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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Siskiyou)

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THE PEOPLE,

Plaintiff and Respondent,

v.

DAVID WILLIAM DINGLE,

Defendant and Appellant.

C065118

(Super. Ct. No. 08-219)

Defendant David William Dingle, acquitted of first degree murder and assault with a firearm, appeals from a conviction of second degree murder. (Pen. Code, § 187.)<sup>1</sup> He raises contentions of instructional error regarding accomplices, motive, and the failure to instruct on voluntary manslaughter. He also contends the trial court erred in denying him presentence credits.

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

We correct the judgment to include 782 days of presentence custody credit for the actual amount of time defendant spent in county jail before he was sentenced (§ 2900.5) and affirm.

### **FACTUAL AND PROCEDURAL BACKGROUND**

By an amended information, the prosecution charged defendant with three offenses committed against the victim, Frank Martin, Jr., on February 1, 2008:

(1) first degree murder (§ 187),

(2) assault by means of force likely to produce great bodily injury (§ 245, subd. (a)(1)), and

(3) assault with a firearm (§ 245, subd. (a)(2)).

Appended to the murder count were special allegations for personal and intentional discharge of a firearm causing great bodily injury (§ 12022.53, subd. (d)) and personal use of a firearm (§ 12022.5, subd. (a)(1)). It was also alleged that defendant had sustained a prior strike conviction (§ 667, subd. (e)) for a 1975 conviction for assault with intent to commit mayhem (§ 220).

### **Trial Evidence**

Defendant and his then-girlfriend Darinda McElhaney (now his wife) lived in a mobile home in a rural area. Defendant's younger brother Malcolm lived approximately 35 yards away in a separate mobile home connected to defendant's home by a short trail. Malcolm's wife, Janet Dingle, lived with Malcolm. The victim was a friend of both defendant and Malcolm, but was closer to defendant.

When defendant and the victim drank alcohol they fought about who was "badder." On multiple occasions, defendant told the victim "Well, I'm going to kick your butt," to which the victim replied, "No you can't." Defendant was angry about a fight in December 2007, several weeks before the killing, in which the victim broke defendant's eardrum. The victim's sister, Patty Eldridge, testified that a few days before the killing, defendant told her that "the next time [the victim] tried to jump on him,

[defendant] had a big surprise for him. He was going to get him [the victim].” The sister also told a detective that defendant said he was not going to let “that punk, Frank Martin, . . . kick [defendant’s] ass in his own home again.” However, a week or so before the killing, the victim referred to defendant as his “brother” in introducing defendant to the property manager where the victim lived.

On February 2, 2008, hunters discovered the victim’s body in brush 5-10 feet off of a jeep trail in a remote high desert area of the county. The body had massive trauma to the face and gashes across the throat, the eyes were swollen shut, and one leg was severely deformed, indicative of a fracture. Defendant’s DNA was on a crushed Miller Genuine Draft beer can found on top of the snow near the body.<sup>2</sup> The victim’s wallet was found on his body.

A voicemail message from the victim’s cell phone to his stepfather’s phone, left on January 31 at 9:49 p.m., contained sounds of gagging and coughing and apparent footsteps.

An autopsy revealed blunt force trauma to the head and brain stem, incised wounds made by a knife or sharp-edged instrument to the head and neck, and bullet wounds caused by two bullets. There were no defensive wounds. The cause of death was “multiple forms of homicidal violence.”

The pathologist testified that the blunt force trauma to the head caused multiple radiating fractures to the basilar skull. There was extensive bruising to the face, including two black eyes. The pathologist was unable to say how these injuries were

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<sup>2</sup> The DNA results indicated a mixture of at least two donors. Defendant and the victim could not be excluded as donors. Approximately one person in 83 million could be included as possible contributors. Defendant’s brother Malcolm was excluded as a donor.

inflicted; they could have been inflicted by an object, fists or foot stomping. However, there was more than one blow and the delivery of “a lot of force.”

The two incised wounds to the neck measured eight inches and four inches in length. They were shallow and neither wound lacerated any major blood vessels or the airway.

The two gunshot wounds were both to the victim’s back. There was no evidence of close-range firing. One bullet entered the back of the right shoulder and exited the pectoral muscle and then entered the left arm. This bullet missed the lungs and chest cavity.

The other bullet entered the lower back, traveled through the lower abdomen and diaphragm, grazing the liver and kidney, perforating the colon and small intestine, exiting the body, grazing the penis and reentering the left thigh, shattering the femur, and exiting the same leg. This bullet also did no damage to the chest cavity and lungs.

Based upon the location of the entry and exit wounds and the bullet paths, the pathologist opined the victim was on his left side, in the fetal position, when he was shot.

Two deformed bullets recovered during the autopsy had a unique rosy hue similar to Russian ammunition for a Czech/Russian 7.62-millimeter Tokarev gun and similar to an unexpended round found at the crime scene and another found near defendant’s home.<sup>3</sup>

The victim had a blood-alcohol level of .19 percent.

The pathologist opined that the blunt force injuries to the head were severe and potentially lethal in and of themselves. He opined that the basilar skull fractures were “probably” a “lethal incapacitating injury at the outset.” The neck lacerations were not lethal. The bullet that entered the back of the victim’s right shoulder was not lethal; it

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<sup>3</sup> Similar ammunition found inside defendant’s home was not associated with the 7.62-millimeter gun.

was survivable and would not have prevented “activity to get away.” The bullet wound that entered in the victim’s lower back was potentially lethal. Without medical treatment, the victim would have developed peritonitis and died from a bacterial infection of the abdominal cavity. Additionally, there was the potential for continued blood loss without medical attention. And the injury to the thigh caused by this bullet also had lethal potential, because of the potential for substantial blood loss. While the bullet that entered the back of the shoulder would not have been immediately incapacitating, the bullet that entered the lower back and ultimately entered the thigh and shattered the femur was incapacitating and would have prevented the victim from walking very far unless the victim could hop effectively. The leg was “out of play” after that wound was inflicted. The pathologist opined the gunshot wounds occurred at or near the time of death based on the fact that the bullets caused hemorrhage. However, there was not a great deal of bleeding in the abdominal cavity along the path of the bullet that entered the lower back and the victim may have been “on the way out” when the wounds associated with that bullet were inflicted.

On February 3, 2008, sheriff’s investigators, having learned that defendant and the victim were close friends, contacted defendant to check on his well-being. Defendant drew suspicion to himself by denying that they were close. Contrary to the information provided by the victim’s property manager, defendant denied describing his relationship with the victim as that of a brother and claimed he had not seen the victim for at least a month.

Later on February 3, a search warrant was executed at defendant’s mobile home. During the search, an officer asked defendant if he knew the victim, and defendant again said he did not know the victim well and had not seen him for at least a month.

The search revealed that a small square of carpet and carpet pad had been cut from the floor in defendant’s living room. Red stains on the exposed floor board were DNA-tested and identified as the victim’s blood. DNA tests of blood on a sock found in

defendant's bedroom showed a mixed DNA profile consistent with reference profiles from defendant and the victim and inconsistent with Malcolm. The victim's blood was also found on a tarp and a clothesline located between the homes of defendant and Malcolm.

Cans of Miller Genuine Draft beer were found in defendant's refrigerator. A plastic bag in his kitchen contained numerous Miller Genuine Draft beer cans, crushed in a fashion similar to the Miller Genuine Draft can found near the victim's body.

Defendant's pickup truck was found near Malcolm's house. The truck had a flat tire. Nearby was a smoldering burn pile that contained what appeared to be a truck bed liner and some carpet. Stains on the tailgate liner that remained on the truck were DNA-tested and identified as the victim's blood.

A search of Malcolm's house the following day revealed nothing of forensic value, though there were Miller Genuine Draft beer cans in the refrigerator. Malcolm said he had not seen the victim for about four weeks.

A detective testified that, in jailhouse phone conversations between defendant and Darinda or his son, defendant said he "didn't do it," and anyway it was self-defense, and the victim started it, and the victim's violence would help prove self-defense.<sup>4</sup> Defendant claimed Malcolm did it, and he was angry that he was being blamed while Malcolm was free.

At trial, Malcolm testified under a grant of use/derivative use immunity pursuant to section 1324. He testified that he owns a Czech gun but loaned it to defendant. The gun is a semiautomatic that resembles a .45-caliber handgun. The ammunition for the weapon is similar to .38-caliber ammunition.

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<sup>4</sup> The parties agreed to have the evidence come in through a detective's testimony rather than redact the tapes themselves.

On January 31, defendant and the victim had dinner at Malcolm's and Janet's home. Thereafter, the three men went to defendant's home. Malcolm watched television while defendant and the victim talked and then argued as the victim got drunk. The victim said "fuck you, Dave." Malcolm asked what was going on and the victim said, "He's trying to pick a fight with me." Malcolm got in front of defendant. Defendant hit the victim in the back of the head with an object, causing him to fall on top of Malcolm. Malcolm could hear the victim's head being struck with something. Malcolm rolled out from under the victim and ran outside for about half a minute. When Malcolm went back inside, he saw defendant straddled over the victim pointing a small .22-caliber Derringer pistol at him. Defendant fired the gun at the victim and said, "F this mother f'er [sic]." Malcolm went back outside. The bloodied victim ran away. Malcolm ran up to the victim and the victim said, "Look what he did to me, Malcolm." Malcolm told the victim they would get help. Malcolm went back to defendant and told him they had to help the victim. They drove defendant's pickup to Malcolm's house to put air in the tire. Janet asked what was going on. They said the victim was hurt and needed help. She left in her own vehicle to search for the victim while the brothers put air in defendant's tire.

