrier at 28th Street and Chestnut heard the shots and alerted a patrolling policeman, Officer Michael Osanna, to the shooting. Osanna drove down Chestnut Street toward where the shots were fired and stopped at the intersection of 30th and Chestnut. He heard a car coming toward him at a high rate of speed. It turned out to be a black car, and as it passed him, Osanna recognized Watts “[w]ithout a doubt” as the driver on the basis of previous contacts. The passenger in the black car was wearing a black-and-white checkered shirt. The car made a left turn from 30th Street onto Chestnut and sped towards 28th Street.

Officer Osanna then turned right onto 30th Street and approached the area of the shooting. Several people, including Jones, who was on the ground wounded, directed him to “the black car” and pointed in the direction from which Osanna had just come. After calling dispatch for an ambulance, Osanna went to look for the black car. Neighbors loaded Jones into a car and took him to the hospital, where he died.

³ Martinez told the police the shooter was about 5’9”.

After driving around the block and returning to Chestnut Street, Osanna located the black Saturn parked at 26th Street and Chestnut Street. Osanna saw Watts and Deshawn Reed running on 26th Street about 25 yards from the parked car and arrested them at gunpoint. He estimated it took only 15 to 20 seconds to locate the car and arrest the suspects. He arrested them at 2:38 p.m. At the time of the arrest, Watts, who was 25 years old, was wearing a black hooded sweatshirt, and Reed was wearing a green or black-and-green checkered shirt without a hoodie. In the investigation following the shooting, the police never recovered a second black hooded sweatshirt or a gun.

At a field show-up shortly after Watts and Reed were apprehended, Martinez identified the black Saturn as the car that had picked up the shooter and Reed as the passenger and the shooter, even though Martinez noticed Reed was wearing different clothes. The police found paperwork in the car suggesting that Watts had been in possession of it. Martinez did not identify Watts at the show-up or at trial. At the show-up Tackitt identified the Saturn as the black car she had seen and identified Watts as the passenger and shooter with 90 percent certainty; she again identified Watts at trial as the passenger, thus casting some doubt on which role he played.⁴ At the preliminary hearing, however, she identified Reed as the passenger. Reed was tried separately.

Watts's defense was mistaken identity. Oakland Police Officer Keith Dodds, called by the defense, testified he was also in the vicinity at the time of the shooting. He knew both Reed and Watts because he was assigned to work on a nearby high school campus that they both had once attended. When Dodds heard the dispatch about the shooting he headed to 26th and Chestnut to see if he could help. Near 26th Street and Chestnut Street he saw a man doubled over appearing to be ill or out of breath and a

⁴ The weight of the evidence suggests Watts was the driver of the car, especially because Officer Osanna, who knew Watts, saw him driving the black car just after the shooting, when there would not have been time for Reed and Watts to have changed positions. In his opening and closing arguments, the prosecutor explicitly disclaimed any reliance on the theory that Watts was the shooter. It also appears from the jury's notes during deliberation that Watts was convicted as the driver. We therefore adopt that view of the evidence.

young woman who appeared to be inquiring into his welfare. The man was African American, in his early 20's, about 5' tall, weighing about 160 pounds, and wearing a black hooded sweatshirt.

Defense counsel produced evidence that gunshot residue (GSR) tests were performed on both Watts and Reed, but the police and prosecutor never requested that the results be analyzed. On rebuttal, the prosecutor presented evidence that defense counsel had requested the GSR tests and had them sent to a laboratory. No GSR evidence was presented at trial.

B. Jury Instructions, Deliberation, Verdicts and Sentence

The jury was originally instructed only with CALJIC No. 3.01 concerning an aider and abettor's liability for murder based on foreknowledge of the direct perpetrator's unlawful purpose and the intent to encourage or facilitate it, which we shall refer to as "direct" aider and abettor liability.⁵ In pertinent part, the instruction told the jurors: "A person aids and abets the commission or attempted commission of a crime when he or she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice, or, by failing to act in a situation where a person has a legal duty to act, aids, promotes, encourages or instigates the commission of the crime." On November 19, 2012, when the case was first assigned to a department for trial, the prosecutor filed a written request for jury instructions, including CALJIC No. 3.02 on the natural and probable consequences doctrine. The case proceeded to trial, and it was not until December 11, 2012, during the instruction conference, that the instruction was discussed. Over defense objection, the court ruled that the instruction would be given. Despite the favorable ruling, the prosecutor withdrew his request for CALJIC No. 3.02 on

⁵ A defendant may be held liable as an aider and abettor on either of two theories: (1) based on direct knowledge of the perpetrator's criminal purpose and intent to commit, encourage or facilitate it, or (2) because the perpetrator's crime, though unintended by the aider and abettor, was the "natural and probable consequence" of a crime which the aider and abettor did know about and intended to facilitate. (*Chiu, supra*, 59 Cal.4th at p. 158.)

the next morning (December 12), after defense counsel repeated his objection. Both counsel agreed to the final form of instructions, which did not include CALJIC No. 3.02. With respect to the degree of the crime, the jury received CALJIC No. 8.20 on willful, deliberate and premeditated murder as the sole theory of first degree murder.

The prosecutor argued to the jury that Watts knew Reed's murderous purpose, intended to facilitate both murders, and acted in aid of their commission. He did not mention the "natural and probable consequences" doctrine. Defense counsel told the jury this was a "whodunit"—not a "what is it"—and emphasized the failure to find the weapon and the second sweatshirt, the failure to test the GSR samples, the confused identifications, and the asserted lack of proof that Reed was the shooter. He did not argue that Watts may have only intended to facilitate one murder, nor did he argue a second murder was not foreseeable.

After the jury had deliberated less than two hours, the foreman sent a note to the judge that read: "Does all 3 points of aiding and abetting have to be satisfied? [¶] Does the defendant have to have knowledge of the crime or any unlawful purpose, per point 1 [of CALJIC No. 3.01] of aiding and abetting? (specific crime).” It appears from these and later questions that the jury had rejected Watts's defense of mistaken identity early on and viewed Watts as the driver of the black car, but had questions about the intricacies of the law of accomplice liability as applied to the facts in evidence. The jury evidently disagreed with defense counsel and thought the case was a "what is it?"

After conferring with counsel, the judge answered "yes" to the first question, and as to the second answered: "The defendant has to have knowledge of the crime of murder." Defense counsel agreed with those answers but took the position the response to the jury's questions should stop there.

Instead, at the prosecutor's request and over defense objection, the court also read to the jury CALJIC No. 3.02, describing the natural and probable consequences doctrine, as follows: "One who aids and abets another in the commission of a crime is not only guilty of [that crime] but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime[s] originally aided and abetted. [¶] In

order to find the defendant guilty of the crimes of murder, you must be satisfied beyond a reasonable doubt that: 1. The crime of murder [was] committed; [¶] 2. That the defendant aided and abetted [that] crime; [¶] 3. That a co-principal in that crime committed a second crime of murder; and [¶] 4. That a subsequent crime of murder [was] a natural and probable consequence of the commission of the first murder. [¶] In determining whether a consequence is ‘natural and probable,’ you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A ‘natural’ consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. ‘Probable’ means likely to happen. [¶] You are not required to unanimously agree as to which originally contemplated crime the defendant aided and abetted, so long as you are satisfied beyond a reasonable doubt and unanimously agree that the defendant aided and abetted the commission of an identified and defined target crime and that the crime of murder was a natural and probable consequence of the commission of that target crime.” The jury foreman responded that the answer given by the judge was helpful and satisfied the jury’s need for further instruction.⁶

Outside the jury’s presence, defense counsel objected, arguing CALJIC No. 3.02 was not responsive to the question posed and tended to “muddy the waters.” He pointed out that the prosecutor had not argued the natural and probable consequences doctrine to the jury. Defense counsel claimed there was no reason to believe the jury was concerned about liability for the second murder, as opposed to the first. He further suggested the last paragraph of the instruction conflicted with other instructions, was “confusing,” and

⁶ Before the judge answered the jury’s request No. 1, the jury sent a second note asking, “Are we to judge both murders independently or as one complete crime?” The judge never answered that note because of the foreman’s assurance that the answer to note No. 1 was sufficient for the jury’s needs.

