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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
THIRD APPELLATE DISTRICT
(Sacramento)

THE PEOPLE,

Plaintiff and Respondent,

v.

CAROLYN SIMMONS,

Defendant and Appellant.

C065601

(Super. Ct. No. 09F03013)

In 1991, 65-year-old Richard Jackson picked up defendant Carolyn Marie Simmons on a street corner in the Oak Park neighborhood of Sacramento and brought her back to his apartment. His body was found the next morning on his couch with a fractured skull and several deep lacerations to the right side of his head caused by multiple strikes from a blunt object. His body was naked from the waist down and covered by a blanket. A nylon Brillo pad was placed in his mouth. While defendant's fingerprints were found in Jackson's apartment and vehicle, the

District Attorney determined there was insufficient evidence to prosecute her for the murder.

In 2009, defendant's son, Anthony Tyree, contacted police and reported that his mother had confessed to robbing and killing an "old dude" at the man's home in Oak Park. According to Tyree, defendant stated she became angry when the man tried to postpone paying her, so she hit him in the head with an object and took "every dime in his pocket." Defendant also told her son where they were living when the crime occurred, which led him to estimate the crime was "18 or 19 years old." This revelation caused police to conduct further investigation into the Jackson murder, during which police discovered defendant had confessed to other people over the years.

In 2010, defendant was tried by jury and convicted of second degree murder. She was sentenced to an indeterminate term of 15 years to life in state prison.

On appeal, defendant contends the trial court prejudicially erred and violated her constitutional rights by: (1) declining to dismiss the action for pre-accusation delay; (2) erroneously instructing the jury with respect to aiding and abetting; (3) erroneously instructing the jury with respect to voluntary intoxication; (4) denying a defense request to re-open closing argument; (5) declining to declare a mistrial after the jury was mistakenly read a portion of a certain witness's testimony that was provided during a hearing outside their presence; and

(6) admitting into evidence Tyree's out-of-court statement that defendant had previously threatened to kill another man.

Defendant further contends: (7) the cumulative prejudice arising from the foregoing assertions of error requires reversal; and (8) the main jail booking and classification fees imposed by the trial court must be stricken because there is insufficient evidence of her ability to pay.

As we explain, defendant's contentions lack merit. Defendant's claim that her constitutional right to due process was violated by the delay in charging her with Jackson's murder fails because substantial evidence supports the trial court's conclusion that the justification for the delay outweighed any prejudice suffered by defendant. With respect to defendant's assertions of instructional error, we conclude any error to have been harmless. We also reject defendant's claim that her constitutional rights were violated by the trial court's decision to deny her request to re-open closing argument because the jury question that prompted the request did not introduce a new theory to the case. We further conclude that while the jury was mistakenly read a portion of a certain witness's testimony that was provided during a hearing held outside their presence, there is no reasonable possibility the outcome would have been different had the jury not heard this hearing testimony. The hearing testimony and trial testimony were nearly identical. Nor did the trial court abuse its discretion by admitting

Tyree's out-of-court statement as a prior inconsistent statement. Defendant's claim of cumulative prejudice also fails. Finally, defendant's challenge to the booking and classification fees has been forfeited. Accordingly, we affirm the judgment.

FACTS

On June 16, 1991, Jackson made plans to have Father's Day dinner with his close friend Addie Hayes. Jackson lived alone in a small apartment on Clauss Court in South Sacramento, on the periphery of Oak Park. Hayes lived a few blocks away. Because Jackson was an alcoholic, Hayes was the payee for certain government benefits Jackson received and made sure his rent and utilities were paid. Jackson called Hayes on a nightly basis to inform her that he had made it home safely. Hayes also had a key to Jackson's apartment in case she needed to check on him. That afternoon, Jackson called Hayes and told her that he might not come over for dinner and to save him a plate of food for the next day. Hayes became worried when Jackson did not call to check in later that night. The next morning, after a couple of unsuccessful attempts to reach him on the phone, Hayes went to Jackson's apartment and discovered his body on the couch.

As already mentioned, Jackson had been repeatedly hit in the head with a blunt object, "something like a hammer," and had "multiple deep lacerations of the right side of his head." His skull, cheekbones, and eye socket were fractured. Jackson also

suffered blunt-force injuries to the right side of his neck. His carotid artery was "torn almost completely through," his jugular vein was "torn completely," and the right portion of his thyroid gland was "crushed and torn." Jackson did not have any defensive wounds on his body, suggesting that the first blow "could have been an incapacitating blow, a blow to the side of the head, possibly the one that caused the [skull] fracture."

Hayes yelled for the apartment manager, who called the police. When Detective Dick Woods arrived, he noted there were no signs of forced entry. Nor was any blood found outside of the apartment. On the couch in the living room, Jackson's body was naked from the waist down and covered with a blanket. A nylon Brillo pad was placed in his mouth. Blood covered Jackson's head and neck, staining his previously white shirt. A blood swipe was found on his left thigh and blood spatters were found on both legs beneath the blanket. The blanket itself appeared free of blood. Blood spatters were also found on three living room walls, the ceiling, and the coffee table. There was no sign of blood in either the kitchen or bathroom. Based on the location of the blood and the spatter patterns, Detective Woods concluded all of the blood came from Jackson and declined to have any of it tested.

The overall appearance of the apartment was clean and orderly. There were no signs of ransacking. Several items were on top of the coffee table, including an empty bottle of

Seagram's Seven Crown whiskey, a jar of Vaseline, four prescription bottles made out in Jackson's name, and a cardboard Brillo pad wrapper that had been torn into two pieces. Jackson's pants were on the floor by the front door. Police searched the pants and found a lighter, pocketknife, and soiled linen. They did not find a wallet, money, driver's license, or car keys either in the pants or anywhere else in the apartment. The bedroom was also neat and clean, with the exception of the bed's mattress being off of the frame and pushed about a foot and a half toward the wall. A closet door in the hallway was partially open. Inside the closet was an assortment of tools. Police found nothing in or around the apartment they believed to be the murder weapon.

Jackson's car was also missing. It was found in Oak Park the next morning, illegally parked at the intersection of Martin Luther King Boulevard and 22nd Avenue. The driver's seat was positioned as close to the steering wheel as possible. Several cigarette butts were in the ashtray, some of which were marked with lipstick. There did not appear to be any blood in the vehicle.

Police processed both the apartment and vehicle for latent fingerprints and interviewed several people in connection with the crime. Defendant became a suspect after her fingerprint was found on the toilet seat in Jackson's apartment and was brought in for questioning. After additional fingerprints were matched

to defendant, she was again questioned by police.¹ At the time, defendant lived at her mother's house on Schreiner Street in South Sacramento. Police executed a search warrant at this location, but found nothing tying defendant to the crime. Defendant's son was present during the search. The District Attorney determined there was insufficient evidence to prosecute defendant for the murder.

The case went cold for nearly 18 years.

On January 23, 2009, Tyree walked into the police station and told Detective Kyle Jaspersen that his mother had confessed to committing a murder. Tyree explained that on a Sunday morning the previous summer, defendant told him that she wanted to go to church but was not able to do so. Tyree suggested that she go to church with her neighbors, Dan Elliott and his wife. Defendant then stated that she was not allowed to go to their church because she had previously told their pastor, who was also a police officer, that she was "involved in a homicide."