Defendant and Malcolm came upon the victim first. Janet arrived, and the victim yelled toward Janet that he needed help. Malcolm sent Janet home, saying he and defendant would get the victim to a doctor. After Janet left, defendant worried aloud that the victim was going to "snitch." The victim said he would not snitch. The victim swung at defendant, and defendant knocked the victim to the ground. The victim pleaded for his life. Malcolm, who was walking around in shock on the other side of the truck, heard two gunshots. Malcolm saw the gun in defendant's hand. It was the gun Malcolm had loaned defendant. Defendant then kicked the victim "a couple of three times," pulled out a knife, and stabbed and sliced the victim's neck twice. Malcolm did not intervene, because he was afraid defendant would hurt him too.

At defendant's instruction, Malcolm helped put the victim's body in the truck. Defendant drove into the woods, saying, "Man, I lost my head." They left the body in some bushes. Malcolm said they should call the police. Defendant said he acted in self-defense, but the police would never believe him. At defendant's instruction, they set fire to the truck bed liner and their clothes.

Back at home, Malcolm told Janet that the victim "subdued to his injuries [*sic*]." He did not explain, and she did not ask any questions.

The jury learned that an unrelated firearm possession charge against Malcolm was dismissed when he pleaded guilty to being an accessory after the fact for helping defendant dispose of the victim's body. The district attorney's office made no promises to Malcolm about his sentence.

The jury watched videotapes of sheriff's detectives interviewing Malcolm on February 8, 14, and 15, 2008. Malcolm's trial testimony was mainly consistent with his February 15 interview. However, defense counsel cross-examined Malcolm about his prior inconsistent statements to sheriff's detectives on February 8 and 14. On February 8, Malcolm first told sheriff's detectives he was not present when the victim was killed but was at home watching television with his wife. They fell asleep and awoke when defendant knocked on the door, said he and the victim got into a fight, defendant acted in self-defense, and there had been an accident. Malcolm helped defendant dispose of the body. In his February 14 interview, Malcolm said Janet helped clean up the blood in defendant's home.

Janet testified at trial under a grant of use/derivative use immunity pursuant to section 1324. She, Malcolm, defendant, and the victim had dinner and drinks at her and Malcolm's home on January 31, 2008. After dinner, the three men went to defendant's home. Janet fell asleep and awoke to hear a voice saying defendant needed help. Janet went to defendant's home and saw blood all over the floor. Defendant told her not to call anyone, just help him clean up. She was scared because of the look in his eyes and the

sound of his voice. When defendant left, Janet went home and saw Malcolm, who was frantic and wanted to find the victim to help him. She went looking but did not find the victim. On her way home, she saw Malcolm. He said they were going to get the victim some help and she should go home, which she did. Janet was hysterical because she thought something bad had happened. She went home, drank a glass of peppermint schnapps, and went to bed. Malcolm later returned and said the victim had “subdued to his injuries [*sic*].”

No defense witnesses were called. The defense argued that Malcolm murdered the victim, pointing to his history of violence, the use of Malcolm’s gun, inconsistencies between statements by Malcolm and Janet, and defendant’s consistent denials.

The jury found defendant not guilty of first degree murder, but guilty of second degree murder. The jury found “not true” the enhancement allegations for personal use of a firearm and personal and intentional discharge of a firearm. The jury did not reach a verdict on count two, assault by means of force likely to produce great bodily injury (which the prosecutor declined to retry). The jury found defendant not guilty of count three, assault with a firearm.

The trial court sentenced defendant to a term of 30 years to life in prison.

## **DISCUSSION**

### **I. Voluntary Manslaughter Instruction**

Defendant contends the trial court prejudicially erred in failing to instruct the jury *sua sponte* on the lesser included offense of voluntary manslaughter based on sudden quarrel or heat of passion. We disagree.

#### **A. Background**

The trial court discussed with counsel whether or not to instruct on voluntary manslaughter based on heat of passion, and both defense counsel and the prosecutor

agreed the court should *not* instruct on voluntary manslaughter.<sup>5</sup> The court did instruct that “[p]rovocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide.”

### **B. Analysis**

A trial court has a sua sponte duty to instruct on lesser included offenses supported by substantial evidence. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*)).<sup>6</sup> However, instructions on lesser included offenses are required only when evidence that the defendant is guilty only of the lesser offense is substantial enough to merit consideration by the jury. (*Id.* at p. 162.) “ ‘Substantial’ ” in this context means evidence from which a jury of reasonable persons could conclude that the lesser offense, but not the greater, was committed. (*Ibid.*) In deciding whether there is substantial evidence of a lesser included offense, courts should not evaluate witness credibility. (*Ibid.*)

Voluntary manslaughter arising from a sudden quarrel or heat of passion (§ 192, subd. (a)) is a lesser included offense of intentional murder (§ 187, subd. (a)).

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<sup>5</sup> The instruction conference discussion as to this instruction was as follows:

“[THE PROSECUTOR]: I have [CALCRIM No.] 570 as a lesser included offense.

“[DEFENSE COUNSEL]: I don’t think you get to pick those, counsel.

“[THE PROSECUTOR]: I think you are right. But, no, I just threw it in there. [¶] . . . [¶] We are not requesting it at this time depending on the evidence.

“THE COURT: All right. And 570 is out.”

<sup>6</sup> “[T]he claim may be waived under the doctrine of invited error if trial counsel both ‘intentionally caused the trial court to err’ and clearly did so for tactical reasons. [Citation.] Invited error will be found, however, only if counsel expresses a deliberate tactical purpose in resisting or acceding to the complained-of instruction.” (*People v. Souza* (2012) 54 Cal.4th 90, 114.) The record here does not show that trial counsel declined the instruction for tactical reasons. (See fn. 5, *ante.*)

(*Breverman, supra*, 19 Cal.4th at pp. 153-154.) “Heat of passion arises if, ‘ ‘at the time of the killing, the reason of the accused was obscured or disturbed by passion to such an extent as would cause the ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.’ ’ [Citation.] Heat of passion, then, is a state of mind caused by legally sufficient provocation that causes a person to act, not out of rational thought but out of unconsidered reaction to the provocation. (*People v. Beltran* (2013) 56 Cal.4th 935, 942 (*Beltran*)).) No specific type of provocation is required, and the passion need not be anger; it may be any violent, intense, high-wrought or enthusiastic emotion “other than revenge.” (*Breverman, supra*, 19 Cal.4th at p. 163.) However, “the provocation must be one that would cause an emotion so intense that an ordinary person would simply react, without reflection. . . . [T]he anger or other passion must be so strong that the defendant’s reaction bypassed his thought process to such an extent that judgment could not and did not intervene.” (*Beltran, supra*, 56 Cal.4th at p. 949, italics omitted.) Moreover, if sufficient time has elapsed between the provocation and the fatal blow, for passion to subside and reason to return, the killing is not voluntary manslaughter. (*Beltran, supra*, 56 Cal.4th at p. 951; *Breverman, supra*, 19 Cal.4th at p. 163.)

Provocation to reduce murder to manslaughter has both a subjective and an objective component. (*People v. Manriquez* (2005) 37 Cal.4th 547, 584.) “ ‘ “[N]o defendant may set up his own standard of conduct and justify or excuse himself because in fact his passions were aroused, unless . . . the facts and circumstances were sufficient to arouse the passions of the ordinarily reasonable [person].” ’ ” (*Ibid.*) To satisfy the objective element of this form of voluntary manslaughter, the defendant’s heat of passion must be due to “ ‘ “ ‘sufficient provocation.’ ” ’ ” (*Ibid.*) Furthermore, “[t]he claim of provocation cannot be based on events for which the defendant is culpably responsible.” (*People v. Oropeza* (2007) 151 Cal.App.4th 73, 83.) In other words, “[a] defendant may

not provoke a fight, become the aggressor, and, without first seeking to withdraw from the conflict, kill an adversary and expect to reduce the crime to manslaughter by merely asserting that it was accomplished upon a sudden quarrel or in the heat of passion.” (*Oropeza, supra*, at p. 73.)

Here, there was insufficient evidence of sudden quarrel or heat of passion to warrant instruction on voluntary manslaughter. Quarrels were the predictable outcome when defendant and the victim drank alcohol together, as they did that night, and defendant was waiting for a chance to get revenge for the eardrum incident. Revenge is not an emotion that supports an instruction on heat of passion voluntary manslaughter. (*Beltran, supra*, 56 Cal.4th at p. 948; *Breverman, supra*, 19 Cal.4th at p. 163.) Moreover, there was no evidence that there was any provocation that would “cause an emotion so intense that an ordinary person would simply react, without reflection” (*Beltran, supra*, 56 Cal.4th at p. 949, italics omitted), or that defendant’s reason was actually obscured by passion (*id.* at p. 948). Subjective conditions such as intoxication do not meet the objective test for sufficient provocation to rouse an ordinary person of average disposition to heat of passion. (*In re Cordero* (1988) 46 Cal.3d 161, 190.)

Defendant argues his rage, which the prosecutor characterized as revenge, could just as easily be heat of passion -- a simmering anger about being beaten up by the victim on the prior occasion, which “boiled over” when the victim became drunk and belligerent in defendant’s home again, yelling obscenities like “fuck you,” which defendant views as “fighting words, which are inherently likely to provoke an immediate violent reaction.” We disagree. Mere words cannot constitute adequate provocation. (*Beltran, supra*, 56 Cal.4th at p. 948, citing *People v. Valentine* (1946) 28 Cal.2d 121, 140.) Although words may be a factor in creating provocation (*People v. Le* (2007) 158 Cal.App.4th 516, 526), a “fuck you” between friends (even angry friends) under these circumstances does not meet the objective test for provocation reducing murder to manslaughter (*People v.*

*Cole* (2004) 33 Cal.4th 1158, 1216 [cursing was the norm between defendant and victim]).