“water[ed] down their instruction that they do have to unanimously agree on whether or not the defendant committed a crime of murder.”

Approximately 45 minutes later the jury sent a third note to the judge: “We request a clarification of the law, in 2 questions: (1) If one aids and abets the second (chronologically) of two murders—knowledge of the unlawful purpose of murder occurring only at the time of the second murder, is the first murder considered ‘a subsequent crime’ in the meaning of CALJIC 3.02 . . . [?] [¶] (2) Is a posteriori knowledge of the unlawful purpose of murder in the first of two subsequent murders (as described in (1)) sufficient to satisfy clause (2) in the definition of aiding and abetting (CALJIC 3.01)?” The first of these questions appears to ask whether a “natural and probable consequence” of a target offense can logically occur before the target offense is committed. The second appears to question whether an aider and abettor can be guilty of a murder on a direct aiding and abetting theory (“CALJIC No. 3.01”) if he does not learn of that crime until after its commission.

The prosecutor suggested the first of these questions should be answered “yes,” the court seemed inclined to agree, but defense counsel objected. The court found the questions “intricate,” and the prosecutor found the second question “confusing.” Both counsel agreed the second question should not be answered. After conferring with counsel, the court answered the entire note simply, “You have all of the jury instructions that you need to answer these questions.” Defense counsel explicitly agreed with this approach, while the prosecutor objected to the court’s failure to answer the first question. Approximately two and a half hours later (which included a lunch break) the jury reached its verdicts, finding Watts guilty of two counts of first degree murder (§ 187, subd. (a)), with true findings on both murders that a principal was armed with a firearm (§ 12022, subd. (a)(1)), and a true finding on the multiple murders special circumstance (§ 190.2, subd. (a)(3)).

On February 8, 2013, the court sentenced Watts to two life terms in prison without possibility of parole (§ 190.2, subd. (a)(3)), plus two additional years for the armed principal enhancements (§ 12022, subd. (a)(1)). The judge imposed the two life terms

concurrently and imposed no sentence for two prior drug convictions that Watts had admitted. Watts timely appealed.

C. The Decision in *People v. Chiu* (2014) 59 Cal.4th 155

After Watts filed his opening brief on appeal, and before the Attorney General filed her respondent's brief, the California Supreme Court decided *Chiu, supra*, 59 Cal.4th 155. In that case a teenager was shot dead outside a pizza parlor after a brawl erupted between members of rival gangs. (*Id.* at pp. 159–160.) Chiu was convicted of first degree murder, although he did not pull the trigger, because he went to the pizza parlor expecting to participate in a fight between gangs, and he encouraged his friend to shoot the victim. (*Id.* at p. 160.) The Supreme Court reversed the conviction, holding an aider and abettor cannot be held liable for first degree murder on a natural and probable consequences theory. (*Id.* at pp. 158–159.)

Because the court's new aiding and abetting rule affected only the degree of the offense, the Supreme Court affirmed the Court of Appeal's reversal of the first degree murder conviction and gave the People the option of either accepting a reduction of the conviction to second degree murder or retrying Chiu for the greater offense on a direct aiding and abetting theory. (*Chiu, supra*, 59 Cal.4th at p. 168.) In so doing, it announced for the first time: "We now hold that an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Id.* at pp. 158–159, original italics.) A conviction of premeditated murder must be based on direct aiding and abetting principles. (*Id.* at pp. 159, 166.) The Supreme Court noted it had "not previously considered how to instruct the jury on aider and abettor liability for first degree premeditated murder under the natural and probable consequences doctrine." (*Id.* at p. 162.) Nor did it answer that question. Instead, it held "punishment for second degree murder is commensurate with a defendant's culpability for aiding and abetting a target crime that would naturally, probably, and foreseeably result in a murder under the natural and probable consequences doctrine. We further hold that where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing [an aider

and abettor] to be convicted of that greater offense under the natural and probable consequences doctrine.” (*Id.* at p. 166.) “A primary rationale for punishing such aiders and abettors—to deter them from aiding or encouraging the commission of offenses—is served by holding them culpable for the perpetrator’s commission of the nontarget offense of second degree murder. [Citation.]” (*Id.* at p. 165.)

The trial court had instructed the jury on both direct accomplice liability and the natural and probable consequences doctrine, and based on the jury’s notes during deliberations, the Supreme Court found the jury may have been focused on the natural and probable consequences theory of aiding and abetting when it determined Chiu’s guilt. (*Chiu, supra*, 59 Cal.4th at p. 167.) Because it could not conclude beyond a reasonable doubt that the jury based its verdict on the alternate, valid legal theory of direct accomplice liability, the court found conditional reversal necessary. (*Id.* at p. 168; see *People v. Chun* (2009) 45 Cal.4th 1172, 1201, 1203–1205; *In re Johnson* (2016) 246 Cal.App.4th 1396, 1402–1409 [beyond a reasonable doubt standard applies even on habeas review of a final conviction]; *In re Brigham* (2016) 3 Cal.App.5th 318, 329–332, [same].) “When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. [Citations.]” (*Chiu, supra*, 59 Cal.4th at p. 167.) “Defendant’s first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder. [Citation.]” (*Ibid.*; see also, *id.* at pp. 160–161, 165–167.)

II. DISCUSSION

A. The Parties' Positions

Watts raises several issues in his opening brief: (1) the evidence was insufficient to support the first degree murder convictions under either the ordinary rules of aider and abettor liability or under the natural and probable consequences doctrine, and his convictions violated his due process rights; (2) the court erred and violated Watts's due process rights when in response to the jury's request No. 1, the judge told the jury, "The defendant has to have knowledge of the crime of murder" to be liable as a direct aider and abettor; (3) the court's mid-deliberation instruction with CALJIC No. 3.02 on the natural and probable consequences doctrine was non-responsive to the jury's question, unsupported by the evidence, legally erroneous, and violated Watts's due process rights; (4) the court erroneously failed to answer the jury's request No. 3, which hypothesized the Jones murder was the target offense; (5) trial counsel was ineffective in failing to object to the court's various responses (or lack of response) to jury notes during deliberations and failing to request to reopen argument on natural and probable consequences; and (6) the court erred in failing to grant Watts presentence custody credits. He also proposes in supplemental briefing that both of his convictions must be reversed under *Chiu, supra*, 59 Cal.4th 155.⁷

The Attorney General agrees the first degree murder conviction for the death of Jones must be reversed based on the holding of *Chiu*, but argues the conviction of first degree murder of Johns may be affirmed on grounds that Watts specifically harbored the intent to facilitate that killing without resort to the natural and probable consequences instruction. She claims, based on the wording of CALJIC No. 3.02, as given, the jury necessarily found Watts directly aided and abetted the murder of Johns. Therefore, she

⁷ Watts suggests we must consider the challenges raised in his opening brief first, and only if we reject those arguments should we reach the *Chiu* issue. We agree that we must address both sets of issues, to the extent they might call for a remedy more advantageous to Watts than the limited remand provided by *Chiu*. We do not agree we must address the issues in any particular order.

argues, the guilty verdict on count one (Jones) must be reversed under *Chiu*, but not the conviction on count two (Johns). With respect to the additional instructional issues raised by Watts and his claim of ineffective assistance of counsel, the Attorney argues, there was no judicial error, and trial counsel was not ineffective. She does agree, however, that Watts is entitled to 1,072 days of actual credit for the time he spent in jail prior to sentencing.