After some coaxing, defendant confessed certain details of the crime to her son. Tyree explained that defendant, who was "a known prostitute," told him that she was hanging out in Oak Park when an "old dude" picked her up and offered her money to

¹ The People conceded these statements were taken in violation of defendant's rights under *Miranda v. Arizona* (1966) 384 U.S. 436, 479 [16 L.Ed.2d 694] and did not attempt to introduce them into evidence.

come over to his house. Defendant agreed and accompanied the man to his house. But when the man tried to postpone paying her the money he promised, defendant became angry and "picked up some type of object." The man "took a drink or turned his head," at which point defendant "hit him in the head really hard." Defendant "took every dime in his pocket and left," taking the murder weapon with her. She then "went somewhere and changed her clothes."

Defendant also told her son that the crime occurred when they lived on Schreiner Street. Tyree, who was 21 years old at the time, remembered the police searching the house and bringing his mother in for questioning. He estimated the crime occurred between 1988 and 1990, stating the crime could not have happened after he was arrested in January 1991 and sent to prison. Detective Jasperson did not find a cold case matching the description Tyree provided during the specified years. Jasperson then checked Tyree's criminal record and discovered that he was actually arrested in January 1992. Expanding the search to include 1991, Jasperson found that the Jackson murder matched Tyree's description.

The next month, Detective Jasperson contacted the bishop of the church attended by the Elliotts between 2001 and 2004, Stephen Hinkson. Hinkson, who was also a police officer, told Jasperson that a woman had come to the church "about eight years ago" and stated that she was "involved" in a murder. When

Jasperson showed Hinkson a picture of defendant from 2001, he could not positively identify her as the same person, but stated that she was "the same race" and "about the right age." At trial, Hinkson testified that while the woman did not go into details, she did state that "it was a male victim," that "the cause of death may have been a blunt force trauma," and that she felt "responsible" for the man's death. Hinkson told the woman that she would have to reveal everything she knew about the murder to law enforcement before she could become a member of the church.

On March 3, 2009, Detective Jasperson tried to contact defendant at her residence. Tyree answered the door. He told Jasperson that his mother was not home, but that she had also confessed the murder to Rebecca Person, a close friend of the family. At Jasperson's request, Tyree went down to the police station and called Person on the phone. During the phone call, which was recorded, Tyree asked Person whether defendant had told her that "she killed somebody" and then changed the story and said that "she cleaned up the crime scene" after somebody else committed the crime. Person responded: "Yeah, something like that. I don't know. I don't know what to believe."

The next morning, Tyree called Detective Jasperson and said that his cousin, Alicia Joseph, might have information about the murder. Jasperson then called Joseph on the phone and told her that he was investigating an old homicide that potentially

involved defendant. Joseph responded: "Well, I know that she confessed herself to me." As Joseph explained, defendant stated that she went to an "older" man's house, and when he "made her mad," she picked up an object and "hit him on top of his head, and she just kept hitting him." Defendant told Joseph that after she killed the man, she "cleaned herself up, and she cleaned up as much as she could so she wouldn't get caught." Defendant also told Joseph that she was questioned by police in connection with the murder. Joseph believed defendant confessed to her in order to "get it off her chest."

On March 5, 2009, Detective Jasperson provided Tyree with a police "bait car," which was equipped with a hidden video camera and audio recorder. Tyree had previously agreed to use the car to pick up defendant and engage her in conversation about the murder. When Jasperson spoke to Tyree after he dropped defendant off, Tyree stated that he asked his mother why she told Person about the murder. Defendant responded that she "felt guilty about it." For some reason, the car's equipment failed to record the conversation.

That night, Joseph called the police and reported that defendant had assaulted her with a deadly weapon. Defendant was arrested and taken to jail. She was not under arrest for the murder.

On March 6, 2009, Detective Jasperson contacted Person at her home. After a brief conversation in the kitchen, Person

asked if they could talk somewhere else, and the interview was moved to the police station. At the station, Person explained that an emotional defendant called her one night at around 10:30 p.m. and said: "I just can't live with myself, things that I've done in my life." Person tried to console defendant by saying that God would forgive her for whatever she had done. Defendant responded: "I killed somebody." Person said that she did not want to discuss the matter over the phone and agreed to meet defendant at the Bonfare Market on Broadway.

At the market, defendant told Person that two male drug dealers killed a man in front of her and forced her to clean up the crime scene. According to defendant, one of the drug dealers promised to give her "some dope" in exchange for helping him "get in contact" with the man. She agreed. Pursuant to the plan, when defendant went to the man's house, the drug dealers showed up and defendant opened the door for them. The drug dealers killed the man in front of her and demanded that she clean up the crime scene. When she refused, one of the drug dealers pointed a gun at her head and forced her to do so. After defendant used ammonia and bleach to clean up the crime scene², the drug dealers told her "you better keep your mouth shut" and dropped her off a couple blocks from her mother's house. Defendant also stated the fact that the drug dealers

² There was no evidence that any blood at the crime scene had been cleaned up with ammonia or bleach.

needed to "go through her" to get in touch with Jackson should have tipped her off that this "wasn't a good situation."

As Detective Jasperson drove Person home following the interview, she told him that she remembered the "street name" of one of the drug dealers defendant claimed was responsible for the murder, "Little Ray." The next two days, Person twice visited defendant at the jail. During the first visit, Person told defendant that she had spoken to Jasperson about the murder and told him that two drug dealers had committed the crime. Defendant responded: "You shouldn't have even told him that." Person also told defendant that she made up the name "Little Ray" because she felt pressured. During the second visit, defendant told Person that instead of two male drug dealers, two women were actually responsible for the murder. After this visit, Person called Jasperson and told him that defendant had "changed her story," and that "now there were two females who were supposedly responsible or involved in this homicide." Person stated that this was the first time defendant told her this version of the murder.

On April 8, 2009, Detective Jasperson went to Person's house to follow up on her conversations with defendant at the jail. By this point, defendant had been released from jail and was at Person's house. Jasperson spoke with Person alone in the driveway. Person continued to assert that defendant had told

her that two male drug dealers committed the murder and that "Little Ray" was the name of one of the drug dealers.

After obtaining permission to enter the house, Detective Jasperson spoke to defendant alone in one of the back rooms. Defendant admitted to being at Jackson's apartment the day he was killed, but claimed "there were two females who came walking into the apartment as she was leaving." Defendant denied that drug dealers were involved. Jasperson then brought Person into the room and asked whether defendant had told her that two drug dealers had committed the murder. Defendant answered that she never said that to Person. Person's only response was that "she did not want to be involved in this." Defendant then repeatedly denied that drug dealers were involved in the murder. She then revised her story about the two women who were purportedly involved, and said that they were not walking into the apartment, but were instead coming into the apartment complex as she left. Defendant provided no names for these women.

As already mentioned, aside from defendant's statements to Tyree, Joseph, Person, and Hinkson concerning the murder, she left several fingerprints both in Jackson's apartment and in his vehicle. Two such prints were found on the Brillo pad wrapper on Jackson's coffee table.

DISCUSSION

I

Delay in Bringing Charges

Defendant contends the trial court violated her state and federal constitutional rights to a fair trial and due process by denying her motion to dismiss the case. According to defendant, the 18-year delay in bringing charges for Jackson's murder was both unjustified and prejudiced her defense. She is mistaken.