Defendant cites a 1975 case for the proposition that the word “ ‘motherfucker’ ” yelled in a hostile manner can be “ ‘fighting words.’ ” (*Jefferson v. Superior Court* (1975) 51 Cal.App.3d 721, 723-724.) In that case, the issue was whether such words were sufficient to support a charge of disturbing the peace in violation of section 415. (*Jefferson, supra*, at p. 724.) The People asserted, “ ‘You call somebody a mother fucker [and] the guy’s likely to punch you in the nose.’ ” (*Ibid.*) *Jefferson* does not help defendant. Applying *Jefferson* in the context of voluntary manslaughter, as defendant would have us do, would be inconsistent with our high court’s pronouncements in *Beltran* and *Valentine*.

Moreover, defendant announced in advance that he was going to get revenge. Defendant said he was going to “get” the victim. He had a “big surprise” for the victim. And furthermore, he was not going to let the victim kick his ass in his own home again. Defendant argues that, since he and the victim were close friends, heat of passion is more likely than revenge, and in any event it was a jury question. However, we conclude the voluntary manslaughter instruction should not have been given to the jury, because there was insufficient evidence of provocation that would have caused “an emotion so intense that an ordinary person would simply react, without reflection.” (*Beltran, supra*, 56 Cal.4th at p. 949, italics omitted.) Nor was there evidence of provocation that caused “anger or other passion . . . so strong that the defendant’s reaction bypassed his thought process to such an extent that judgment could not and did not intervene.” (*Ibid.*)

Defendant cites authority that provocation can occur over a considerable period of time. While true, the point does not help defendant. His cited cases are inapposite. In *People v. Berry* (1976) 18 Cal.3d 509, the defendant’s wife traveled alone to Israel three days after their wedding, returned to demand a divorce because she loved and had sexual relations with another man, and “continually provoked defendant with sexual taunts and

incitements, alternating acceptance and rejection of him” for 13 days before he killed her. (*Id.* at pp. 513-514.) In *People v. Wharton* (1991) 53 Cal.3d 522, also cited by defendant, the court found harmless error in omission of a jury instruction that legally adequate provocation could occur over a considerable period of time, where the evidence showed the defendant killed his live-in girlfriend when she threw a book at him, but they had a dysfunctional relationship and had spent the preceding days or weeks in drunken arguments that grew increasingly shrill. (*Id.* at pp. 543, 571-572.) “The key element is not the duration of the source of provocation but ‘ “whether or not defendant’s reason was, at the time of his act, so disturbed or obscured by some passion . . . to such an extent as would render ordinary men of average disposition liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.” ’ ” (*Wharton, supra*, 53 Cal.3d at pp. 569-570.)

Here, there was no buildup of legally adequate provocation. There was no evidence of a sexual relationship between defendant and the victim, and they did not live trapped in the same home. They were just friends who behaved badly when they drank. And intoxication is not provocation.

Moreover, as the People observe, because defendant stopped at his brother’s place to put air in his tire before tracking the victim to a location about a quarter of a mile from defendant’s home, there was time for defendant to cool off, such that the killing could not be voluntary manslaughter. While it is unclear what blows caused the victim’s death, the pathologist did opine that the basilar skull fractures “probably” were a “lethal incapacitating injury at the outset.” Furthermore, the fractured femur caused by the bullet that entered the lower back rendered that leg “out of play,” making it unlikely the victim could have walked very far after that bullet wound was inflicted. This testimony suggests that the victim would not have been able to flee to the place where he was found by defendant and Malcolm had those injuries been inflicted at defendant’s house. Furthermore, even if the fatal blow was struck in defendant’s home, defendant’s actions

by the side of the road show defendant resumed his homicidal violence while having the presence of mind to worry that the victim would “snitch.” All of this evidence is inconsistent with defendant’s heat-of-passion theory.

Defendant argues his newly minted theory of voluntary manslaughter is based on *People v. Nero* (2010) 181 Cal.App.4th 504, 513-518, where a brother and sister were both convicted of second degree murder. The People’s theory was that the sister, Brown, aided and abetted murder by handing a knife to her brother, Nero, who stabbed the victim. (*Nero, supra*, at p. 510.) Nero testified that the victim called Brown a “bull dyke” and “bitch” and made crude hand gestures before the stabbing. (*Id.* at p. 519.) During deliberations, the jury asked if it could find the aider/abettor less culpable than the direct perpetrator. (*Id.* at p. 509.) The trial court referred the jury to the instruction that aiders/abettors are equally guilty. (*Id.* at p. 510.) The appellate court reversed as to Brown, because an aider/abettor may be found guilty of a lesser offense than the actual perpetrator, and Brown was entitled to have the jury consider whether she aided/abetted the crime in the heat of passion, even though her brother did not act in the heat of passion when he stabbed and killed the victim. (*Id.* at pp. 515-520.) Defendant argues that this case is similar because the jury could have found that defendant, “while still in the heat of passion, encouraged Malcolm to chase after the victim, the same way that Brown encouraged her brother to chase down the victim in Nero.”<sup>7</sup> But as we have noted, the provocation defendant asserts was insufficient to cause an ordinarily reasonable person of average disposition to act rashly and without deliberation and reflection, and from such passion rather than from judgment.

Defendant argues the jury must have rejected the bulk of Malcolm’s testimony, because the jury deadlocked on the charge of assault likely to produce great bodily injury

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<sup>7</sup> There is nothing in *Nero* that indicates the victim was “chased down” before he was stabbed.

and acquitted defendant of first degree murder and all firearm allegations.<sup>8</sup> Defendant further argues the jury must have concluded Malcolm was the one who assaulted and shot the victim, and must have found defendant guilty on a theory that he aided and abetted Malcolm. Defendant argues the jury, by finding him guilty of second degree rather than first degree murder, must have found provocation, and therefore he would have fared even better had the jury been given the option of voluntary manslaughter.

We disagree with defendant's analysis. The jury's deadlock on the assault with force likely to produce great bodily injury charge is a wild card about which we will not speculate. The jury's choice of second degree murder does not necessarily mean the jurors found that provocation reduced a first degree murder to second degree murder, as opposed to finding insufficient evidence of deliberation and premeditation. Moreover, in contrast to the provocation required for manslaughter, which has both a subjective and an objective component, the test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder is strictly subjective. (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.) The evidence here supports a jury finding that defendant "lost his head" while making good on his threat to spring his "surprise" on the victim, "get" the victim, and not let the victim again get the best of him in his own home. On the other hand, as we have said, the evidence was insufficient to establish sufficient provocation to support a voluntary manslaughter instruction.

As to the gun, we agree the jury's rejection of the firearm allegations means the jury did not find beyond a reasonable doubt that Malcolm's testimony indicating defendant was the shooter was credible. However, that does not mean the jury found

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<sup>8</sup> Defendant acknowledges that if an acquittal of one count is inconsistent with a conviction on another, effect is given to both. (*People v. Avila* (2006) 38 Cal.4th 491, 600.)

defendant liable only as an aider and abettor. Contrary to defendant's assumption, it was not established that the gunshot wounds killed the victim. Only one of the two bullet wounds was potentially lethal and death would have resulted from that bullet wound because of infection or loss of blood. As for death resulting from blood loss causing death, based on the relatively small amount of blood loss resulting from wounds inflicted by this bullet, the pathologist opined the victim was probably already "on his way out" by the time that wound was inflicted. As for death resulting from infection, the pathologist said the victim died at or near the time the bullet wounds were inflicted. On the other hand, the blunt trauma caused a basilar fracture that "probably" would have been a "lethal incapacitating injury at the outset."

## **II. Accomplice Instructions**

Defendant argues CALCRIM No. 334 misstates the law. We disagree.

### **A. Background**

Pursuant to section 1111,<sup>9</sup> the trial court instructed the jurors with CALCRIM No. 334, that they must decide whether Malcolm was an accomplice, as follows:

"Before you may consider the statement or testimony of Malcolm Dingle as evidence against the defendant, you must decide whether Malcolm Dingle was an accomplice. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if: [¶] 1. He or she knew of the criminal purpose of the person who committed the crime; [¶] AND [¶] 2. He or she intended

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<sup>9</sup> Section 1111 provides, "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime.

“The burden is on the defendant to prove that it is more likely than not that Malcolm Dingle was an accomplice. [¶] . . . [¶]

“If you decide that a declarant or witness was an accomplice, then you may not convict the defendant . . . based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice’s statement or testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice’s statement or testimony; [¶] AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes.

“*Supporting evidence, however, may be slight.* It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence *must tend to connect* the defendant to the commission of the crime. [¶] The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice.

“Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.” (Italics added.)

At defendant’s request, the court further instructed with the following language taken from Justice Kennard’s concurring opinion in *People v. Guiuan* (1998) 18 Cal.4th 558, 576 (*Guiuan*):

“In deciding whether to believe the testimony given by an accomplice, *you should use greater care and caution than you do when deciding whether to believe testimony given by an ordinary witness.* An accomplice’s testimony may be strongly influenced by the hope or expectation that the prosecution will regard<sup>[10]</sup> testimony that supports the prosecution’s case by granting the accomplice immunity or leniency. For this reason, you should view with distrust accomplice testimony that supports the prosecution’s case. Whether or not the accomplice testimony supports the prosecution’s case, you should bear in mind the accomplice’s interest in minimizing the seriousness of the crime and the significance of the accomplice’s own role in its commission[,] the fact that the accomplice’s participation in the crime may show the accomplice to be an untrustworthy person and an accomplice’s particular ability, because of inside knowledge about the details of the crime, to construct plausible falsehoods about it. In giving you this warning about accomplice testimony, I do not mean to suggest that you must or should disbelieve the accomplice testimony that you heard at this trial. Rather, you should give the accomplice testimony whatever weight you decide it deserves after considering all the evidence in the case.”<sup>11</sup> (Italics added.)

During deliberations, the jury sent a note stating, “We don’t understand the statement on jury instruction # 334. [¶] ‘The burden is on the defendant to prove that

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<sup>10</sup> Justice Kennard used the word “reward.” (*Guiuan, supra*, 18 Cal.4th at p. 576 (conc. opn. of Kennard, J.)) The verbal and written instructions in this case used the word “regard.” Defendant makes no issue of this point on appeal.