B. Applicability of *Chiu*

Because CALJIC No. 8.20 on deliberate and premeditated murder, as given, did not require simply that *Reed* premeditated the killings to justify a first degree murder verdict, but rather required that *Watts* did, we address whether *Chiu* applies at all in this case as a threshold question. To find a premeditated murder, the jury was instructed to determine whether “the killing was preceded and accompanied by a clear, deliberate intent *on the part of the defendant [i.e., Watts]* to kill, which was the result of deliberation and premeditation” (Italics added.) This distinguishes our case from the instruction given in *Chiu*, where “the trial court instructed that the jury could find defendant guilty of first degree murder if it determined that *murder* was a natural and probable consequence of either target offense aided and abetted, and if in committing murder, the *perpetrator* acted willfully, deliberately, and with premeditation.” (*Chiu*, *supra*, 59 Cal.4th at p. 158, second italics added.)

But CALJIC No. 8.20 as given in our case also told the jury: “To constitute a deliberate and premeditated killing, the *slayer* must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, he decides to and does kill.” (Italics added.) It is unclear whether the jury would have understood from the instruction that Watts could be found guilty of first degree murder if *he* premeditated and deliberated, if *Reed* premeditated and deliberated, or only if they *both* premeditated and deliberated. This ambiguity prevents us from finding that *Chiu* error was eliminated by the distinction noted in the preceding paragraph.

C. Both Murder Convictions Must Be Reversed Under *Chiu*

We agree with Watts that both of his first degree murder convictions must be conditionally reversed under *Chiu* because it is possible the jury relied on the natural and probable consequences doctrine in each conviction, and it is not possible to tell from the record which murder the jurors considered the target offense.⁸ The instruction given in *Chiu* was CALCRIM No. 403, which (similarly to CALJIC No. 3.02) told the jurors that to find defendant guilty of murder as an accomplice, “the jury had to decide (1) whether he was guilty of the target offense (either assault or disturbing the peace); (2) whether a coparticipant committed a murder during the commission of the target offense; and (3) whether a reasonable person in defendant’s position would have known that the commission of the murder was a natural and probable consequence of the commission of either target offense.” (*Chiu, supra*, 59 Cal.4th at p. 160.)

In accordance with *Chiu*, we find the combination of instructions given in this case potentially allowed the jury to convict Watts of first degree murder based on Reed’s state of mind under a natural and probable consequences theory, potentially without knowledge by Watts of Reed’s intent to murder one of the men he shot. The instructions given by the court did require Watts to have knowledge of Reed’s intent with respect to at least one of the murders, but we cannot tell, based on the verdicts and other indications in the record, which of the murders the jury considered the target offense.

The Attorney General argues with some force that because CALJIC No. 3.02, as quoted in section I.B., *ante*, referred to “first,” “second” and “subsequent” murders, it left the jury with only one option in deciding which was the target offense: the murder of Johns occurred “first,” and the murder of Jones was “second” or “subsequent.” This is consistent with the evidence, which showed that Reed confronted Johns first, chased him

⁸ The opinion in *Chiu* did not restrict the degree of murder for an aider and abettor in the methods of killing specifically listed in section 189. (*Chiu, supra*, 59 Cal.4th at p. 166.) At the beginning of this opinion we called the crime a variation of a drive-by shooting. Had the shots actually been fired from the car, it would have come within the statutory definition of a first degree murder. (§ 189.)

to the rear of the house, and loaded him full of bullets before turning his attention to Jones. Hence, the Attorney General concludes, the jury necessarily found Watts guilty as a direct accomplice in the murder of Johns, and only the conviction of the Jones murder must be reversed under *Chiu*. In other circumstances we might agree that the jurors would have understood “first,” “second” and “subsequent” to refer to chronological sequence.⁹ This is a plausible, we think the most plausible, interpretation of the evidence and the instructions.

But plausibility does not amount to a showing beyond a reasonable doubt as required by *Chiu*. The jury’s request No. 3 prevents us from adopting the Attorney General’s reasoning. In that note the jurors were particularly focused on accomplice liability, including the natural and probable consequences doctrine, and how those concepts applied if Watts acquired knowledge of Reed’s murderous purpose, or at least its full scope, only during the course of Reed’s rampage. The jury asked for “clarification” regarding a hypothetical situation in which the non-killer “aid[ed] and abet[ted] the second (chronologically) of two murders,” yet gained “knowledge of the unlawful purpose of murder . . . only at the time of the second murder.” One or more jurors evidently had some doubt that Watts knew when Reed exited the car that he intended to kill someone, but they were convinced that, by the time of the second murder, Watts was aware of Reed’s deadly purpose and intended to and did facilitate that second murder (Jones).

Whether note No. 3 reflects the analysis that led to the final verdicts is uncertain, we think unlikely, but it does cast doubt on whether the jury understood “first,” “second” and “subsequent” in the straightforward chronological manner advocated by the Attorney General. Whatever the precise meaning of the note, and whatever its ultimate impact on the verdicts, the jury in this case seems to have been more non-linear in its thinking than the Attorney General supposes. Given this insight into the jury’s thinking, we cannot

⁹ Juries are normally instructed to construe words in jury instructions according to their everyday common meaning (CALCRIM No. 200), but no such instruction was given in this case.

agree with the Attorney General beyond a reasonable doubt that the jury used a direct aiding and abetting theory in convicting Watts of the Johns murder. Thus, we cannot determine beyond a reasonable doubt whether the jury used a valid or invalid theory in convicting Watts on either count, and must conditionally reverse both convictions under the rationale of *Chiu*.

D. Sufficiency of the Evidence

We address the sufficiency of the evidence argument separately, for if the evidence was in fact insufficient it would not only require reversal, but would bar retrial. (*Burks v. United States* (1978) 437 U.S. 1, 11, 16–17.) We are confident the evidence was sufficient to convict Watts of both first degree murders on a direct aiding and abetting theory. Watts argues the evidence did not establish what the pre-existing relationship was between Watts and Reed, did not even suggest a motive, did not disclose any discussion between the two men to show that Watts shared Reed’s murderous intent, and did not establish a gang-related aspect to the murders. He emphasizes that he did not get out of the car with Reed and was not present when the shooting occurred, there was no evidence he knew Reed was armed when he got out of the car, and no evidence he knew Reed had just killed two people when he got back into the car. Watts minimizes the evidence of flight as consciousness of guilt and claims a verdict premised on the circumstantial evidence in this case amounted to nothing more than speculation.