A.

Applicable Law

We begin by noting that "[t]he statute of limitations is usually considered the primary guarantee against bringing overly stale criminal charges,' and there 'is no statute of limitations on murder.' [Citation.]" (*People v. Nelson* (2008) 43 Cal.4th 1242, 1250.) Nevertheless, "[d]elay in prosecution that occurs before the accused is arrested or the complaint is filed may constitute a denial of the right to a fair trial and to due process of law under the state and federal Constitutions. A defendant seeking to dismiss a charge on this ground must demonstrate prejudice arising from the delay. The prosecution may offer justification for the delay, and the court considering a motion to dismiss balances the harm to the defendant against the justification for the delay. [Citations.]" (*People v. Catlin* (2001) 26 Cal.4th 81, 107; *People v. Nelson, supra*, 43 Cal.4th at p. 1250.)

While “[a] claim based upon the federal Constitution also requires a showing that the delay was undertaken to gain a tactical advantage over the defendant” (*People v. Catlin, supra*, 26 Cal.4th at p. 107), “under California law, negligent, as well as purposeful, delay in bringing charges may, when accompanied by a showing of prejudice, violate due process.” (*People v. Nelson, supra*, 43 Cal.4th at p. 1255.) As our Supreme Court has explained: “‘The ultimate inquiry in determining a claim based upon due process is whether the defendant will be denied a fair trial. If such deprivation results from unjustified delay by the prosecution coupled with prejudice, it makes no difference whether the delay was deliberately designed to disadvantage the defendant, or whether it was caused by negligence of law enforcement agencies or the prosecution. In both situations, the defendant will be denied his right to a fair trial as a result of governmental conduct.’ [Citation.]” (*Ibid.*) However, “whether the delay was negligent or purposeful is relevant to the balancing process. Purposeful delay to gain an advantage is totally unjustified, and a relatively weak showing of prejudice would suffice to tip the scales towards finding a due process violation. If the delay was merely negligent, a greater showing of prejudice would be required to establish a due process violation.” (*Id.* at p. 1256.)

Whether delay in bringing charges is unjustified and prejudicial is a question of fact, the trial court’s resolution

of which “‘must be upheld on appeal if it is supported by substantial evidence.’ [Citation.]” (*People v. New* (2008) 163 Cal.App.4th 442, 460 (*New*)). As we shall explain, substantial evidence supports the trial court’s conclusion that the justification for the delay outweighed any prejudice suffered by defendant.

B.

Additional Background

Defendant accurately describes the relevant background in her motion to dismiss the case: “The investigation, at the time of discovery of the decedent, continued in the usual manner: [h]omicide detectives were assigned to the case; evidence was collected; [Jackson’s] car was located and searched; photographs were taken; [defendant’s] home was searched; witnesses were interviewed. None of the evidence collected or witnesses interviewed proved that [defendant] had killed [Jackson].” Accordingly, “the determination was made that there was insufficient evidence to support any charges being filed against [defendant] or anyone else.” Eighteen years later, there was a “‘change’” which prompted the filing of charges: Tyree walked into the police station and informed police that his mother had confessed to committing the crime. Subsequent investigation revealed that defendant had also confessed to other people.

Defendant argued in her motion to dismiss that, notwithstanding these changed circumstances, the delay in

prosecution was not justified because law enforcement should have done a more thorough investigation at the time of the murder. Defendant further argued the delay in bringing charges prejudiced her defense because of "the loss and destruction of physical evidence, the loss of witnesses, and the loss of some of the witnesses' ability to recall and remember events." With respect to the loss of witnesses, defendant asserted, "Millicent Slater, the neighbor, and the decedent's son Richard Jackson, Jr., with whom he had a volatile relationship, are both dead. Furthermore, Blue and John Gaines, the culprits in this homicide, are likewise dead." Defendant offered no evidence that these individuals were the murderers.

With respect to the loss of witness memories, defendant argued: "Since so much time has passed, it is now impossible to test the observations of witnesses on the night in question or test the accuracy of what the police claim was said that night. It is impossible to ask the questions that were not asked at the time of [Jackson's] death about things they may have seen or heard. [¶] If asked, witnesses could have supplied evidence as to the comings and goings of other potential suspects, of suspicious things they saw or heard on the date in question, reports of any fights, yelling or struggles coming from the room and lists of disreputable people who frequented the area. Such information would have been investigated to prove [defendant] is not responsible for [Jackson's] death."

Finally, with respect to the loss of physical evidence, defendant stated without explanation that her defense was "disadvantaged in the fingerprint evidence." She also stated that her defense was disadvantaged because "there is evidence that [Jackson] had AIDS and now it is impossible to show that the two culprits were likewise infected as a result of their confrontation with [Jackson]." According to defendant, "[a]s a result of the delay, it is impossible for the defense to prove that [Jackson] was involved with other [people who] would have had a motive for killing him and [obtain] the physical evidence linking them to the crime." She further argued that "it is too late at this point to re-trace the steps of the investigating officers and follow the leads they did not follow, even though there were many."

The trial court denied the motion to dismiss. Stating that the foregoing claims of prejudice were "either speculative or in some respects perhaps overstated," the trial court found "some prejudice sufficient to require the People to justify the pre-accusation delay." The trial court then found the justification offered by the People, i.e., that there was insufficient evidence to prosecute defendant for the murder until new evidence literally walked into the police station, to be "strong" and similar to the situation presented in *New, supra*, 163 Cal.App.4th 442, which will be discussed in the analysis that follows. The trial court concluded that defendant would

not be "denied a fair trial because of this delay" and denied the motion to dismiss without prejudice to her ability to renew the motion at the conclusion of the evidence.

During trial, defendant asked the trial court to allow her to call certain police officers to testify to the content of out-of-court statements made by four people who were interviewed during the initial investigation. These people were Slater, Terry Hobbs, Maryanne Berube, and Roxanne Henderson. According to defendant, Slater, Hobbs, and Berube told police "about who they saw in and about [Jackson's] apartment the day -- likely the day of his death." Defendant also stated that Henderson told police that she "heard" that Jackson "had a date with a girl on the day he was killed" and that "[t]here were reportedly two males with this girl," but that she did not "know who she heard this from." Acknowledging that these statements were "technically hearsay," defendant explained that because Slater was dead, and Hobbs, Berube, and Henderson had not been located, "the only way for that information to be before the jury is through the officers who took those reports from those witnesses." Defendant argued that because the absence of these witnesses was caused by the delay in prosecution, due process required the trial court to provide "some leeway in getting that information before the jury." Defendant also mentioned that Jackson's son and one of the crime scene investigators who

processed certain latent prints in the case, CSI Hudson, were also dead.

The trial court sustained the People's objection to the proposed testimony, ruling that defendant's right to due process did not require admission of the proffered hearsay. The trial court also reminded defendant that she would be permitted to renew her motion to dismiss the case because of the delay in bringing charges at the conclusion of the evidence. Defendant did not do so.

C.