<sup>11</sup> The trial court was not required to give this instruction derived from a concurring opinion in *Guiuan, supra*, 18 Cal.4th 558. A concurrence is not the opinion of the court and is not binding. (*People v. Amadio* (1971) 22 Cal.App.3d 7, 14.) The majority in *Guiuan* specifically endorsed the language of the form instruction about viewing accomplice testimony with caution (formerly in CALJIC No. 3.18, now in CALCRIM No. 334), without the concurrence’s suggested addition. (*Guiuan, supra*, 18 Cal.4th at pp. 569-570.)

it is more likely than not that Malcolm Dingle was an accomplice.’ [¶] Is this a correct statement regarding burden of proof?” In response, the trial court referred the jury to a special instruction, which stated: “In order to establish that an individual is an accomplice, a defendant bears the burden of both producing evidence raising that issue and of proving the accomplice status by a preponderance of the evidence. [¶] The burden of proving a fact is satisfied when the requisite evidence has been introduced or the persuasion accomplished. It is of no consequence whether the evidence was introduced by the prosecution rather than the defendant or whether the persuasion was due to the evidence or to the argument of either counsel. [¶] [Citation.] [¶] ‘*Preponderance of the evidence*’ is defined as that level of evidence that proves that the fact sought to be proved is more likely to be true than not true. After weighing all of the evidence, if you cannot decide that something is more likely to be true than not true, you must conclude that the fact is not proven. You should consider all the evidence, no matter which party produced the evidence.” (Original italics.)

## **B. Analysis**

Defendant mounts three general challenges to the accomplice instructions.

### **1. Slight Evidence**

Defendant argues CALCRIM No. 334 undermines the due process standard of proof beyond a reasonable doubt by permitting the jury to find corroboration upon “slight evidence.” Defendant argues that, because section 1111 (fn. 9, *ante*) says a conviction “cannot be had” upon uncorroborated accomplice testimony, corroboration is part of the “quantum of evidence” necessary to convict and therefore is part of the prosecution’s burden of proof beyond a reasonable doubt. We disagree.

A similar distortion of section 1111 was rejected in *People v. Frye* (1998) 18 Cal.4th 894 (overruled on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22). In challenging the jury instruction requiring the defendant to prove accomplice status by a preponderance of the evidence, the defendant in *Frye* argued that

section 1111, by stating a conviction “ ‘cannot be had’ ” on uncorroborated accomplice testimony, makes corroboration an element of every crime unless the evidence supporting the conviction comes from a source other than an accomplice. (*Frye, supra*, 18 Cal.4th at p. 967.) The Supreme Court responded: “We are aware of no decision, and defendant cites to none, supporting the proposition that section 1111 establishes an issue bearing on the substantive guilt or innocence of the defendant or otherwise constitutes an element of a criminal offense. Nor are we persuaded that the statute is properly construed in the manner defendant suggests. Like the provision making hearsay evidence inadmissible [citation], section 1111 concerns the reliability of evidence that is used to convict an accused of a criminal offense. The rationale underlying the statutory requirement of corroboration is the danger that an accomplice will falsely implicate the defendant in order to obtain leniency or immunity for herself. [Citations.] [T]he corroboration requirement embodied in section 1111 is harsher than the common law rule requiring only that the jury be instructed to view the testimony of an accomplice with suspicion. Although the accomplice’s testimony is admissible and competent, such testimony has been ‘legislatively determined’ never to be sufficiently trustworthy to establish guilt beyond a reasonable doubt unless corroborated. [Citation.] Like the collateral nature of a challenge to the reliability of incriminating evidence on hearsay grounds, a challenge to the reliability of an accomplice’s testimony does not require proof of factual matters in the chain of proof that is required for convicting a defendant of the charged crime. [Citation.]” (*Frye, supra*, 18 Cal.4th at pp. 967-968.)

The *Frye* court also rejected the defendant’s contention that requiring him to prove the witness’s accomplice status by a preponderance of the evidence violated federal due process. (*Frye, supra*, 18 Cal.4th at p. 968.) “ ‘[T]he Due Process Clause “protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged.” ’ [Citation.] Because the corroboration requirement established in section 1111 has no bearing on the

prosecution's proof of any element of the charged crime, there is no constitutional impediment to placing on a defendant the burden of proving, by a preponderance of the evidence, a witness[']s status as an accomplice. As the court in *Patterson v. New York* (1977) 432 U.S. 197 [53 L.Ed.2d 281] explained, 'it is normally "within the power of the State to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion," and its decision in this regard is not subject to proscription under the Due Process Clause unless "it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." ' (*Id.* at pp. 201-202 [upholding statute imposing on murder defendant burden of proving extreme emotional disturbance for reduction to manslaughter]; cf. *Mullaney v. Wilbur* [(1975) 421 U.S. 684,] 686-687 [44 L.Ed.2d 508] [statute placing on defendant charged with second degree murder burden of proving facts negating element of malice offends due process].)" (*Frye, supra*, 18 Cal.4th at pp. 968-969.)

Thus, *Frye* held section 1111's corroboration requirement has no bearing on the prosecution's proof of any element of the charged crime. (*Frye, supra*, 18 Cal.4th at p. 968.)

Defendant argues *Frye* is undermined by *Carmell v. Texas* (2000) 529 U.S. 513 [146 L.Ed.2d 577] (*Carmell*). That case involved application of the ex post facto rule. The high court held a state corroboration requirement, requiring corroboration for rape victims' testimony, was part of the "quantum of evidence necessary to sustain a conviction," such that the ex post facto clause prohibited application of a new Texas state law eliminating the corroboration requirement in a rape trial where the alleged rape occurred before the new law went into effect. (*Carmell, supra*, 529 U.S. at p. 530.) The court said procedural rule changes, such as changes in the rules of evidence, ordinarily do not implicate ex post facto concerns (*id.* at p. 533, fn. 23), but changes which alter "the legal rules of evidence" and change the type or degree of requisite evidence do implicate ex post facto concerns (*id.* at p. 522). Because the new Texas law reduced the amount of

evidence (quantum of proof) needed to convict the defendant, who would have been acquitted under the former law, application of the new law violated the ex post facto clause. (*Id.* at pp. 530, 534.)

Here, defendant cobbles *Carmell* together with *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435], in which the court found a due process violation in a state hate crime statute which authorized an enhanced prison sentence based on a judge's finding of racial motive by a preponderance of the evidence. The court held that any fact that increases the penalty beyond a statutory maximum (other than the fact of a prior conviction) must be proved to a jury beyond a reasonable doubt. (*Id.* at p. 490.) The consequence of these combined cases, according to defendant, is that, when a jury is relying on accomplice testimony, corroboration is a fact necessary to convict, which must be proved beyond a reasonable doubt. We disagree.

As noted, *Carmell* was an ex post facto case. The ex post facto principle concerns itself with *change*, and in *Carmell* the rule was applied to a *change* reducing the amount of evidence needed to convict from that which had been required at the time the offense was committed. (*Carmell, supra*, 529 U.S. at p. 530.) *Carmell* did not prohibit prospective application of the new Texas law on the ground it violated due process; it merely prohibited retrospective application of the change -- a matter not at issue in the case before us. Nothing in *Carmell* disapproved of *Patterson v. New York, supra*, 432 U.S. 197 (*Patterson*), which rejected a due process challenge to a statute imposing the burden on the defendant to prove extreme emotional disturbance reducing murder to manslaughter. *Carmell* did not hold that corroboration was a fact necessary to constitute a statutory offense, or that corroboration evidence tested by a standard lower than beyond a reasonable doubt was constitutionally invalid.

We recognize *Apprendi* indicated that cases such as *Patterson* do not allow a state to manipulate the burden of proof, e.g., by relabeling an element of a crime as an

affirmative defense. (*Apprendi, supra*, 530 U.S. at p. 475.) But no such manipulation is at issue here.

We are thus left with the well-established rule that “ ‘slight . . . evidence’ ” suffices to corroborate accomplice testimony. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024; *People v. Ames* (1870) 39 Cal. 403 (*Ames*)). Defendant argues the “slight evidence” standard derives from appellate courts applying a substantial evidence test to evaluate the sufficiency of evidence on appeal, and while it may be an appropriate standard for a reviewing court, it is not appropriate for the jury. We disagree.

The court in *Ames*, construing the predecessor statute to section 1111, which contained language that was substantially identical, said: “[T]he corroborating evidence . . . need not, of course, be sufficient to establish [the defendant’s] guilt; for, in that event, the testimony of the accomplice would not be needed. But it must tend, in some *slight degree* at least, to implicate the defendant.”<sup>12</sup> (*Ames, supra*, 39 Cal. at p. 404, italics added.)

Defendant cites federal cases finding reversible error where juries were instructed that, once the government shows the existence of a conspiracy, it need show only “slight evidence” connecting a particular defendant to the conspiracy. (E.g., *United States v. Partin* (5th Cir. 1977) 552 F.2d 621, 628.) However, these cases are inapposite, because participation in a conspiracy is an element of the offense which must be proved beyond a reasonable doubt. (*United States v. Huezco* (2d Cir. 2008) 546 F.3d 174, 185.)

Defendant argues our conclusion elevates form over substance, and it does not matter whether something is called an “element” or “Mary Jane.” (*Ring v. Arizona*

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<sup>12</sup> The court in *Ames* went on to say there has to be some evidence tending to raise at least a “suspicion” of the accused’s guilt. (*Ames, supra*, 39 Cal. at p. 404.) This aspect of *Ames* was overruled in *People v. Kempley* (1928) 205 Cal. 441, 455-456, in which the court said the slight evidence must be more than a mere suspicion.

(2002) 536 U.S. 584, 602 [153 L.Ed.2d 556]; *id.* at p. 610 (conc. opn. of Scalia, J.).) In *Ring*, the high court held the Sixth Amendment guarantees a jury trial of facts essential to punishment, including aggravating circumstances rendering a defendant eligible for the death penalty.