In assessing sufficiency of the evidence, “the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.” (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) It is true the jury’s findings regarding Watts’s state of mind depended upon circumstantial evidence, but there is nothing unusual about that. (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1055.) The prosecutor was not required to prove motive. (*People v. Larrios* (1934) 220 Cal. 236, 251; CALJIC No. 2.51; CALCRIM No. 370.) And though evidence of gang affiliation or a prior relationship between Watts and Reed and one or more of the victims might have helped to explain the murders, lack of it certainly was not fatal to the charges.

The circumstantial evidence in this case was strong. Assuming the jury proceeded on the theory that Watts was the driver, not the shooter (see fn. 4, *ante*), there was still sufficient evidence to show he shared Reed's unlawful purpose in killing both victims. The manner in which Watts drove the car before and after the shootings suggests he knew of Reed's criminal intent. The black car pulled up to the corner of 30th and Chestnut moving at about one mile per hour. It then pulled sharply over to the curb to allow Reed to exit, and it continued around the corner, following along in Reed's same direction, toward the vicinity of where the shootings occurred. The driver of the car inferably could have seen the initial confrontation, or at least heard the shootings. There was not just a single shot for each victim. A total of 13 ammunition casings were recovered from the scene. If a mail carrier at 28th and Chestnut could hear the shots, the jury could have reasoned that Watts also heard the shots and knew what Reed had done. Yet, he stayed nearby and picked Reed up after the gunplay. Reed was out of the car for only the brief time required to run down the block, shoot two people, and return to the car. This suggests he was operating under a preconceived plan. It is unlikely he would have committed such a crime without knowing he had a means of escape. Watts remained nearby in the car with the engine running, waited for Reed to finish his business, then picked him up and sped off. The jury could reasonably have inferred both murders were pre-planned, with a getaway car at the ready.

And Watts's mistaken identity defense was weak. The out-of-breath man Officer Dodds encountered after the murders was 5'5" tall and weighed about 160 pounds. Watts is 6'2" and weighs 240 pounds. The shooter was also described as being "kind of a little bit tall," about six feet, or even as tall as 6'8". It is unlikely the jury would have believed the man on the street was the shooter, and equally unlikely the jury would have concluded Watts was uninvolved on that basis. The fact that Officer Osanna knew Watts from prior contacts made his "without a doubt" identification of Watts as the driver of the black car especially compelling. Watts and Reed were apprehended within at most a few minutes after the murders. There was substantial evidence to support both first degree murder convictions, even on a direct aiding and abetting theory.

E. Alleged Instructional Errors During Jury’s Deliberation

We also address Watts’s argument that the court erred in responding to the jury’s notes at various points during the deliberation to determine if Watts is entitled to some relief greater than that provided under *Chiu*. Relying on section 1138, which requires the trial judge to respond to jury questions that arise during deliberations,¹⁰ Watts contends the trial court erred in several respects, as we shall discuss. But the trial court is vested with discretion to determine how best to address a jury’s inquiry under section 1138, and we normally interfere only when the court has abused its discretion. (*People v. Hodges* (2013) 213 Cal.App.4th 531, 539.) We conclude two of the claimed errors were forfeited, and the third was not an error.

1. *Instruction That to Convict Watts of Murder, Jurors Must Find Watts Knew of Reed’s Intent to Commit “Murder”*

Watts’s first complaint concerns the way in which the court handled the following inquiry: “Does the defendant have to have knowledge of the crime or any unlawful purpose, per point 1 of aiding and abetting? (specific crime).”¹¹ After conferring with counsel and securing defense counsel’s express agreement, the judge answered: “The defendant has to have knowledge of the crime of murder.” Watts now claims the judge should have answered “yes,” and her failure to do so violated both section 1138 and his federal due process rights. Alternatively, he argues the court should have told the jury the defendant had to have knowledge of Reed’s intention to commit “two premeditated

¹⁰ That section reads: “After the jury have retired for deliberation, if there be any disagreement between them as to the testimony, or if they desire to be informed on any point of law arising in the case, they must require the officer to conduct them into court. Upon being brought into court, the information required must be given in the presence of, or after notice to, the prosecuting attorney, and the defendant or his counsel, or after they have been called.” (§ 1138.)

¹¹ We agree with Watts that, because the jury had only been instructed on direct aider and abettor liability at that point, the reference in the note to “point 1” must have pertained to the requirement under a direct (or “ordinary”) aiding and abetting theory (described in CALJIC No. 3.01) that the defendant have “knowledge of the unlawful purpose of the perpetrator.”

murders”—rather than simply “murder”—in order to find him guilty of first degree murder.

These claims were forfeited by trial counsel’s express agreement with the judge’s intended answer. (*People v. Salazar* (2016) 63 Cal.4th 214, 248–249 (*Salazar*) [“counsel’s affirmative agreement with the court’s reply to a note from the jury forfeits a claim of error”]; *People v. Rogers* (2006) 39 Cal.4th 826, 877 [even acquiescence works as a forfeiture]; *People v. Roldan* (2005) 35 Cal.4th 646, 729 [failure “to object or move for a mistrial” may constitute “tacit approval”]; *People v. Rodrigues* (1994) 8 Cal.4th 1060, 1193.)

Furthermore, we interpret the jury’s question as calling, on the most basic level, for an either/or answer, not a yes/no answer. In effect, the jury was asking: “Does the defendant have to have knowledge of the [specific] crime [the perpetrator intends to commit] or [is it enough if he knows of] *any* unlawful purpose [of the perpetrator], per point 1 of [direct] aiding and abetting?” (Italics added.) That is evidently why the jury included the words “(specific crime).” The jury seems to have been uncertain about the *degree of specificity* required in the knowledge element, and nothing more. They wanted to know if Watts had to know Reed intended to commit a *murder* to be found guilty as a direct accomplice, or whether he could be so convicted if he just knew Reed was up to no good, or intended to assault or scare someone instead of intending to kill. (See *People v. Prettyman* (1996) 14 Cal.4th 248, 268 [“nefarious” conduct not enough].) Thus, a simple “yes” would not have been responsive to the jury’s question.

Likewise, we reject Watts’s argument that the court should have specified “two premeditated murders” instead of “murder” on grounds of forfeiture and because it would have left the jury with the mistaken impression that if Watts did not know the full scope of Reed’s plan, he could not be convicted of either murder. That is clearly not the law. (See, e.g., *People v. Vasco* (2005) 131 Cal.App.4th 137, 142, 160-161.) The Supreme Court has rejected the notion that an aider and abettor is not liable for the full extent of a co-participant’s conduct simply because the co-participant acts in a manner contrary to

the original intention of the participants. (*People v. Smith* (2014) 60 Cal.4th 603, 616–617.)

Moreover, the argument that greater specificity was required to sustain a conviction of first degree murder has effectively been mooted by *Chiu*, which held a murder committed without the foreknowledge of an aider and abettor is *always* second-degree on the part of the aider and abettor, even if premeditated and deliberated by the perpetrator. (*Chiu, supra*, 59 Cal.4th at pp. 158–159, 164-166.)

And finally, Watts’s argument rests on the faulty assumption that the jury was restricted to finding accomplice liability solely on a direct aiding and abetting rationale, a premise we reject in the next section of the opinion based on the evidence and the way in which the issue unfolded in the trial court.