Analysis

1. *Forfeiture*

As a preliminary matter, the Attorney General argues that defendant has forfeited the claim that the trial court violated her right to due process by denying her motion to dismiss because she did not renew the motion at the conclusion of the evidence. Defendant counters that the trial court "unequivocally denied the motion" on two occasions, and "[t]he fact that it did so 'without prejudice' to raise the issue for yet a *third time* at the conclusion of the trial, does not mean that [defendant] forfeited her right to appeal the court's decision *twice* denying her motion to dismiss." "As a general matter, when a trial court denies a motion without prejudice the matter is forfeited if not renewed." (*People v. Mills* (2010) 48 Cal.4th 158, 170.) The Attorney General cites no case, nor have

we found any on our own, applying this general rule to require a defendant to renew a motion to dismiss based on a claim of unjustified and prejudicial delay in bringing charges. However, we see no reason the rule would not apply equally in this situation. We also disagree with defendant's assertion that the trial court twice denied her motion to dismiss. The second ruling involved whether defendant would be allowed to elicit hearsay statements from people who were either dead or apparently unavailable due to the delay in charging her with the murder. This cannot be construed as a second denial of her motion to dismiss the case. Nevertheless, in denying the motion, the trial court described defendant's claims of prejudice as "minimal" and the People's reason for the delay as "strong." Then, in arguing the hearsay issue, defendant pointed out that additional witnesses, i.e., Hobbs, Berube, Henderson, and CSI Hudson, would also be unavailable to testify due to the delay. Because the trial court referenced its earlier decision denying the motion to dismiss, and again reminded defendant that the decision was without prejudice to her ability to renew the motion at the close of the evidence, it is understandable that defendant believed the trial court viewed the absence of these additional witnesses as not adding enough prejudice to tip the scales in favor of finding a due process violation. And because no additional evidence of prejudice was presented between the hearsay ruling and the close of the evidence, it is at least

arguable that defendant was justified in believing that the trial court's position had not changed, and that renewing the motion would be a futile gesture. Thus, a close case is presented on the forfeiture issue. We decline to resolve the point. Instead, we assume the contention was preserved and conclude the trial court did not err in denying defendant's motion to dismiss. (See, e.g., *People v. Gurule* (2002) 28 Cal.4th 557, 614.)

2. *Merits*

Defendant's claim that her constitutional rights to due process and a fair trial were violated by the delay in charging her with Jackson's murder fails because substantial evidence supports the trial court's conclusion that the justification for the delay outweighed any prejudice suffered by defendant.

New, supra, 163 Cal.App.4th 442, the case primarily relied upon by the trial court, is instructive. New killed his first wife, Somsri, with a rifle in 1973. He shot her in the head. New claimed he was cleaning the rifle when it accidentally fired, killing Somsri who was asleep on the couch. While certain measurements were taken, no blood spatter analysis was performed because that technology did not exist in 1973. The detectives who investigated Somsri's death concluded the shooting was an accident. (*Id.* at pp. 453-454.) In 2004, New killed his third wife, Phyllis, while she was sleeping in bed. He also shot her in the head. This time, New claimed that he

went to the 24-hour pharmacy to buy migraine medicine for his wife, and when he returned, he found the home burglarized and Phyllis dead. (*Id.* at pp. 447-449.) Following Phyllis's death, investigators reviewed photographs and police reports from the 1973 investigation into Somsri's death, took additional measurements from the residence where the shooting occurred, and reconstructed the crime scene using computer enhancement tools. This new investigation revealed that New's account of Somsri's death was inconsistent with the physical evidence. (*Id.* at pp. 454-455.) He was subsequently tried and convicted of murdering both Somsri and Phyllis. (*Id.* at p. 458.)

The Court of Appeal rejected the claim that the 32-year delay in prosecuting New for Somsri's murder deprived him of the right to a fair trial. The court acknowledged that the delay was prejudicial to New, but explained that many of his claims of prejudice were overstated. (*New, supra*, 163 Cal.App.4th at p. 462.) In response to the argument that the death of the coroner was an "irremediable problem," the court pointed out that the prosecution had stipulated to his medical observations as stated in his report. While the coroner's testimony would have been "useful," New "could have called an expert to present his or her interpretation of [the coroner's] observations, just as the prosecution did." (*Id.* at p. 463.) The court also pointed out that, because the coroner "handled thousands more autopsies after Somsri's autopsy," during which "forensic

science had improved and [his] experience had deepened," there was no guarantee that he would have "maintained his position as set forth in his report." (*Ibid.*) The court also rejected New's argument that he was prejudiced because "he was unable to question any of the paramedics who arrived at the scene about 'any disturbance they caused to the scene,'" explaining that "[e]vidence from the preliminary hearing demonstrated that the testimony of the paramedics would not have been significant." (*Id.* at pp. 463-464.)

With respect to New's claim that certain physical evidence had been destroyed, the court explained that "the prosecution was able to present a love seat of similar dimensions to the one on which Somsri was lying when she was shot. New could have had experts use this love seat to demonstrate why the prosecution's calculations concerning the trajectory of the bullet and the distance from which Somsri was shot were wrong." (*New, supra*, 163 Cal.App.4th at p. 464.) The court also pointed out that "the fact that original physical evidence is unavailable does not necessarily cause prejudice to a defendant to such a degree as to render the trial unfair." (*Ibid.*)

Turning to the justification for the delay, the court explained that Phyllis's death was "the critical factor that caused prosecutors to reexamine the circumstances of Somsri's death." (*New, supra*, 163 Cal.App.4th at p. 465.) Rejecting New's assertion that the investigation into Phyllis's death

uncovered no new evidence that he murdered Somsri, the court explained the fact that "another of New's wives was found dead in her home, shot in the back of the head while sleeping," amounted to "new evidence that could be used to establish that New did not accidentally shoot Somsri, as he claimed, but rather, that he shot her intentionally." (*Id.* at pp. 465-466.)

Acknowledging the possibility that "the delay in charging [New] with Somsri's murder is in part attributable to the fact that the law enforcement officers who conducted the initial investigation into Somsri's death were negligent in failing to detect and/or pursue inconsistencies in New's version of how the shooting occurred," the court nevertheless found substantial evidence supporting the trial court's conclusion that, until Phyllis's death in 2004, "there was simply not a prosecutable case" against New. (*New, supra*, 163 Cal.App.4th at p. 466.) The court concluded: "While the lengthy delay in prosecuting New resulted in the loss of both physical evidence and witness testimony, and was thus prejudicial to New, there is substantial evidence to support the trial court's ruling that the prejudice did not deprive New of a fair trial and that the justification for the delay outweighed the prejudice to New." (*Id.* at p. 462.)

Similarly, here, substantial evidence supports the trial court's conclusion that defendant's claims of prejudice were overstated and outweighed by the strong justification for the

delay. We begin with the justification because "the more reasonable the delay, the more prejudice the defense would have to show to require dismissal." (*People v. Dunn-Gonzalez* (1996) 47 Cal.App.4th 899, 915.) We also point out that "[t]he decision when to proceed with a prosecution is exclusively one for the executive branch of government. It can be a complex question and prosecutors have great discretion in deciding when and if to proceed." (*People v. Boysen* (2007) 165 Cal.App.4th 761, 774 (*Boysen*).) "A court should not second-guess the prosecution's decision regarding whether sufficient evidence exists to warrant bringing charges. 'The due process clause does not permit courts to abort criminal prosecutions simply because they disagree with a prosecutor's judgment as to when to seek an indictment. . . . Prosecutors are under no duty to file charges as soon as probable cause exists but before they are satisfied they will be able to establish the suspect's guilt beyond a reasonable doubt. . . .' [Citation.]" (*People v. Nelson, supra*, 43 Cal.4th at p. 1256.)