However, corroboration is neither an element nor a fact that must be proved. As indicated, the corroborating evidence need not establish the defendant's guilt beyond a reasonable doubt; for, in that event, the testimony of the accomplice would be superfluous. (See *Ames, supra*, 39 Cal. at p. 404.) In *People v. Cardona* (2009) 177 Cal.App.4th 516, the defendant argued that the factual findings involved in a juvenile court's fitness determination were the functional equivalent of an element of a crime, requiring a jury trial under *Apprendi*. (*Cardona, supra*, 177 Cal.App.4th at pp. 522-523.) The Fifth District rejected the argument. The determination did not result in an adjudication of guilt or an increase in the maximum penalty one can receive if punished according to the facts as reflected in the jury verdict alone. (*Cardona, supra*, at p. 532.) In *People v. Ferris* (2005) 130 Cal.App.4th 773, the Fifth District rejected the defendant's argument that *Apprendi* required the People to prove the defendant's sanity beyond a reasonable doubt. Insanity is not an element of a criminal offense, and a finding of sanity does not increase the maximum penalty one can receive if punished according to the facts as reflected in the jury verdict alone. (*Ferris, supra*, 130 Cal.App.4th at p. 780.) Like the factual findings in *Cardona* and *Ferris*, the determination of whether there is corroborating evidence under section 1111 does not result in a finding of guilt or enhance a defendant's sentence.

We conclude corroboration is not an element of a criminal offense and does not increase the maximum penalty triggering *Apprendi*.

Defendant argues the "slight evidence" instruction invades the province of the jury by giving a formula of "accomplice testimony plus slight evidence" which, together with the reasonable doubt instruction, gives jurors the impression that the law assigns

considerable weight to accomplice testimony. Again, we disagree. The jury was appropriately told that an accomplice's testimony must be viewed with caution. And the special instruction defendant requested told the jury to use *greater care and caution than you do when deciding whether to believe testimony given by an ordinary witness* when deciding whether to believe the testimony of an accomplice. Reviewing the instructions as a whole as we must do (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30 (*Paysinger*)), we conclude the assertion that the jury was left with the impression the law assigns considerable weight to accomplice testimony is completely meritless.

We reject defendant's challenge to the "slight evidence" language of the accomplice instruction.

## **2. Burden of Proving Witness is an Accomplice**

Defendant argues CALCRIM No. 334 misstates the law by (a) placing on defendant the burden to prove that a witness is an accomplice, and (b) requiring defendant to prove actual guilt of the witness as an accomplice, rather than just showing probable cause to believe the witness was an accomplice. Although defendant makes both points in his opening brief, he appears to withdraw the first point in his reply brief, where he says he agrees the instruction correctly placed the burden on him, and he challenges only the way the instruction defines an accomplice as someone subject to prosecution, which in turn is defined as someone who committed the crime or aided and abetted its commission. The People did not respond to the latter point in their briefing. Assuming the point is preserved for appeal, it does not provide a ground for reversal.

Defendant argues CALCRIM No. 334 correctly states an accomplice is someone who is "subject to prosecution" for the same crime, but the instruction goes astray by effectively requiring defendant to prove the person's actual guilt as an accomplice, rather than merely showing probable cause. Defendant notes section 1111 (fn. 9, *ante*) uses the phrase "liable to prosecution," rather than the instruction's language "subject to prosecution." Defendant says a person is liable to prosecution for an offense if it has

been committed and “probable cause” exists to believe he did it. He cites case law addressing contentions that trial courts erred by failing to instruct juries that witnesses were accomplices “as a matter of law.” (*People v. Rodriguez* (1986) 42 Cal.3d 730, 759 (*Rodriguez*); *People v. Dailey* (1960) 179 Cal.App.2d 482, 485, citing *People v. Cowan* (1940) 38 Cal.App.2d 231, 242.) Defendant says a proper instruction would require only that he show “probable cause” to believe the witness is guilty of the offense. “Probable cause” signifies a level of proof below preponderance of evidence. (*People v. Hurtado* (2002) 28 Cal.4th 1179, 1188 [probable cause means a state of facts that would lead a person of ordinary prudence to entertain a strong suspicion of guilt].)

In holding that probable cause was not enough to warrant an instruction that a witness was an accomplice as a matter of law, our high court said in *Rodriguez*, “the phrase ‘liable to prosecution’ in section 1111 means, in effect, *properly* liable. Any issues of fact determinative of the witness’s factual guilt of the offense must be submitted to the jury. Only when such facts are clear and undisputed may the court determine that the witness is or is not an accomplice as a matter of law. [Citations.] The decisions stating that [o]ne is “liable to prosecution” for an offense if it has been committed and there is “probable cause” to believe he has committed it’ [citations] are not inconsistent with these principles. In *Dailey* accomplice status was established by uncontradicted facts [citation], while in *Cowan* the uncontradicted evidence showed that the witness was not an accomplice [citation]. The accomplice rule is intended to alleviate distortion stemming from consciousness of guilt, not from fear of unjust prosecution. Self-exculpatory testimony is certainly false if the witness is in fact guilty, but much less likely untruthful if the witness is innocent though falsely accused. And testimony by one not actually guilty is less prone to be “ ‘tainted . . . [or] given in the hope or expectation of leniency or immunity.’ ” ’ ” (*Rodriguez, supra*, 42 Cal.3d at p. 759.)

Defendant cites *Rodriguez*’s language that probable cause liability is “not inconsistent.” According to defendant, that language means that probable cause is the

correct formulation for jury determination of accomplice status. We disagree. Cases are not authority for propositions not therein decided. (*People v. Barragan* (2004) 32 Cal.4th 236, 243.)

We conclude that the burden stated in CALCRIM No. 334 is appropriate.

### **3. Accomplice Truth Telling**

Defendant complains CALCRIM No. 334 failed to instruct that accomplice corroboration must connect the defendant with commission of the crime “in such a way as may reasonably satisfy the jury that the accomplice is telling the truth.” Defendant challenges the form instruction itself and the trial court’s failure to follow through with its grant of defendant’s request to include such language. We conclude the form instruction is not defective, defendant forfeited omission of his proposed modification by failing to bring it to the trial court’s attention, and in any event any error was harmless.

The quoted language about the accomplice telling the truth comes from appellate court review of sufficiency of evidence of corroboration (*People v. Szeto* (1981) 29 Cal.3d 20, 27; *People v. Lyons* (1958) 50 Cal.2d 245, 257) and from case law holding that a trial court’s failure to instruct on accomplice liability under section 1111 is harmless if there is sufficient corroborating evidence in the record, and evidence is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth (*People v. Hartsch* (2010) 49 Cal.4th 472, 499 (*Hartsch*); *People v. Brown* (2003) 31 Cal.4th 518, 556; *People v. Lewis* (2001) 26 Cal.4th 334, 370; *People v. Fauber* (1992) 2 Cal.4th 792, 834).

Defendant asked the trial court to include the quoted language. The prosecutor did not object, and it appears the trial court intended to include it. However, the modification does not appear in the verbal or written instructions given to the jury.

Defendant forfeited the apparently inadvertent omission of his modification by failing to bring the omission to the trial court’s attention when it could have been corrected. (*People v. Tuggles* (2009) 179 Cal.App.4th 339, 364 [omission of

modification clarifying or amplifying correct instruction is subject to forfeiture by defendant's failure to preserve the issue in the trial court].) In any event, the omission was not reversible error.

In reviewing a claim of instructional error, we review the instructions as a whole to determine whether the jury may have misunderstood them in the manner suggested by the defendant. (*Paysinger, supra*, 174 Cal.App.4th at p. 30.) We presume the jurors are intelligent persons capable of understanding and applying the instructions. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Defendant argues the jury may have misunderstood the instructions, in that the jury may have believed that when an accomplice testifies against a defendant, a guilty verdict is warranted if there is "slight" supporting evidence tending to connect the defendant to the commission of the crime, whether the accomplice is telling the truth or not. Defendant notes the jury's acquittal of defendant on the firearm charges shows the jury found Malcolm was not telling the truth about defendant using a gun. However, defendant's argument proves too much. As to matters about which the jury disbelieved Malcolm, the jury acquitted defendant. Thus, the jury did not convict defendant on matters about which it disbelieved Malcolm.<sup>13</sup>

In our view, it is inconceivable that the jury misunderstood the instructions and convicted defendant based solely on accomplice testimony plus corroborating evidence even if it found the accomplice completely lacked any credibility. The trial court gave the standard instructions on witness credibility and the need for the jury to decide what evidence, if any, to believe, and the need for corroboration of accomplice testimony, the

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<sup>13</sup> Defendant also claims the jury's inability to reach a verdict on assault by means of force likely to produce great bodily injury shows the jury disbelieved Malcolm's testimony about defendant hitting, stomping, or knifing the victim. However, as we discussed *ante*, it would be sheer guesswork to try to divine the reason for the jury deadlock.

need for the prosecution to prove defendant's guilt beyond a reasonable doubt, and the court, at defendant's request, instructed the jury: "In deciding whether to believe the testimony given by an accomplice, you should use greater care and caution than you do when deciding whether to believe testimony given by an ordinary witness. An accomplice's testimony may be strongly influenced by the hope or expectation that the prosecution will regard testimony that supports the prosecution's case by granting the accomplice immunity or leniency. For this reason, you should view with distrust accomplice testimony that supports the prosecution's case. Whether or not the accomplice testimony supports the prosecution's case, you should bear in mind the accomplice's interest in minimizing the seriousness of the crime and the significance of the accomplice's own role in its commission[,] the fact that the accomplice's participation in the crime may show the accomplice to be an untrustworthy person and an accomplice's particular ability, because of inside knowledge about the details of the crime, to construct plausible falsehoods about it. In giving you this warning about accomplice testimony, I do not mean to suggest that you must or should disbelieve the accomplice testimony that you heard at this trial. Rather, you should give the accomplice testimony whatever weight you decide it deserves after considering all the evidence in the case."