2. *Reading CALJIC No. 3.02 During Deliberations in Response to Jury Note No. 1*

Watts claims CALJIC No. 3.02 was nonresponsive to note No. 1, lacked support in the evidence,¹² erroneously explained the law, and “ambushed” the defense. Defense counsel objected to the instruction at trial on grounds it was nonresponsive and unsupported by the evidence. And though there was no objection on constitutional grounds, Watts claims on appeal that giving the instruction mid-deliberation violated due process/notice requirements. In appellate counsel’s view, the instruction on the natural and probable consequences theory opened up a whole new subject area, as to which trial counsel should have objected on due process/notice grounds and requested to reopen argument.¹³ Watts raises legal issues and mixed questions of fact and law that are

¹² We agree that CALJIC No. 3.02 should not have been given if not supported by substantial evidence, and we review this issue *de novo*. (*Quiroz, supra*, 215 Cal.App.4th at p. 76.) But contrary to Watts’s assertions, the evidence did support a natural and probable consequences theory. The manner in which Watts drove the car both before and after the shootings strongly supported an inference that he knew Reed intended to kill someone from the beginning, perhaps both Johns and Jones. But because there were two killings, the jury could have considered one of them to be an act by Reed beyond the crime which Watts intended to facilitate. Hence, CALJIC No. 3.02 was properly given.

¹³ The due process claim of error was forfeited by failure to object on that basis and will be addressed as ineffective assistance of counsel. (See section II.E.2, *post*.)

predominantly legal, making our review de novo. (*People v. Quiroz* (2013) 215 Cal.App.4th 65, 70 (*Quiroz*).

Because the jury was initially instructed only on direct aider and abettor liability, and because the jury's note obliquely referenced CALJIC No. 3.01 ("per point 1 of aiding and abetting"), Watts proposes the note should be construed as limited to a request to clarify whether Watts could be convicted of murdering Johns under the "ordinary [or direct] aiding and abetting theory of liability" as described in CALJIC No. 3.01, assuming Watts only found out about Reed's intent to kill Johns "at the time of" the Jones killing.¹⁴ But the jury's confusion and its question cannot be so neatly cabined.

We construe the note as asking for any legal guidance the court might offer in clarifying the degree of specificity of knowledge that an aider and abettor must have of the shooter's criminal intent. The jury's note asked in essence whether the defendant could be convicted on any theory that did not involve foreknowledge of the perpetrator's criminal purpose. Since CALJIC No. 3.02 deals precisely with aider and abettor liability for an offense as to which such foreknowledge is not present, it responded directly to the concerns expressed in the note. Reading the note in the context of the whole trial, it is evident the judge's giving of CALJIC No. 3.02, together with the instructions already given, was responsive and supported by the evidence.

Given the jury's inquiry, the court was under a duty to provide meaningful guidance. (§ 1138; *People v. Beardslee* (1991) 53 Cal.3d 68, 97; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 127–128 (*Ardoin*); *People v. Thompkins* (1987) 195 Cal.App.3d 244, 250–251.) The response had to be legally accurate, responsive to the question posed, and evenly balanced. (*People v. Moore* (1996) 44 Cal.App.4th 1323, 1331.) If the court had failed to inform the jurors of the natural and probable consequences doctrine, it would have left them with the mistaken belief that an aider and abettor can *never* be

¹⁴ Watts's opening brief suggests the jury's note asked, in effect, if Watts could be liable for both murders, if he did not find out about either murder until "after" the killing of Jones. The note itself posits that Watts acquired knowledge of murder "at the time" of Jones's killing, not afterwards.

guilty of an offense unless he or she knew in advance the perpetrator’s exact illegal purpose. Of course, that is not true. (See fn. 5, *ante*.) To leave the jury struggling with its confusion would have been a dereliction of the judge’s duty and a subversion of the truth-finding function of the trial. We see no error in the court’s giving of CALJIC No. 3.02. The only error, under *Chiu*, was in allowing the jury to find Watts guilty of first degree murder on the basis of CALJIC No. 3.02.

In fact, in describing culpability, the instruction was technically correct. Even after *Chiu* it is true that an aider and abettor who knows his co-participant will commit one murder may be guilty of a second murder under the natural and probable consequences doctrine. The only limitation is that such an aider and abettor is guilty only of *second degree* murder for the second murder.¹⁵ The jury in Watts’s case was given separate instructions on determining the degree of the murder that we find sufficiently ambiguous to require reversal under *Chiu*, but CALJIC No. 3.02, as given, was not erroneous. The Supreme Court has only recently affirmed the correctness of

¹⁵ Indeed, we conclude CALJIC No. 3.02, as given in this case, by referring in several places to the foreseeability of “murder” rather than “first degree premeditated murder,” avoided the precise problem identified in *Chiu*. (*Chiu, supra*, 59 Cal.4th at pp. 158–159.) As we read *Chiu*, the instructional error was not the natural and probable consequences instruction itself, but the instruction that identified premeditated murder by the perpetrator as first degree murder on the part of the aider and abettor as well. (*Chiu, supra*, 59 Cal.4th at pp. 158–161.) It was the combination of instructions that led to an improper conviction in *Chiu*. Our reading of *Chiu* is substantiated by the fact that the editors of CALJIC implemented the holding of *Chiu* by drafting an entirely new instruction, CALJIC No. 8.34.1: “An aider and abettor of [a person] [persons] who commit[s] [an] offense[s] other than murder, which crime[s] produce[s] as a natural and probable consequence a murder of another, whether premeditated or unpremeditated, is subject to liability for the crime of second degree murder.” (CALJIC No.8.34.1 (Fall ed. 2016), at p. 637.)

Separate instructions on degrees of murder were given in this case, which did not entirely track the instruction given in *Chiu*. (CALJIC Nos. 8.20, 8.30, 8.70, and 8.71.) Although we conclude that CALJIC No. 8.20 created enough ambiguity that Watts is entitled to relief under *Chiu*, we are convinced that CALJIC No. 3.02, as given in this case, correctly advised the jury on the *culpability* aspect of aiding and abetting.

CALJIC No. 3.02 even after *Chiu*, and it found error under *Chiu* harmless. (*People v. Covarrubias* (2016) 1 Cal.5th 838, 899-902 & fn. 26.)

Nevertheless, relying on *People v. Woods* (1992) 8 Cal.App.4th 1570, 1587 (*Woods*), Watts suggests CALJIC No. 3.02 was legally erroneous because it should have required the jury to find Watts knew Reed intended to commit first degree premeditated murder, not just murder.¹⁶ But the question of the degree of specificity required in the instruction is moot after *Chiu*, for the simple reason that greater specificity does not solve the problem identified in *Chiu*. (*Chiu, supra*, at pp. 158–159, 164–166.) Greater specificity would have left Watts’s exposure to a first degree murder conviction in the jury’s hands, whereas *Chiu* eliminates such exposure. (*Ibid.*) (See fn. 15, *ante.*) Indeed, *Woods* itself concluded the instructional error affected only the degree of the offense and afforded the aider and abettor a conditional reversal only, with the conviction to be replaced by a second degree murder conviction if the prosecution elected not to retry him—the same remedy provided in *Chiu*. (*Woods, supra*, 8 Cal.App.4th at p. 1596.) Thus, Watts’s reliance on *Woods* provides him with no greater relief than we have already determined to give him.