Here, the District Attorney determined there was insufficient evidence to prosecute defendant for Jackson's murder in 1991. While her fingerprints were discovered in Jackson's apartment and in his vehicle, defendant's statements to police at the time of the initial investigation provided a plausible explanation for the presence of these prints, i.e., Jackson picked her up in his car and brought her back to his

apartment to engage in an act of prostitution. Defendant also stated that Jackson bought her some cocaine with the money he paid for the "trick" at 16th Avenue and Martin Luther King Boulevard, and that she drove the car because Jackson was "drunk," which provided a plausible explanation for her prints being found on the driver's side of the vehicle and for the driver's seat being positioned so close to the steering wheel. Defendant's statements did not explain the presence of her prints on the Brillo pad wrapper. However, without additional evidence tying defendant to the commission of the crime, e.g., the murder weapon or blood-stained clothing, we cannot second-guess the District Attorney's conclusion that the evidence was insufficient to prove her guilt beyond a reasonable doubt.

Everything changed in 2009 when Tyree told Detective Jaspersen that his mother had confessed to the crime. Without question, defendant's confession constituted new evidence of her guilt. This confession was then corroborated by defendant's statements to Hinkson, Joseph, and to a lesser degree, Person. Armed with this new evidence, the District Attorney charged defendant with Jackson's murder. We agree with the trial court that the People provided a strong justification for the delay.

Defendant disagrees, arguing that "while the statements obtained in 2009 may superficially *explain* the delay, the statements do not *justify* the delay in this case." According to defendant, had the police conducted a more thorough

investigation in 1991, there would have been no need to wait for Tyree's revelation to prosecute her for the murder. As an example of police negligence, defendant points out that two latent prints were processed on the Brillo pad wrapper in 1991, but only one of those prints was submitted for comparison. Then, in February 2010, the other latent print was submitted for comparison and print examiners determined that it actually contained two prints, both belonging to defendant. Defendant argues that "[h]ad the government processed these prints in 1991, it would have had *three* of [defendant's] prints on the Brillo pad wrapper, instead of one partial print. This evidence was enough for the government to prosecute the case." We are not persuaded. While we agree that three prints are better than one, we cannot conclude that the District Attorney's decision to refrain from filing charges turned on the number of prints on the Brillo pad wrapper. The fact is that the District Attorney knew defendant had touched the Brillo pad wrapper when making the decision to refrain from filing charges. We do not believe that two additional prints on the same object would have swayed the decision.

We also agree with the trial court's assessment that defendant's claims of prejudice were either "speculative" or "overstated." Defendant argues that Slater was a "very important witness" who "had information that could have been helpful to the defense, and would have been investigated by the

defense, had this crime been timely prosecuted." As mentioned, Slater was the apartment manager who accompanied Hayes to Jackson's apartment and called the police when Hayes discovered the body. Earlier that day, Slater called the police and reported a "suspicious subject" hanging around her apartment, which was close to Jackson's apartment. The jury was informed of this through the testimony of Detective Woods. While defendant claims that Woods did not "follow-up on this critical information," she does not support this assertion with any citation to the record. Nor did she question Woods about whether he followed up on Slater's statement. Defendant also claims prejudice from the fact that she was unable to question Slater about her observations at Jackson's apartment when Hayes discovered the body. However, the record indicates that Slater was "almost legally blind." We are not persuaded that Slater's testimony concerning what she witnessed at Jackson's apartment would have been helpful to the defense.

With respect to Jackson's son, defendant asserts, "[t]he defense had information that [he] had a volatile relationship with his father, making him a potential suspect in Jackson's killing." The record does not reveal what this information was. Indeed, the only evidence in the record is to the contrary. Hayes testified that Jackson and his son "got along pretty good." Hayes also testified that when she arrived at Jackson's apartment complex to check on him, Slater told her that

Jackson's son tried to see him the previous day, which was Father's Day. Because Jackson's car was not there, his son assumed he had not come home the night before, waited in front of the apartment for a period of time, and then left. Moreover, while Detective Woods testified that family members were questioned early in the investigation, there was no evidence that Jackson's son was ever considered a suspect. Nor were his fingerprints found in Jackson's apartment or vehicle.

With respect to Blue and John Gaines, defendant states that they were "two drug-dealers believed to be responsible for this crime," but cites no evidence to support this assertion. While she argues that the delay in prosecution prevented her from exploring their "possible involvement" in the murder, that is simply not true. She was apparently able to uncover that these men died. An investigator could have interviewed people who knew these men, found out where they lived at the time Jackson was murdered, discovered where they did business, determined whether or not they had any connection to Jackson, and so forth. In the absence of any evidence that these men had a reason to kill Jackson, disliked him, or even knew who he was, we must conclude defendant's assertion that they were the actual murderers is pure speculation. (See *Boysen, supra*, 165 Cal.App.4th at pp. 779-780 [Boysen was prejudiced by the death of Hobbs, who "knew and disliked the victims" and who "owned a nine-millimeter handgun and had a history of violence," but

other suggestions of third-party culpability were "mere speculation, e.g., the possibility they were killed by drug traffickers"].)

Defendant complains that she was deprived of the ability to question Hobbs, Berube, Henderson, and three other people, Sheila Talbert, Marilyn Brown, and Stephanie Taylor. She did not identify any of these people in her motion before the trial court. An argument on appeal may not invoke facts different from those the trial court was asked to apply. (See *People v. Foster* (2010) 50 Cal.4th 1301, 1322, fn. 9.) In any event, defendant does not demonstrate these people were either dead or unavailable at the time of trial. Nor does she demonstrate that their testimony would have been useful.

Defendant also complains that the death of CSI Hudson prevented her from impeaching "his collection of the evidence: how the prints were lifted, how they were processed, where they were taken from, and whether the print cards were accurate." Because defendant did not mention the death of CSI Hudson in her motion before the trial court, she may not rely on his death to support her argument on appeal. In any event, defendant could have called an expert to challenge the quality of CSI Hudson's work. (See *People v. Cowan* (2010) 50 Cal.4th 401, 431-432 [prejudice arising from the unavailability of the print examiner was "minimal" because "both the latent prints and defendant's rolled prints were still in existence and available for

examination by defense experts; if the prints did not match, the defense could have presented its own expert to so testify"]..) Moreover, the prints found on the Brillo pad wrapper were not processed by CSI Hudson. These prints were processed by CSI Sue Conradi, who did testify, and who was cross-examined by defense counsel.

Defendant further asserts that the delay "naturally caused memories to fade" and enabled Hinkson to "change his story." With respect to the fading of memories, we agree. But this prejudiced both defendant and the prosecution. With respect to Hinkson changing his story, we disagree. When Hinkson was interviewed by Detective Jasperson, he stated that the woman who came to his church told him that "she was involved in a homicide, but he could not recall specifically whether or not she said she actually committed it." At trial, Hinkson testified that after speaking to Jasperson he spent some time thinking about his previous conversation with the woman and remembered that she believed she was "responsible" for the man's death, and that she mentioned "the cause of death may have been a blunt force trauma." Defendant argues: "Obviously, if Hinkson had been interviewed 18 years earlier, when his memory was fresh, his story would have been clear and defined for trial. And given what he initially told Jasperson, he would not necessarily have been a helpful witness for the prosecution."