Nothing more was required. Defendant cites no authority requiring addition of the truth-telling language to the jury instruction (beyond denial of a requested pinpoint instruction, which defendant has forfeited). Defendant cites no authority for his assertion that corroboration should demonstrate that the accomplice is telling the truth overall, not just in bits and pieces.

Defendant cites *People v. MacEwing* (1955) 45 Cal.2d 218, an inapposite case where the trial court improperly instructed that the test for corroboration was whether independent evidence connected the defendant with the crime "or" satisfied the jury that the accomplice/witness was telling the truth. It was the disjunctive language that was

problematic. (*Id.* at pp. 222-224.) No such mistake was made here. Defendant argues: “Because [*MacEwing*] held it erroneous to instruct on the two concepts in the alternative, it must follow that instruction on one but not the other is likewise erroneous.” Defendant is wrong. The problem with the disjunctive language was that it would improperly allow the jurors to accept the accomplice/witness’s testimony even if the corroborating evidence did not tend to connect the defendant to the crime. The instruction in this case would not produce such an outcome.

Defendant argues there may have been independent evidence connecting him to the offenses, but not in a way that would satisfy the jury that Malcolm was telling the truth about defendant’s involvement. However, he offers no examples. In any case, the question is not whether each piece of independent evidence buttresses the accomplice’s testimony (*People v. Simpson* (1954) 43 Cal.2d 553, 563 (*Simpson*) [§ 1111 does not require that an accomplice be corroborated as to every fact to which he testified]), but whether there is sufficient evidence in the record tending to connect defendant to the crime<sup>14</sup> (*Hartsch, supra*, 49 Cal.4th at p. 499). Indeed, the express language of section 1111 states that evidence must “tend to connect the defendant with the commission of the offense,” but does not include the additional language suggested by defendant that the evidence must tend to connect defendant to the crime “in such a way as reasonably may satisfy a jury that the accomplice is telling the truth.” (Italics omitted.) We decline to read more into the statutory requirement than expressly set forth by the Legislature. (*People v. Morse* (2004) 116 Cal.App.4th 1160, 1165 [“Our task is to give [the statute] the meaning expressed, for ‘[i]f the words of the statute are clear, the court should not add to or alter them to accomplish a purpose that does not appear on the

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<sup>14</sup> Defendant observes that *Simpson, supra*, 43 Cal.2d 553, and another case cited by the People, do not hold (as suggested by the People) that, when evidence connects a defendant to the crime, the inference is that an accomplice witness is telling the truth.

face of the statute or from its legislative history’ ”]; *People v. Sharp* (2003) 112 Cal.App.4th 1336, 1342 [judicial function is to ascertain what is in the terms and substance of the statute, not to insert what has been omitted].)

Defendant argues his proposed addition about truth telling would have cured a supposed deficiency in that CALCRIM No. 334 uses the term “supporting” evidence, whereas section 1111 uses the word “corroboration.” He asserts that the modification he had requested “would have informed the jury that ‘supporting evidence’ does not mean additional evidence that supports the prosecutor’s theory that the defendant is guilty.” We disagree. The words “corroborating” and “supporting” are synonymous. (*People v. Solórzano* (2007) 153 Cal.App.4th 1026, 1035.) The meaning is not changed by defendant’s suggested language. Whether the evidence is labeled “corroborating” or “supporting,” the instruction tells the jury to make the finding required by section 1111 -- there must be “other evidence” that “tends to connect the defendant with the commission of the offense.”

#### **4. Harmless Error**

Even assuming error, it was harmless because there is overwhelming corroborating evidence (even apart from Janet’s testimony).

Evidence tending to connect defendant to the commission of the crime included: (1) the victim’s blood on defendant’s floor, and on a sock found in defendant’s home, as well as on defendant’s truck liner; (2) defendant’s DNA on a beer can found near the victim’s body, which was found in a remote area, and the existence of similarly smashed beer cans in defendant’s house; (3) the existence of a motive of revenge; (4) preoffense statements in which defendant indicated he had a big surprise for the victim the next time the victim tried to jump him, he was going to get the victim, and he would not let the victim kick his ass in his own home again; and (5) when first contacted by sheriff’s investigators, defendant lied to them twice about his relationship with the victim and when he last saw the victim, reflecting a consciousness of guilt.

Defendant argues the forensic evidence does not corroborate that defendant was the one who killed the victim, and maybe it was Malcolm who assaulted the victim in defendant's house, and maybe defendant just helped cover up an assault, and anyway the assault in the home was not what killed the victim. However, the corroborating evidence need not, in and of itself, prove defendant's guilt, or that defendant was the actual perpetrator. It need only connect the defendant to the commission of the crime. (§ 1111; *Hartsch, supra*, 49 Cal.4th at p. 499.)

Defendant says the fact that either he or Malcolm could have committed the assault raises a "coin flip" situation. He cites *People v. Smith* (2005) 135 Cal.App.4th 914, 927, in which the court said a "coin flip" situation does not constitute substantial evidence supporting a "true" finding on a felony-murder special circumstance. (*Ibid.*) *Smith* has no bearing on this case.

Defendant argues this was a close case because the jury deliberated for two full days plus a couple of hours and made six inquiries, requesting among other things, clarification of accomplice instructions, transcription of closing arguments, and readback of testimony. In light of the overwhelming corroborating evidence, we disagree that the deliberations suggest a reasonable probability that defendant would have received a more favorable verdict but for the asserted error.

Defendant reiterates the jury did not believe Malcolm completely, because the jury acquitted defendant of the firearm charges despite Malcolm's testimony that defendant used a gun. As indicated, this circumstance supports our conclusion that the jury did not misunderstand the instructions.

### **III. Accomplice Instruction Regarding Janet**

Defendant argues the trial court erred by failing to instruct the jury that Janet may be an accomplice. We disagree.

The evidence shows, at most, that Janet helped remove blood evidence from defendant's home and did not ensure that the victim was taken to a doctor. That evidence

makes Janet an accessory after the fact to whatever crime occurred in defendant's house, but it is insufficient to make Janet an accomplice to murder. To be an accomplice, "the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33)." (*People v. Sully* (1991) 53 Cal.3d 1195, 1227.) An accessory after the fact is not liable to prosecution for the identical offense of which the defendant is charged and therefore is not an accomplice. (*People v. Horton* (1995) 11 Cal.4th 1068, 1114.)

Defendant argues Janet helped the assailant(s) "hunt . . . down" the victim and "lur[ed]" the victim out of the woods and into the road where he was killed. Defendant describes Janet's conduct as suspicious and her explanation of her conduct as contrived and as further evidence of her guilt. Defendant cites case law which supposedly stands for the proposition that a person who participates in luring a victim to a place where the victim is assaulted is an accomplice to that crime. (*People v. Williams* (2008) 43 Cal.4th 584, 637 (*Williams*); *People v. Bradley* (2003) 111 Cal.App.4th 765, 767-768 (*Bradley*)). An accomplice is one who aids or promotes the perpetrator's crime *with knowledge of the perpetrator's unlawful purpose and the intent to assist in the commission of the target crime*. (*Williams, supra*, 43 Cal.4th at p. 637.) There is no evidence that Janet intentionally did anything to lure the victim out of the woods to facilitate a further assault or murder. There is no evidence that Janet even knew the victim would be assaulted in the road.

The authority defendant cites does not support his position. In *Bradley*, cited by defendant, the court did not determine whether the defendant was an accomplice but merely said she was convicted as an accomplice. The defendant did not dispute her convictions on appeal; she challenged only the consecutive nature of the sentencing. (*Bradley, supra*, 111 Cal.App.4th at p. 767.) The court in *Williams* addressed a different issue; it rejected a defendant's contention that the trial court should have instructed that a

particular person was an accomplice as a matter of law, rather than letting the jury decide. (*Williams, supra*, 43 Cal.4th at p. 635.)

Here, it is pure speculation that Janet helped to “hunt . . . down” the victim, then “lur[ed]” the victim out of the woods, and that Janet did those things knowing that the victim would be assaulted again and that she had the intent to aid, facilitate, promote or encourage or instigate a further assault on the victim. Speculation does not warrant an accomplice instruction. (See *People v. Avila* (2006) 38 Cal.4th 491, 566 (*Avila*) [argument that the reason a prosecution witness lied about his involvement in one crime was so that he could deny involvement in another crime was speculative and did not warrant instruction that the witness was an accomplice as a matter of law]; *People v. Lewis* (2001) 26 Cal.4th 334, 371 [defendant’s evidence supporting the request for accomplice instructions was not substantial but speculative; there was no evidence other than speculation that the prosecution witness encouraged or instigated the robbery and murder to give rise to accomplice liability].)

Defendant contends that Janet’s participation took place before the murder, so that she was not an accessory to murder. He contends that the crime was still ongoing when she cleaned up the house and drove to the location where the victim was found. According to defendant, Janet helped facilitate the murder by cleaning up after the assault in defendant’s home. But again, there is no evidence to support this theory. Defendant relies on pure speculation that Janet cleaned up with the intent of facilitating a later assault or murder that would take place at some other location if the victim were found.

Even assuming for the sake of argument that the trial court should have instructed on Janet as a potential accomplice, any error was harmless.

“A trial court’s failure to instruct on accomplice liability under section 1111 is harmless if there is ‘sufficient corroborating evidence in the record.’ [Citation.] To corroborate the testimony of an accomplice, the prosecution must present ‘independent evidence,’ that is, evidence that ‘tends to connect the defendant with the crime charged’

without aid or assistance from the accomplice's testimony. [Citation.] Corroborating evidence is sufficient if it tends to implicate the defendant and thus relates to some act or fact that is an element of the crime. [Citations.] ‘ “The corroborative evidence may be slight and entitled to little consideration when standing alone.” [Citations.]’ ” (*Avila, supra*, 38 Cal.4th at pp. 562-563.)