Watts also argues the prosecutor was absolutely bound by the withdrawal of his original request for CALJIC No. 3.02 and his emphasis during closing argument on a direct aiding and abetting theory, so that giving CALJIC No. 3.02 was not only judicial error but a due process/notice violation. This argument was forfeited by failure to object on due process grounds and is refuted by *Ardoin, supra*, 196 Cal.App.4th at page 128, which Watts cites in support of his argument. There Division One of this District held, “

¹⁶ The trial court in *Woods* instructed the jury that a non-shooter accomplice is “equally guilty” with the actual shooter under the natural and probable consequences doctrine and that an aider and abettor can never be convicted of a lesser offense than the crime committed by the perpetrator. (*Id.* at p. 1579.) Because the jury was not given the option of convicting the aider and abettor of second degree murder, the Court of Appeal found error. (*Id.* at pp. 1589–1593.) The same misinstruction did not occur here, as the jurors were told an aider and abettor may be guilty of a crime greater than or less than that of the actual perpetrator.

‘the court is not *precluded* from giving any instruction for which there is evidentiary support. The fact that a party did not pursue a particular theory does not preclude the trial judge from giving an instruction on that theory where it deems such an instruction to be appropriate.’ ” (*Ibid.*)

Watts also accuses the prosecutor of having “ambushed” defense counsel with a new theory for the first time during deliberations. On the contrary, defense counsel was aware from the outset of the trial that the prosecutor wanted the jury to receive CALJIC No. 3.02 and that the natural and probable consequences theory was potentially involved in the case. Throughout the People’s evidentiary portion of the trial, defense counsel was on notice that the prosecutor intended to pursue a natural and probable consequences theory. That remained true until December 12, 2012, when, at the urging of defense counsel, the prosecutor withdrew his request for CALJIC No. 3.02. Viewed in light of the whole record, there was no due process violation of Watts’s right to be notified of the charges against him, which is the primary concern of due process in this area. (*Lopez v. Smith* (2014) 574 U.S. ___, 135 S.Ct. 1, 3-4 [per curiam]; *Quiroz, supra*, 215 Cal.App.4th at pp. 70–71.)¹⁷ Nor has appellate counsel explained how the presentation of the defense evidence would have been different if counsel had known that the prosecutor’s withdrawal of CALJIC No. 3.02 would later be rescinded based on the jury’s questions. As Watts seems to acknowledge, the only impact of the prosecutor’s change of heart was that defense counsel did not have an opportunity to argue to the jury that the natural and probable consequences doctrine had no application to the facts.

¹⁷ Watts cites Ninth Circuit cases that arguably require greater specificity in the charging instrument than do the California cases. (*Smith v. Lopez* (9th Cir. 2013) 731 F.3d 859, 867–870, reversed, *Lopez v. Smith, supra*, 135 S.Ct. 1 at pp. 3–4; *Sheppard v. Reese* (9th Cir. 1989) 909 F.2d 1234, 1235-1237.) Watts concedes these cases are not binding on us. (E.g., *People v. Bradford* (1997) 15 Cal.4th 1229, 1292.) We follow California precedent. (*People v. Garrison* (1989) 47 Cal.3d 746, 776, fn. 12 [defendant may be convicted as accomplice if charged as a principal]; *Quiroz, supra*, 215 Cal.App.4th at p. 70 [same].)

Indeed, Watts now suggests, at the very least the court should have allowed the attorneys to address the jury further about the natural and probable consequences doctrine, and the failure to do so violated his Sixth Amendment right to counsel for purposes of argument. (See *Herring v. New York* (1975) 422 U.S. 853, 858–860; *People v. Snow* (2003) 30 Cal.4th 43, 129; *People v. Rodrigues*, *supra*, 8 Cal.4th at p. 1184.) There is some authority to support Watts’s point *if counsel had so requested*. “If supplemental or curative instructions are given by the trial court *without granting defense counsel an opportunity to object, and if necessary, offer additional legal argument to respond to the substance of the new instructions*, the spirit of section 1093.5 and the defendant’s right to a fair trial may be compromised.”¹⁸ (*Ardoin*, *supra*, 196 Cal.App.4th at p. 129 (italics added).) The defense attorney in *Ardoin* made such a request. (*Id.* at p. 125; see also, *U.S. v. Gaskins* (9th Cir. 1988) 849 F.2d 454, 456–460 [request by counsel to reopen argument]; *Sheppard v. Rees*, *supra*, 909 F.2d at p. 1236 [defense counsel was sandbagged by a prosecutor whose “*pattern of . . . conduct affirmatively misled the defendant, denying him an effective opportunity to prepare a defense*”].) But in *Sheppard v. Rees*, the prosecutor had conducted the whole trial on a theory of premeditated murder based on the argument that the killing was to retaliate for the victim’s failure to pay a “debt” in connection with a cocaine transaction. (909 F.2d at p. 1235.) It was only after both parties had rested that the prosecutor asked for a felony-murder instruction for the first time. (*Ibid.*) Here, in contrast, the trial was conducted

¹⁸ *Ardoin* acknowledged that section 1093.5 generally requires the court in a criminal case to decide upon and inform counsel of “ ‘all instructions to be given’ ” before the “ ‘commencement of argument.’ ” But section 1093, subdivision (f) provides in part, “ ‘At the beginning of the trial or from time to time during the trial, and without any request from either party, the trial judge may give the jury such instructions on the law applicable to the case as the judge may deem necessary for their guidance on hearing the case.’ ” In addition, under section 1094, the court may depart from the usual order of trial set forth in section 1093 “ ‘for good reasons, and in the sound discretion of the Court.’ ” [Citation.]” (*Ardoin*, *supra*, 196 Cal.App.4th at p. 127.) Thus, *Ardoin* held it was not error to give a clarifying felony-murder instruction during deliberations that was responsive to the jury’s request, rejecting a due process challenge. (*Id.* at pp. 126–127.)

with both counsel fully aware that the prosecutor might decide to use the natural and probable consequences doctrine to inculcate Watts. Defense counsel *was* given an opportunity to object (and did object) to the supplemental instruction, yet he did *not* request a further opportunity to argue before the jury. Watts suggests no additional evidence he would have put on had he known sooner that the prosecutor would request CALJIIC No. 3.02, and he argues only that he should have been given a renewed opportunity to argue to the jury.

In *People v. Bishop* (1996) 44 Cal.App.4th 220, 231, 235, which we deem controlling, the Court of Appeal found there was no denial of due process, or denial of the right to representation by counsel, when the court instructed on aiding and abetting liability with respect to a special circumstance allegation after deliberations had commenced. (*Id.* at pp. 228–235.) The court found decisive that defense counsel did not request to reopen argument and had therefore “waived” any objection. (*Id.* at p. 235.) Indeed, to require further argument when it has not been requested could lead the defendant to claim on appeal that his due process rights have been violated. (See *People v. Salazar* (2014) 227 Cal.App.4th 1078, 1084, 1087.) Even assuming the court had discretion to reopen argument on its own motion (See Cal. Rules of Court, rule 2.1036(b)), [court may allow further argument at jury impasse]), that discretion was not abused and any assumed error was harmless. “[I]n cases where a new theory is introduced late in the game for reasons other than prosecutorial gamesmanship, courts have employed a harmless error test. That test looks to whether the late notice ‘unfairly prevented [defense counsel] from arguing his or her defense to the jury or . . . substantially misled [counsel] in formulating and presenting arguments.’” (*Quiroz, supra*, 215 Cal.App.4th at p. 70.) On the question whether the trial court erred in failing to reopen argument without a request by counsel, this case is governed by *Bishop*, not *Ardoin*, and the failure to reopen must be analyzed under the rubric of ineffective assistance of counsel. (See section II.E.3., *post.*)

3. *The Court's Decision Not to Respond Further to Jury Request No. 3*

Watts's final claim of instructional error under section 1138 is that the court failed to respond to the jury's request No. 3, telling the jurors instead they already had been given all the instructions they needed to answer their questions. To recap, request No. 3 was as follows: "We request a clarification of the law, in 2 questions: (1) If one aids and abets the second (chronologically) of two murders—knowledge of the unlawful purpose of murder occurring only at the time of the second murder, is the first murder considered 'a subsequent crime' in the meaning of CALJIC [No.] 3.02 . . . [?] [¶] Is a posteriori knowledge of the unlawful purpose of murder in the first of two subsequent murders (as described in (1)) sufficient to satisfy clause (2) in the definition of aiding and abetting (CALJIC 3.01)?"