There are several problems with this argument. First, Hinkson could not have been interviewed 18 years earlier because defendant did not tell him about the crime until about eight years before his interview with Jasperson. Second, Hinkson could not have been interviewed prior to 2009, when Tyree informed Jasperson that his mother had confessed to the crime and told him about her conversation with Hinkson. Third, even if police had somehow found out about defendant's conversation with Hinkson when it happened, and interviewed Hinkson immediately thereafter, there is no reason to believe that his testimony would have been any different.

Finally, defendant claims to have been prejudiced by the loss of physical evidence. Specifically, she faults Detective Woods for failing to collect or test any of the blood at the crime scene and for failing to use chemicals to verify his visual observation that there was no blood in the kitchen and bathroom sinks. According to defendant, "[t]he defense believed that the true killers, Blue and Gaines, suffered from HIV/AIDS," and that "[t]esting on the blood could have corroborated the defense." There is no evidence that Blue and John Gaines had HIV/AIDS. Nor is there any evidence that Jackson had the virus. Thus, the idea that testing the blood at the crime scene could have corroborated the theory that these purported drug dealers were infected with HIV during their assault on Jackson is pure speculation.

Defendant also complains that additional scientific testing could have been done on certain items of evidence collected at the crime scene. But these items of evidence were available at the time of trial, and defendant neither had the items tested nor presented any expert testimony that the passage of time prevented her from doing so.

In sum, we agree with the trial court's conclusion that the prosecution provided a strong justification for the delay and that defendant's claims of prejudice were overstated and largely speculative. As was the case in *New, supra*, 163 Cal.App.4th 442, while the delay caused some prejudice to defendant, "there is substantial evidence to support the trial court's ruling that the prejudice did not deprive [her] of a fair trial and that the justification for the delay outweighed the prejudice to [her defense]." (*Id.* at p. 462.)

II

Aiding and Abetting Instructions

Defendant asserts a number of errors with respect to the jury instructions the trial court provided describing the principle that a person who aids and abets a confederate in the commission of a crime is liable not only for that crime, but also for any other crime committed by the confederate that is a natural and probable consequence of the crime originally aided and abetted. We find any instructional error to have been harmless.

A.

Applicable Law

Under the "'natural and probable consequences' doctrine," a person who aids and abets a perpetrator in the commission of a crime is liable not only for that crime (the target crime), but also for any other crime (nontarget crime) committed by the perpetrator as a "natural and probable consequence" of the crime originally aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 254.) To convict a defendant of a nontarget crime as an accomplice under this doctrine, "the jury must find that, with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the commission of the target crime, the defendant aided, promoted, encouraged, or instigated the commission of the target crime. The jury must also find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a 'natural and probable consequence' of the target crime that the defendant assisted or encouraged." (*Ibid.*) The trial court has a sua sponte duty to instruct the jury on the natural and probable consequences doctrine "when the prosecution has elected to rely on the 'natural and probable consequences' theory of accomplice liability and the trial court has determined that the evidence will support instructions on that theory." (*Id.* at p. 269.)

B.

Additional Background

The jury was instructed with the standard CALCRIM instructions on aiding and abetting (CALCRIM Nos. 400 and 401), including the natural and probable consequences doctrine (CALCRIM No. 403). While the prosecution did not argue an aiding and abetting theory to the jury, instead arguing that defendant alone killed Jackson after he tried to postpone paying her, the prosecution nevertheless asked the trial court to provide these instructions because of defendant's statements to Person that two drug dealers committed the murder after she "set up" Jackson by letting them into his apartment.

CALCRIM No. 400, as given to the jury, provided: "A person may be guilty of a crime in two ways: One, she may have directly committed the crime. I will call that person the perpetrator; two, she may have aided and abetted a perpetrator who directly committed the crime. [¶] A person is guilty of the crime, whether she committed it personally or aided and abetted the perpetrator who committed it. Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."

CALCRIM No. 401, as given to the jury, provided in relevant part: "To prove that the Defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

[¶] The perpetrator committed the crime. [¶] The Defendant knew that the perpetrator intended to commit the crime. [¶] Before or during the commission of the crime the Defendant intended to aid and abet the perpetrator in committing the crime. [¶] And the Defendant's words or conduct did, in fact, aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if she knows of the perpetrator's unlawful purpose and he or she specifically intends to and does, in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime."

CALCRIM No. 403, as given to the jury, provided: "Before you may decide whether the Defendant is guilty of murder, you must decide whether she's guilty of assault with a deadly weapon, felony assault. To prove that the Defendant is guilty of murder, the People must prove: [¶] That the Defendant is guilty of felony assault; during the commission [of] a felony assault a co-participant in that felony assault committed the crime of murder; and under all the circumstances, a reasonable person in the Defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the felony assault. [¶] A co-participant in a crime is a perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing

unusual intervenes. [¶] In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the felony assault, then the commission of murder was not a natural and probable consequence of felony assault. [¶] To decide whether the crime of murder was committed, please refer to the separate instructions that I will give you on that crime."

During deliberations, the jury sent the trial court the following question: "What are the necessary criteria to be an accomplice to 2nd degree murder[?]" The trial court responded by referring the jury back to CALCRIM Nos. 400, 401, and 403 on aiding and abetting, and to CALJIC Nos. 8.30 and 8.31 defining second degree murder. The trial court also explained in a special instruction: "Under the instructions you have already been given, there are [two] theories under which a person can be guilty as [an] aider and abettor. First, he or she can be guilty as an aider and abettor of a crime committed by another if he or she aided and abetted the commission of the crime with the intent or purpose of aiding and abetting that crime. In addition to being guilty of the intended crime, if another crime is committed during the commission of the intended crime, a person can be guilty of the other crime, if, under all of the circumstances, a reasonable person in the defendant's position would have know[n] that the commission of the other crime was a

natural and probable consequence of the commission of the intended crime."

The same day the trial court provided this special instruction, the jury sent two additional questions: "(1) What is the general definition of being an accomplice to 2nd degree murder? [¶] (2) What are the requirements to qualify as an accomplice?" In response to these questions, the trial court referred the jury back to CALCRIM No. 400 and provided two additional instructions, CALJIC Nos. 3.01 and 3.02.

CALJIC No. 3.01, as given to the jury, provided: "An accomplice is someone who aids and abets the commission of a crime when she: [¶] (1) With knowledge of the unlawful purpose of the perpetrator, and [¶] (2) With the intent or purpose of committing or encouraging or facilitating the commission of the crime, and [¶] (3) By act or advice aids, promotes, encourages or instigates the commission of the crime. [¶] A person who aids and abets the commission of a crime need not be present at the scene of the crime. [¶] Mere presence at the scene of a crime which does not assist the commission of the crime does not amount to aiding and abetting. [¶] Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting."