Apart from the testimony of Janet and Malcolm, there was overwhelming evidence of defendant's guilt, which we have already highlighted. For the same reasons any error regarding the accomplice instructions pertaining to Malcolm is harmless, the error asserted related to Janet is harmless as well.

Defendant here again argues *Carmell, supra*, 529 U.S. 513, elevated corroboration to a quantum of evidence required to convict, making this an issue of federal constitutional error. We have already rejected defendant's argument, *ante*.

Defendant argues that he was prejudiced, because the jury “most likely” viewed Janet's testimony with suspicion. This is so, defendant argues, because Janet is Malcolm's wife and because she cleaned up the blood. Defendant contends that by not telling the jury to view Janet's testimony with caution, the jury likely viewed her testimony as more reliable than Malcolm's and used her testimony to corroborate Malcolm's testimony.

First, we note that the jury was properly instructed on witness testimony, including that in deciding witness credibility, the jury should consider whether the witness is influenced by bias, a personal relationship with someone involved in the case or a personal interest in how the case is decided. Second, as we have already noted, there was ample evidence independent of Janet's testimony that tended to connect defendant to the crime and thereby corroborated Malcolm's testimony. Third, defendant contends that it was Janet's testimony “about how [defendant] warned her not to call 911 and forced her to help clean up [the victim's] blood in [defendant's] house and her testimony about seeing [defendant's] pickup truck at the scene of the killing” that must have

convinced the jury that defendant was guilty of second degree murder. Yet, independent of Janet's testimony, the evidence establishes that the victim's blood was shed in defendant's house, 911 was never called, and the blood evidence and attempt to burn the truck liner indicated defendant's truck was involved in the crime.

We conclude defendant fails to show reversible error resulting from the jury not being directed to consider whether Janet was an accomplice.

#### **IV. CALCRIM No. 373**

Defendant argues that, because Malcolm and Janet were subject to prosecution for their involvement and also testified at trial, it was appropriate for the jury to consider their possible prosecution in assessing their credibility as witnesses, and therefore the trial court erred in instructing the jury not to speculate about the prosecution of others pursuant to CALCRIM No. 373.<sup>15</sup> According to defendant, CALCRIM No. 373 prohibits the jury, in assessing witness credibility, from considering the fact that a prosecution witness was not prosecuted for his or her role in the crime, and therefore the instruction effectively prohibited the jury from considering witnesses' motivation in testifying, in violation of defendant's federal constitutional rights. Defendant cites inapposite case law where defendants were prohibited from confronting witnesses with evidence of bias. (E.g., *Delaware v. Van Arsdall* (1986) 475 U.S. 673, 679-680 [89 L.Ed.2d 674].) We conclude that the instruction does not prohibit the jury from considering witness motivation, and defendant's contentions are without merit.

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<sup>15</sup> The trial court instructed the jury with the first paragraph of CALCRIM No. 373: "The evidence shows that another person may have been involved in the commission of the crimes charged against the defendant. There may be many reasons why someone who appears to have been involved might not be a codefendant in this particular trial. You must not speculate about whether that other person has been or will be prosecuted. Your duty is to decide whether the defendant on trial here committed the crimes charged."

## A. Background

It was the *defense* that requested CALCRIM No. 373 by checking it on the CALCRIM INSTRUCTION WORKSHEET of proposed instructions. And in making the request, the defense did not indicate that the court should give the bracketed paragraph indicating that the instruction does not apply to specified witnesses.<sup>16</sup> In reviewing the proposed instructions, the prosecutor and the trial court both said CALCRIM No. 373 was appropriate, and there was no further discussion about it.

We conclude there was no prejudicial error.

## B. Analysis

The bench notes for CALCRIM No. 373 say, “If other alleged participants in the crime are testifying, this instruction should not be given or [a] bracketed portion should be given exempting the testimony of those witnesses. [Citations.] It is not error to give the first paragraph of this instruction if a reasonable juror would understand from all the instructions that evidence of criminal activity by a witness not being prosecuted in the current trial should be considered in assessing the witness’s credibility. (*People v. Fonseca* (2003) 105 Cal.App.4th 543, 549-550.)”

The California Supreme Court has said that giving the instruction without exempting witnesses is not prejudicial error when the full panoply of instructions on witness credibility and accomplices is also given. (*People v. Brown* (2003) 31 Cal.4th 518, 560-561; *People v. Jones* (2003) 30 Cal.4th 1084, 1113-1114.) “ ‘The purpose of [the instruction] is to discourage the jury from irrelevant speculation about the prosecution’s reasons for not jointly prosecuting all those shown by the evidence to have participated in the perpetration of the charged offenses, and also to discourage speculation about the eventual fates of unjoined perpetrators. [Citation.] When the

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<sup>16</sup> The bracketed paragraph reads as follows: “[This instruction does not apply to the testimony of \_\_\_\_\_ <insert names of testifying coparticipants>.]”

instruction is given with the full panoply of witness credibility and accomplice instructions, . . . [jurors] will understand that although the separate prosecution or nonprosecution of coparticipants, and the reasons therefor, may not be considered on the issue of the charged defendant's guilt, a plea bargain or grant of immunity may be considered as evidence of interest or bias in assessing the credibility of prosecution witnesses. [Citation.]' ” (*Brown, supra*, 31 Cal.4th at p. 560.) The Supreme Court has “declined to label a mistake in the giving of [CALCRIM No. 373] as error when . . . ‘the instruction is given with the full panoply of witness credibility and accomplice instructions.’ ” (*Jones, supra*, 30 Cal.4th at p. 1114.)

Here, the trial court gave the full panoply of instructions on witness credibility, including instruction to consider witness bias, a personal relationship with someone involved in the case, a personal interest in how the case is decided, a promise of immunity, or “anything that reasonably tends to prove or disprove the truth or accuracy” of the witness's testimony. As to Malcolm, the trial court also gave the accomplice instructions we have already discussed. Defendant argues these general instructions do not cure the problem because the jury likely believed a specific instruction (CALCRIM No. 373) would control over a general instruction. However, regarding Malcolm, the most specific instruction was defendant's special instruction, in which the jury was told to use greater care and caution in deciding whether to believe accomplice testimony than when deciding whether to believe testimony given by an ordinary witness. Additional emphasis was given to the possible motivation of an accomplice witness for providing false testimony.

The jury heard that Malcolm received immunity for his trial testimony and pleaded guilty to accessory after the fact for helping defendant dispose of the victim's body. Moreover, we know the jury did not believe, beyond a reasonable doubt, Malcolm's testimony about defendant using a gun, since the jury acquitted defendant of the firearm allegations.

As to Janet, there is no reasonable likelihood that the jury understood CALCRIM No. 373, as defendant asserts, to preclude the jury's consideration of her immunity in assessing her credibility. (*People v. Kelly* (1992) 1 Cal.4th 495, 525.) "[T]he instruction does not tell the jury it cannot consider evidence that someone else *committed* the crime. [Citation.] It merely says the jury is not to speculate on whether someone else might or might not be *prosecuted*." (*People v. Farmer* (1989) 47 Cal.3d 888, 918-919, overruled on other grounds in *People v. Waidla* (2000) 22 Cal.4th 690, 724, fn. 6.) The jury learned that Janet received immunity for her trial testimony, and that the jurors could consider motivation of a witness in determining credibility.

Defendant argues use/derivative use immunity does not mean a witness does not fear prosecution. He argues such fear would almost always be based on speculation, yet CALCRIM No. 373 prohibits the jury from speculating about prosecution of others. However, CALCRIM No. 373 does not preclude the jury from considering a witness's fear of prosecution.

Defendant points to the prosecutor's argument to the jury that, even before being granted immunity, Malcolm gave sheriff's investigators some information implicating defendant. Defendant argues the sheriff's investigators coerced those pretrial statements. However, contrary to defendant's argument, CALCRIM No. 373 did not prohibit the jury from considering the witnesses' motives in assessing credibility.

We conclude CALCRIM No. 373 affords no ground for reversal.

#### **V. Motive Instruction**

Defendant argues the motive instruction, CALCRIM No. 370, was erroneous because it removed motive from the requirement of proof beyond a reasonable doubt. Defendant argues that where, as here, the prosecution uses motive as circumstantial

evidence of criminal intent and identity,<sup>17</sup> motive is a fact essential to prove guilt and must be proven beyond a reasonable doubt. CALCRIM No. 370 was another instruction requested by defendant by checking it on the list of form instructions. Assuming the doctrine of invited error does not preclude review as urged by the People, we find no error.

As provided in CALCRIM No. 370, the trial court instructed the jury: “The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.”

CALCRIM No. 370 instructs on motive, not the burden of proof, and reflects longstanding law that has retained its vitality. (*People v. Smith* (2005) 37 Cal.4th 733, 740-741; *People v. Ibarra* (2007) 156 Cal.App.4th 1174, 1192-1193; *People v. Gonzales* (1948) 87 Cal.App.2d 867, 877-878.) Defendant argues these cases are inconsequential because they did not address his specific challenges.

Defendant argues CALCRIM No. 370 in effect exempted motive from the instruction that told the jury, “[B]efore you may rely on circumstantial evidence to conclude that a fact necessary to find the defendant guilty has been proved, you must be convinced that the People have proved each fact essential to that conclusion beyond a reasonable doubt.” We disagree.

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<sup>17</sup> Evidence of identity (including the victim’s blood on defendant’s floor and sock and defendant’s DNA on the beer can at the dump site) was overwhelming even without the motive evidence. Defendant’s suggestion that the blood and DNA evidence was inconclusive because he may have been a mere hapless observer of a crime committed by Malcolm does not detract from the evidence’s strength.