Watts claims the judge's failure to give further instruction violated his federal due process rights. He points out that even a technically accurate pattern instruction may require a clarification from the trial court. (*People v. Loza* (2012) 207 Cal.App.4th 332, 354–355.) But it is equally true that a court may, in appropriate circumstances, fulfill its duty under section 1138 by referring the jury back to instructions already given. (E.g., *People v. Gonzalez* (1990) 51 Cal.3d 1179, 1212–1213.) Here the previous instructions were sufficient to resolve the jury's confusion.

As we understand his argument, Watts contends on appeal that a simple "no" answer should have been given to both questions¹⁹ (see section I.B., *ante*), but that was not the approach advocated by his counsel at trial. After tentatively suggesting that the jury be instructed that words in jury instructions be given their ordinary everyday

¹⁹ Watts's appellate counsel seems to suggest the correct answer to the first question in note No. 3 was "no," but again, he arrives at this conclusion by artificially restricting the jury's role to determining Watts's "ordinary aiding and abetting instruction." In rejecting that premise, we also reject the conclusions derived from it. Watts's argument on appeal is flatly contradictory to the note itself, which asked about liability for the murder of Johns, and specifically whether the "first murder [could be] considered 'a subsequent crime' in the meaning of CALJIC No. 3.02 [on natural and probable consequences]." The jury was not inquiring strictly about "ordinary" (or direct) accomplice liability.

meaning, defense counsel concurred in the court's decision to tell the jury it had already received all the instructions it needed. Any claim on appeal was forfeited by counsel's express approval of the court's response. (E.g., *Salazar, supra*, 63 Cal.4th at pp. 248-249.) This rule has been applied even where defense counsel silently acquiesced. (See *People v. Boyette* (2002) 29 Cal.4th 381, 430.)

Moreover, attempting to answer the jury's question, especially succinctly and without further dialogue with the jury, could have led the court down a slippery slope. The jury's note was ambiguous as to whether it was hypothesizing that Watts did not know about Johns's murder until the murder of Jones, or whether he did not know about *either* murder until that time. The questions as posed were difficult—and risky—to answer, or even to understand with confidence. The court, with good reason, worried that answering in too much detail would lead to an invasion of the jury's province. It was not an abuse of discretion for the court to proceed with caution. Though Watts now contends his attorney was constitutionally ineffective for not proposing a better solution, this will be dealt with in the next section of the opinion.

F. Ineffective Assistance of Counsel

Watts claims his trial counsel was ineffective in (1) failing to object to and correct the judge's instruction to the jury addressed in section II.D.1, *ante*, that Watts must have known of Reed's intent to commit "murder" in order to be held liable as an aider and abettor; (2) failing to object to the court's reading of CALJIC No. 3.02 during deliberations on due process/notice grounds, (3) failing to request to reopen argument to address the natural and probable consequences doctrine, and (4) failing to request further instruction in response to the jury's note No. 3.

In addressing these issues we apply *Strickland v. Washington* (1984) 466 U.S. 668 (*Strickland*), which requires a showing of both deficient performance and prejudice. (*Id.* at p. 687.) On the performance prong, we "indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" (*id.* at p. 689), and measure counsel's performance against an "objective standard of reasonableness" (*id.* at p. 688). To establish deficient performance under *Strickland*, a defendant must

show “counsel made errors so serious that counsel was not functioning as the ‘counsel’ guaranteed the defendant by the Sixth Amendment.” (*Id.* at p. 687.) Without some indication in the record that counsel’s decision was *not* tactical, we would not be justified in finding deficient performance on direct appeal. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266–267.)

In order to establish prejudice, a defendant “must show that there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” (*Strickland* at p. 694.) A defendant “need not show that counsel’s deficient conduct more likely than not altered the outcome in the case.” (*Id.* at p. 693.) Rather, he must show “a probability sufficient to undermine confidence in the outcome.” (*Id.* at p. 694.) Without addressing the performance prong, we may reject any one of Watts’s ineffective assistance of counsel claims on the basis that the claimed error, assuming it occurred, was not prejudicial. *Strickland* authorizes us to proceed directly to the prejudice prong: “If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed.” (*Strickland, supra*, 466 U.S. at p. 697.)

1. *Failure to Object to Court’s Instruction Specifying that Watts Had to Have Known of Reed’s Intent to Commit “Murder” to Be Found Guilty as a Direct Aider and Abettor*

The court’s advice that Watts challenges is its statement that, to convict Watts as a direct accomplice, “[t]he defendant has to have knowledge of the crime of murder.” “ ‘[D]eciding whether to object is inherently tactical, and the failure to object will rarely establish ineffective assistance.’ ” (*People v. Romero and Self* (2015) 62 Cal.4th 1, 25.) And for reasons we have already discussed, an objection to that response would not have been well-founded, for the instruction was not erroneous. Watts’s appellate claim that defense counsel should have suggested that the judge instruct the jury that Watts had to have knowledge that Reed intended to commit “two premeditated murders” goes only to the degree of the offense and provides no remedy beyond that prescribed by *Chiu*. And, as we have indicated, even assuming defense counsel should have objected, there was no

prejudice in this case that will not be corrected under the remedy we provide for *Chiu* error. (See section II.E.1., *ante*.)

2. *Failure to Object to CALJIC No. 3.02 on Due Process Grounds*

As noted above, counsel objected to CALJIC No. 3.02 on grounds that it was nonresponsive and unsupported by the evidence. His failure also to object on due process/notice grounds was not ineffective assistance of counsel because such an objection would not have been well-founded. (*People v. Bishop, supra*, 44 Cal.App.4th at p. 232 [no due process violation where defendant had “notice of the substantive crimes with which he was charged”]; *Ardoin, supra*, 196 Cal.App.4th at p. 126 [“despite the failure of the prosecution to specifically charge Ardoin with murder committed in the course of an enumerated felony in violation of section 189, he was not denied his notice or due process rights when the trial court gave felony-murder and aiding-and-abetting instructions to the jury”]; *Quiroz, supra*, 215 Cal.App.4th at pp. 70–71 [no constitutional violation where prosecution shifted its theory from identifying defendant as the shooter to theorizing that he aided and abetted a murder] .)

Any assumed error also was not prejudicial. There is no reasonable likelihood the court would have forgone instructing the jury with CALJIC No. 3.02, even if counsel had registered a constitutional objection. As discussed above, had the jury not been given CALJIC No. 3.02, it would have been left with a misapprehension of the law applicable to the case. The judge surely would not have assented to such a circumstance on the disingenuous ground that defense counsel had been “ambushed.” Watts’s appellate claim that defense counsel was misled by the prosecutor or was unaware of the role that the natural and probable consequences doctrine might play in the case is belied by the record. (See § II.E.2., *ante*.)