CALJIC No. 3.02, as given to the jury, provided: "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime

committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crime of murder as charged, or of any lesser offense, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of felony assault was committed; [¶] 2. That the defendant aided and abetted that crime; [¶] 3. That a co-principal in that crime committed the crime of felony assault; and [¶] 4. The crime of murder was a natural and probable consequence of the commission of the crime of felony assault. [¶] In determining whether a consequence is 'natural and probable,' you must apply an objective test, based not on what the defendant actually intended, but on what a person of reasonable and ordinary prudence would have expected likely to occur. The issue is to be decided in light of all of the circumstances surrounding the incident. A 'natural' consequence is one which is within the normal range of outcomes that may be reasonably expected to occur if nothing unusual has intervened. 'Probable' means likely to happen."

C.

Analysis

1. Sufficiency of the Evidence

Defendant claims the trial court should not have given CALCRIM No. 403 or CALJIC No. 3.02 because "there was no substantial evidence [she] intended to and did commit an [assault with a deadly weapon], the target offense, or that she

aided and abetted the commission of an [assault with a deadly weapon] the [natural and probable consequence] of which was murder." We disagree.

According to Person's statement to Detective Jaspersen, defendant told Person that a drug dealer promised to give her "some dope" in exchange for helping him "get in contact" with Jackson because he and Jackson "had something going on between each other. You know, some kind of problems." Defendant agreed. Pursuant to the arrangement, she met with Jackson and went over to his apartment. When the drug dealer arrived with another man, defendant opened the door and let them into the apartment. According to Person, defendant said the fact that the drug dealers needed to "go through her" to get in touch with Jackson should have tipped her off that this "wasn't a good situation." Defendant then explained that the drug dealers killed Jackson in front of her and forced her to clean up the crime scene by holding a gun to her head.

If Person's statement was believed, the jury could have found that defendant knew the drug dealers came to Jackson's apartment to assault him and intended to facilitate the commission of that crime by opening the door to let them into the apartment. Knowledge and intent are "rarely susceptible of direct proof and generally must be established by circumstantial evidence and the reasonable inferences to which it gives rise." (*People v. Buckley* (1986) 183 Cal.App.3d 489, 494-495; *People v.*

Thomas (2011) 52 Cal.4th 336, 355.) The jury could have reasonably inferred defendant's knowledge and intent from the fact that she told Person the drug dealers had "some kind of problems" with Jackson and needed to use defendant to gain access to his apartment. The jury could also have found that one or both of the drug dealers defendant let into Jackson's apartment not only assaulted but also murdered Jackson. This is precisely what defendant told Person. The jury could reasonably have concluded that such a murder is a natural and probable consequence of an assault by two drug dealers on an unsuspecting and partially nude 65-year-old man.

Nor is it important that there is no evidence defendant specifically knew the drug dealers were armed with a deadly weapon when she let them into the apartment. First, a "deadly weapon" is "'any object, instrument, or weapon which is used in such a manner as to be capable of producing and likely to produce, death or great bodily injury.' . . . Some few objects, such as dirks and blackjacks, have been held to be deadly weapons as a matter of law; the ordinary use for which they are designed establishes their character as such. . . . Other objects, while not deadly per se, may be used, under certain circumstances, in a manner likely to produce death or great bodily injury." (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028-1029.) "Objects which are not inherently dangerous but which have been found to be a deadly weapon include 'a pillow

. . . ; an automobile . . . ; a large rock . . . ; a razor blade . . . ; [and] a fingernail file.' [Citation.] Even an apple may constitute a deadly weapon if it contains a foreign object which is likely to produce great bodily injury when the apple is eaten. [Citation.]" (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1054.) The question in this case is not whether defendant knew the drug dealers were armed with a deadly weapon when they entered the apartment, but whether she knew they intended to assault Jackson with some object -- regardless of whether they brought the object with them or used an object they found in his apartment -- in such a manner as to be likely to cause death or great bodily injury. Based on the facts of this case, we conclude the jury could have inferred as much.

Even if we were to find that there was insufficient evidence to support assault *with a deadly weapon* as the target offense, there was enough evidence to support simple assault as the target offense. We have no difficulty finding that the result would have been the same had the trial court substituted simple assault as the target offense. While murder "is not the natural and probable consequence of trivial activities" (*People v. Prettyman, supra*, 14 Cal.4th at p. 269), setting up a 65-year-old man to be assaulted by drug dealers in his apartment is not a trivial activity. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913, 921-922 [fatal shooting following gang-related fistfight was natural and probable consequence of fistfight];

People v. Montes, supra, 74 Cal.App.4th at p. 1056 [shooting during retreat from gang-related fight was natural and probable consequence of fight].) A reasonable person in defendant's position would have foreseen murder as a natural and probable consequence of such an assault. Any error in using assault with a deadly weapon as the target offense instead of simple assault was harmless.

Finally, defendant's reliance on *People v. Singleton* (1987) 196 Cal.App.3d 488 (*Singleton*) is misplaced. *Singleton* was convicted of possession of cocaine for sale and transportation of the substance. She was a passenger in a vehicle driven by Bedell, who was pulled over by police and arrested for driving under the influence. A search of the vehicle uncovered a loaded handgun, which *Singleton* claimed belonged to her. She was arrested and searched. A package of cocaine was found in her boot. (*Id.* at p. 491.) At trial, the jury was given aiding and abetting instructions. The prosecutor told the jury during closing argument that "the sole purpose for the aiding and abetting instruction was to support the inference that defendant, while she may not have intended to sell cocaine herself, could have intended to aid an unidentified seller of cocaine (whom he called 'Mr. X'), and therefore still have possessed the necessary intent to be guilty of possession for sale. The prosecutor made clear, however, that the instructions were *not* meant to suggest that the seller was Bedell, who, he

opined, was the 'one person whom she was not aiding and abetting'" (*Id.* at p. 492.) The Court of Appeal held the prosecution's aiding and abetting theory was not supported by substantial evidence. Pointing out that "the evidence justified the giving of an aiding and abetting instruction based upon the theory that Bedell was the principal dealer of cocaine and that defendant aided and abetted him by hiding the contraband," the court explained: "We cannot accept the notion that a defendant's conviction can rest solely on a theory of aiding, promoting, encouraging, or instigating a principal created from the whole cloth of pure speculation. Indeed, we find it puzzling that the People should simultaneously admit that there was insufficient evidence to convict defendant on the basis that she was *Bedell's* accomplice, but maintain that there was sufficient proof that she aided a phantom figure about whom the jury had heard no evidence." (*Id.* at pp. 492-493.)

Here, it is entirely possible that the two drug dealers who purportedly killed Jackson in front of defendant were created from the whole cloth of defendant's imagination. But this is very different from *Singleton, supra*, 196 Cal.App.3d 488, where the *prosecutor* used an anonymous perpetrator created from *his* imagination to support an aiding and abetting theory of criminal liability. Substantial evidence, in the form of defendant's own statements to Person, supported the People's theory that she aided and abetted an assault by two drug dealers on Jackson and

that murder occurred as a natural and probable consequence of the assault.

2. *The Merger Doctrine*

Defendant also contends that CALCRIM No. 403, as given to the jury in this case, violated the merger doctrine described by our Supreme Court in *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*). Not so.