“Evidence of motive is sometimes of assistance in removing doubt, and completing proof which might otherwise be unsatisfactory, and that motive may either be shown by positive evidence, or gleaned from the facts and surroundings of the act. The motive then becomes a circumstance, but nothing more than a circumstance, to be considered by the jury, and its absence is equally a circumstance in favor of the accused, to be given such weight as it deems proper. But proof of motive is never indispensable to a conviction.” (*People v. Durrant* (1897) 116 Cal. 179, 208.)

In *People v. Meyes* (1961) 198 Cal.App.2d 484, the defendant argued that, since motive is a circumstance, and the case against him was based on circumstantial evidence, each fact which was essential to complete a chain of circumstances that would establish his guilt must be proved beyond a reasonable doubt, and therefore motive had to be proved beyond a reasonable doubt. (*Id.* at p. 497.) The appellate court disagreed, stating, “Appellant’s contention is erroneous because proof of motive is never essential. Thus it does not become one of the chain of circumstances referred to in the instruction properly given by the court pertaining to circumstantial evidence.” (*Ibid.*)

In rejecting an argument that the motive instruction suggested motive alone was sufficient to establish guilt, the court in *People v. Petznick* (2003) 114 Cal.App.4th 663 said, “Although the instruction informs the jury that motive could tend to show that defendant was guilty, the balance of the instructions made it clear that in order to prove the crimes charged all of the elements of each crime must be proved. Since [the instruction] very plainly establishes that motive is not an element of the crimes, it is hard to imagine how a jury might conclude that motive alone would be sufficient to establish guilt. In light of the instructions as a whole it is not reasonably probable the jury would have understood the instruction as defendant urges.” (*Id.* at p. 685.)

The same applies here, where the instructions as a whole made it clear that in order to prove the crimes charged, all of the elements of each crime must be proved beyond a reasonable doubt.

We conclude the jury instruction on motive was not error.

## **VI. Claim of Cumulative Error**

Defendant argues the cumulative effect of trial court error requires reversal.

Having reviewed all claims of error, we disagree.

## **VII. Probation Report Fee**

Defendant argues the trial court erred by ordering him to pay \$340 for preparation of the presentence probation report, pursuant to section 1203.1b,<sup>18</sup> because the statute requires a county ordinance, and here the county ordinance adopted only a *prior* version of section 1203.1b authorizing the fee only if probation was granted. Even assuming for the sake of argument that defendant did not forfeit the issue by failing to raise it in the trial court, we reject defendant's contention.

Subdivision (i) of section 1203.1b authorizes the trial court to order a defendant to pay the probation report fee only if the county has adopted an ordinance to that effect. This language was added to section 1203.1b in 1981 (as subdivision (e) at that time). (Stats. 1981, ch. 284, § 1.)

In 1990, Siskiyou County adopted an ordinance making section 1203.1b operative in the county. The ordinance, contained in a chapter called "PROBATION SERVICES," states: "The provisions of Section 1203.1b *as amended by Chapter 1059, Statutes 1989*

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<sup>18</sup> Section 1203.1b currently provides in part, "(a) In any case in which a defendant is convicted of an offense and is the subject of any preplea or presentence investigation and report, whether or not probation supervision is ordered by the court, . . . the probation officer, or his or her authorized representative, taking into account any amount that the defendant is ordered to pay in fines, assessments, and restitution, shall make a determination of the ability of the defendant to pay all or a portion of the reasonable cost of . . . any presentence investigation and preparing any presentence report made pursuant to Section 1203 . . . . [¶] (b) [If the defendant does not waive the right to a hearing on ability to pay, trial court shall conduct hearing.] . . . [¶] . . . [¶] (i) This section shall be operative in a county upon the adoption of an ordinance to that effect by the board of supervisors."

[italics added], are hereby adopted. The Probation Department is hereby given the authority to implement and carry out the provisions of said section subject to approval by the Superior Court of the County of Siskiyou.” (Ch. 26 of tit. 2, Siskiyou County Code, § 2-26.01, added by Ord. No. 90-1, § 1 (eff. Feb. 8, 1990).)

The 1989 amendment of section 1203.1b made mandatory the trial court’s duty to inquire into ability to pay, whereas the prior version of the statute had given the trial court discretion. (Stats. 1989, ch. 1059, § 1; Stats. 1988, ch. 1430, § 1.)

In 1993, the Legislature amended section 1203.1b (fn. 18, *ante*) to its current authorization of the fee regardless of whether the trial court grants probation or sends the defendant to prison. (Stats. 1993, ch. 502, § 4; *People v. Orozco* (2011) 199 Cal.App.4th 189; *People v. Robinson* (2002) 104 Cal.App.4th 902, 904-905.)

Siskiyou County did not amend its ordinance after the 1993 amendment to the statute. However, the county in 2011 adopted an ordinance listing probation department fees (Ord. No. 11-01, § 1 (Mar. 1, 2011) ch. 26 of tit. 2, Siskiyou County Code, § 2-26.02), with no amendment of ordinance authorizing collection of the probation report fee.

Defendant argues the original ordinance, by referring to the statute “as amended” in 1989, expressly limited adoption to the 1989 version of the statute, which authorized the fee only when the court granted probation, not when the court sent the defendant to prison. (Stats. 1989, ch. 1059, § 1.) Defendant believes the county cannot apply the current version of section 1203.1b unless it amends its ordinance. We disagree.

Since a county ordinance has the same force within county limits as a statute passed by the Legislature has throughout the state, rules relating to the construction of statutes apply to the construction of ordinances. (*Evola v. Wendt Construction Co.* (1959) 170 Cal.App.2d 21, 24.) “ ‘It is a well established principle of statutory law that, where a statute adopts by specific reference the provisions of another statute, regulation, or ordinance, such provisions are incorporated in the form in which they

exist at the time of the reference and not as subsequently modified . . . .” ’ ” (*People v. Cooper* (2002) 27 Cal.4th 38, 44, quoting *Palermo v. Stockton Theatres, Inc.* (1948) 32 Cal.2d 53, 58-59.) However, “ ‘where the reference is general instead of specific, such as . . . to a system or body of laws or to the general law relating to the subject in hand, the referring statute takes the law or laws referred to not only in their contemporary form, but also as they may be changed from time to time . . . . [Citations.]’ [Citation.] Moreover, where the words of an incorporating statute do not make clear whether it contemplates only a time-specific incorporation, ‘the determining factor will be . . . legislative intent . . . .’ ” (*In re Jovan B.* (1993) 6 Cal.4th 801, 816.) A provision which reads as a specific reference may, in context, be construed as a general reference and vice versa. (*Ramish v. Hartwell* (1899) 126 Cal. 443, 446-448.) “[W]here it is questionable whether only the original language of a statute is to be incorporated or whether the statutory scheme along with subsequent modifications, is to be incorporated, the determining factor will be the legislative intent behind the incorporating statute.” (*People v. Domagalski* (1989) 214 Cal.App.3d 1380, 1386.)

For example, *People v. Van Buren* (2001) 93 Cal.App.4th 875, held that section 2933.1, which limits custody credits for persons convicted of felonies “listed in Section 667.5” (*id.* at p. 878), was not a time-specific incorporation of section 667.5, despite a specific reference thereto, but rather was intended to apply generally to felonies listed in section 667.5 as amended from time to time (*id.* at pp. 879-880).

Absent the ordinance’s language “as amended [in] 1989,” the words of the ordinance would not make clear whether it contemplated only a time-specific incorporation of section 1203.1b. The obvious purpose of the ordinance was reimbursement to the county for its costs of preparing probation reports. The county cannot have anticipated that it would be forced to amend the ordinance every time section 1203.1b is amended.

Defendant argues the “as amended [in] 1989” language shows intent for a time-specific incorporation.

However, defendant neglects to acknowledge the closeness in time between the January 1990 effective date of the statutory amendment and the February 8, 1990 effective date of the ordinance. This circumstance supports a conclusion that the ordinance specified the 1989 amendment only to clarify the county’s awareness of the new amendment at the time it adopted its ordinance. Defendant offers no circumstance supporting a contrary intent. Instead, he argues that, because imposition of the fee depends on a defendant’s ability to pay (§ 1203.1b (fn. 18, *ante*)), some counties could determine it is not worth expending judicial resources on a hearing about ability to pay where the defendant is being sent to prison and hence unable to maintain gainful employment. However, intent is determined at the time the county adopted the ordinance, and defendant offers no reason for the county to predict in 1990 that the Legislature would amend section 1203.1b in 1993 to authorize the fee for defendants sent to prison.

We conclude the county ordinance applies to the current statute.

### **VIII. Credit for Actual Time Served**

Defendant argues the trial court erred in failing to award him 782 days of presentence custody credit for actual time served under section 2900.5. The People agree. We accept the concession.

The trial court denied presentence custody credit (§ 2900.5) based on section 2933.2. However, a defendant convicted of murder still earns *presentence* custody credits for actual time served pending trial. (*People v. Taylor* (2004) 119 Cal.App.4th 628, 645-647; *People v. Herrera* (2001) 88 Cal.App.4th 1353, 1366.) The error may be corrected at any time. (*Taylor, supra*, 119 Cal.App.4th at p. 647.)

The probation report said that, as of January 14, 2010, defendant was in actual custody pending trial for 710 days, from February 4, 2008. The trial court sentenced

defendant on March 26, 2010. It thus appears the parties have the right figure at 782 days.

We will order the correction.

**DISPOSITION**

The judgment is affirmed. Defendant is awarded 782 days of presentence custody credit. The trial court is directed to prepare a corrected abstract of judgment showing the award of presentence custody credit, and to forward a certified copy of the corrected abstract of judgment to the Department of Corrections and Rehabilitation.

\_\_\_\_\_ MURRAY \_\_\_\_\_, J.

We concur:

\_\_\_\_\_ BLEASE \_\_\_\_\_, Acting P. J.

\_\_\_\_\_ ROBIE \_\_\_\_\_, J.