3. *Failure to Request to Reopen Argument to Address the Natural and Probable Consequences Doctrine*

Counsel’s decision whether to request to reopen argument, like a decision whether to object, is an inherently tactical one which we should be cautious in second-guessing. This is not a case in which there could be no logical tactical explanation for counsel’s

decision. (See *People v. Mendoza Tello*, *supra*, 15 Cal.4th at p. 266.) It may be, it even seems likely, that defense counsel considered the competing arguments that could be made under the natural and probable consequences doctrine and concluded the instruction was more beneficial to the prosecution than to the defense, and that giving the prosecutor an additional opportunity to argue presented a greater risk than the benefit to be gained by arguing himself.

Watts's attorney possibly could have argued that the non-target killing was a second degree murder because it was objectively unforeseeable that Reed would commit a second premeditated murder. (See *Woods*, *supra*, 8 Cal.App.4th at pp. 1589-1590.) It would have been a hard sell, however, to convince the jury that an *unpremeditated* murder was unforeseeable. Moreover, defense counsel's credibility with the jury might have been undercut if he abandoned his "whodunit" theme to plead for a lesser conviction. Thus, we must conclude defense counsel acted tactically in deciding to forgo altogether a second chance to address the jury.

Even now, Watts does not specify which legal principles or facts defense counsel should have stressed on reopening, and any argument we can imagine would, at best, have resulted in a second degree murder conviction on one count. We see no reasonable likelihood that further defense argument about the natural and probable consequences doctrine would have led to acquittal on either count. (*Strickland*, *supra*, 466 U.S. at pp. 693–694, 697.)

4. *Failure to Request Further Response to Jury Note No. 3*

Appellate counsel suggests both questions in note No. 3 (see sections I.B. & II.E.3., *ante*) should have been answered "no." If defense counsel had advocated for such answers, it is highly unlikely the court would have assented. The prosecutor suggested a "yes" answer to the first question, and the court was inclined to agree. The prosecutor surely would have objected that a "no" answer would have practically dictated an acquittal on count two (Johns). Judicial responses must be balanced and must not invade the fact-finding province of the jury. (See *People v. Moore*, *supra*, 44 Cal.App.4th at p. 1331 ["When a question shows the jury has focused on a particular issue, or is leaning

in a certain direction, the court must not appear to be an advocate, either endorsing or redirecting the jury's inclination"]; *People v. Guerra* (2009) 176 Cal.App.4th 933, 941–944; cf. *People v. Stewart* (1983) 145 Cal.App.3d 967, 978 [court went too far]; CALJIC Nos. 17.30, 17.32.) The judge expressed concern that responding more fully to the note would do just that. Realistically, we doubt a simple yes or no answer would have adequately guided the jurors through the thicket into which they had wandered. As with so many things in life and the law, a more accurate answer would have to begin with “it all depends”²⁰

Alternatively, Watts points out that CALCRIM No. 401 contained information that would have been helpful to the jury, namely that the defendant's intent to aid and abet must be formed “before or during the commission of the crime.” Presumably counsel could have requested a similar instruction in response to the jury's note. While that instruction may have been helpful, its omission was not prejudicial under *Strickland*.

By referring the jury to instructions previously given, the court effectively reinstructed on the same concept referred to in CALCRIM No. 401 through several other instructions, and on even more demanding principles governing aiding and abetting liability for first degree murder. The jury was instructed with CALJIC No. 3.31.5 that “there must exist a union or joint operation of act or conduct and a certain mental state in the mind of the perpetrator.” CALJIC No. 3.30 also informed the jury that “there must exist a union or joint operation of act or conduct and general criminal intent” with respect to the allegation that a principal was armed with a firearm. But most significantly, CALJIC No. 8.20 told the jury that a killing—to be first degree murder—must have been

²⁰ Watts could have been convicted of second-degree murder for the killing of Johns under the natural and probable consequences doctrine even if the murder of Jones was determined to be the target offense, depending on when he began aiding and abetting the murders. (See *People v. Laster* (1997) 52 Cal.App.4th 1450, 1463–1465.) If the jury concluded Watts knowingly aided and abetted either murder by delivering Reed to the scene, then he could properly be convicted of both murders, no matter which one occurred first. If he only began aiding and abetting at the time of Jones's murder by waiting for Reed and driving the getaway car, then he could only be guilty of Jones's murder, not Johns's.

“preceded and accompanied by a clear, deliberate intent on the part of the defendant [i.e., Watts] to kill, which was the result of deliberation and premeditation”

These instructions, in combination, clearly told the jury it could not convict Watts, and certainly not of first degree murder, unless he knew of Reed’s murderous intent prior to each killing, or at least unless a second murder was the objectively foreseeable consequence of his aiding and abetting a target murder. We cannot agree with Watts that the instructions and responses to jury communications left the jury free to convict Watts of first degree murder without knowing of Reed’s criminal intent until after the murders.

It is not reasonably probable that by taking a different tack in response to note No. 3, defense counsel could have secured for Watts an outcome more favorable than that to which he is entitled under *Chiu*. (*Strickland, supra*, 466 U.S. at pp. 693–694.) Note No. 3 represents something the jury was discussing at one point in the deliberations; it does not necessarily reflect the theory upon which the verdicts ultimately rested. Nor does the note establish that the facts hypothesized therein reflected the view of a majority of the jurors. The jury went back and deliberated for approximately an hour and a half after being told that the instructions previously given would answer its questions. We presume the jurors followed the court’s advice and returned to the instructions during that time, including those referenced above.

Although note No. 3 prevents us from finding beyond a reasonable doubt the exact theory upon which the verdicts were based for purposes of the *Chiu* analysis, the likelihood of an outcome for Watts on either charge more favorable than a second degree murder conviction (such as accessory after the fact) was extremely slim. Applying the *Strickland* standard of prejudice, we conclude it is not reasonably likely Watts could have secured acquittal or a conviction of less than second degree murder on either of the charged offenses, even if defense counsel had requested a legally correct and even-handed answer to the jury’s note No. 3.

G. Watts Was Entitled to Actual Presentence Custody Credits

Watts claims, and the Attorney General concedes, that he is entitled to custody credits for the actual days he spent in local custody pending trial and sentencing. We

concur. (§§ 2900.5, 2933.2; *People v. Taylor* (2004) 119 Cal.App.4th 628, 645 [murderer entitled to actual custody credits only]; *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366 [no conduct credits]; see generally, *People v. Duff* (2010) 50 Cal.4th 787, 793-794.) In fact, the court orally awarded credits at sentencing for “the time that he’s actually served,” which the parties agree was 1,072 days. Yet, the abstract of judgment reflects no credits. We therefore order that those credits be reflected on the abstract of judgment following proceedings on remand.

III. DISPOSITION

The judgment on counts one and two is reversed, as is the true finding on the multiple murders special circumstance. The cause is remanded to the superior court for further proceedings consistent with this opinion. The People may elect to retry Watts for both counts of first degree murder under a direct aiding and abetting theory. If the People elect not to retry Watts within the time allowed by statute, the trial court shall enter judgment on two counts of second degree murder and shall resentence Watts accordingly, but the multiple murders special circumstance finding may not be reinstated. (§ 190.2, subd. (a)(3).) In any case, the court shall award actual presentence custody credits of 1,072 days, which shall be reflected on a new abstract of judgment prepared after further proceedings consistent with this opinion.

Streeter, J.

We concur:

Ruvolo, P.J.

Rivera, J.