In *Ireland, supra*, 70 Cal.2d 522, our Supreme Court held that a felony-murder theory cannot be based on a felony that is an integral part of the homicide. To allow otherwise "would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault -- a category which includes the great majority of all homicides." (*Id.* at p. 539.) As we explained in *People v. Karapetyan* (2006) 140 Cal.App.4th 1172: "Because a homicide generally results from the commission of an assault, every felonious assault ending in death would be elevated to murder, relieving the burden of the prosecutor to prove malice in most cases. [Citation.] This would frustrate the Legislature's intent to punish certain felonious assaults resulting in death more harshly than other assaults that happened to result in death but were committed without malice aforethought. [Citation.]" (*Id.* at p. 1178.) However, as we also explained in *Karapetyan*, "the natural and probable consequences doctrine operates independently of the second

degree felony-murder rule" and "is a theory of liability for murder that applies when the assault has the foreseeable result of death. For aider and abettor liability, it is the intention to further the acts of another that creates criminal liability and not the felony-murder rule. [Citation.]" (*Ibid.*; see also *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1189-1190.)

While defendant acknowledges "the *Ireland* doctrine has been found to be inapplicable to aiding and abetting instructions," she nevertheless argues that CALCRIM No. 403, as given to the jury in this case, "required it to find that [defendant] *directly perpetrated* an [assault with a deadly weapon]." Defendant continues: "Assuming [she] personally committed an assault, it merged into the homicide. Therefore, it was error to instruct the jury that it *first* had to find [she] committed an [assault with a deadly weapon] *before* [it] could find her guilty of murder. The instruction relieved the jury of its obligation to find malice aforethought, and lightened the prosecution's burden of proof." Defendant misreads the instruction.

CALCRIM No. 403 does not require the jury to find that defendant directly perpetrated an assault with a deadly weapon. Instead, the instruction informed the jury that the natural and probable consequences theory required the People to prove: "[t]hat the Defendant is *guilty* of felony assault; during the commission [of] a felony assault a co-participant in that felony

assault committed the crime of murder; and under all the circumstances, a reasonable person in the Defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the felony assault."

In order to determine whether there is a reasonable likelihood the jury misunderstood "guilty" to mean "directly perpetrated," as defendant suggests, we must review the instructions as a whole. (See *People v. Battle* (2011) 198 Cal.App.4th 50, 70; *Estelle v. McGuire* (1991) 502 U.S. 62, 72 [116 L.Ed.2d 385, 399].) CALCRIM No. 400 informed the jury that defendant could be "guilty" of a crime *either* by directly committing the crime or by aiding and abetting the perpetrator. Moreover, after the jury expressed confusion over the CALCRIM aiding and abetting instructions, the trial court provided CALJIC No. 3.01, which more clearly defined the elements of aider and abettor liability, and CALJIC No. 3.02, which more clearly defined the natural and probable consequences doctrine: "One who aids and abets another in the commission of a crime is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crime of murder as charged, or of any lesser offense, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of felony assault was

committed; [¶] 2. That the defendant aided and abetted that crime; [¶] 3. That a co-principal in that crime committed the crime of felony assault; and [¶] 4. The crime of murder was a natural and probable consequence of the commission of the crime of felony assault."

We find no reasonable likelihood the jury misunderstood these instructions to allow defendant to be convicted of murder if they found that she directly perpetrated a felony assault that resulted in death. Instead, they required the jury to find that she aided and abetted such an assault, which was committed by a co-principal, and that the crime of murder was a natural and probable consequence of the assault. This is an accurate statement of the law. We find no error. Nor do we find any constitutional violation.

3. *Special Instruction*

Defendant further asserts that the trial court's special instruction "was erroneous because it did not define a target offense, leaving the jury free to speculate about other, undefined offenses, or nefarious conduct." Again, we must review the instructions as a whole rather than judge the trial court's special instruction in isolation. (*People v. Battle*, *supra*, 198 Cal.App.4th at p. 70; *Estelle v. McGuire*, *supra*, 502 U.S. at p. 72 [116 L.Ed.2d at p. 399].) The instructions as a whole clearly identified assault with a deadly weapon as the target crime.

Finally, defendant claims the trial court erred by refusing her request to include in the special instruction the rule that an aider and abettor is not necessarily guilty of the same crime as the actual perpetrator.

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

(Italics added.) The trial court possesses broad discretion "to determine what additional explanations are sufficient to satisfy the jury's request for information. [Citations.] In exercising that discretion, the trial court 'must at least *consider* how it can best aid the jury. It should decide as to each jury question whether further explanation is desirable, or whether it should merely reiterate the instructions already given.'

[Citation.]" (*People v. Giardino* (2000) 82 Cal.App.4th 454, 465; *People v. Beardslee* (1991) 53 Cal.3d 68, 97.)

Here, the jury asked the trial court: "What are the necessary criteria to be an accomplice to 2nd degree murder[?]" As already mentioned, the trial court responded by referring the jury back to CALCRIM Nos. 400, 401, and 403 on aiding and

abetting, and to CALJIC Nos. 8.30 and 8.31 defining second degree murder. The trial court also explained in a special instruction that a person "can be guilty as an aider and abettor of a crime committed by another if he or she aided and abetted the commission of the crime with the intent or purpose of aiding and abetting that crime. In addition to being guilty of the intended crime, if another crime is committed during the commission of the intended crime, a person can be guilty of the other crime, if, under all of the circumstances, a reasonable person in the defendant's position would have know[n] that the commission of the other crime was a natural and probable consequence of the commission of the intended crime." The trial court did not abuse its discretion in determining that this response would satisfy the jury's request for additional information.

Nor are we persuaded by defendant's reliance on *People v. Nero* (2010) 181 Cal.App.4th 504, which held that where "the jury asks the specific question whether an aider and abettor may be guilty of a lesser offense, the proper answer is 'yes,' she can be." (*Id.* at p. 518.) Here, the jury did not ask whether defendant could be found guilty of an offense less than the direct perpetrators. Moreover, unlike *People v. Woods* (1992) 8 Cal.App.4th 1570, also relied upon by defendant, the trial court did not improperly instruct the jury that defendant could *not* be found guilty of second degree murder as an aider and abettor if

the jury determined the direct perpetrators were guilty of first degree murder. Instead, CALJIC No. 3.02, which was given to the jury to clear up any lingering confusion about the natural and probable consequences doctrine, informed the jury that defendant could be found guilty of "murder as charged, *or of any lesser offense*" (italics added), if the jury found beyond a reasonable doubt: "1. The crime of felony assault was committed; [¶] 2. That the defendant aided and abetted that crime; [¶] 3. That a co-principal in that crime committed the crime of felony assault; and [¶] 4. The crime of murder was a natural and probable consequence of the commission of the crime of felony assault."

Viewing the instructions as a whole, we find no reasonable likelihood the jury misunderstood the instructions to preclude defendant from being found guilty of a lesser offense than the direct perpetrators. Indeed, because the natural and probable consequences doctrine "requires separate factual determinations for (1) what crimes have been committed, and (2) what crimes are the reasonably foreseeable consequences of the offense originally contemplated, it is self-evident that *the aider and abettor does not stand in the same position as the perpetrator*. While the perpetrator is liable for *all* of his or her criminal acts, the aider and abettor is liable vicariously only for those crimes committed by the perpetrator which were reasonably

foreseeable under the circumstances." (*People v. Woods, supra*, 8 Cal.App.4th at p. 1586.) We find no instructional error.

III

Voluntary Intoxication Instruction

Defendant also contends the trial court violated her constitutional rights by instructing the jury with CALCRIM No. 625, which informed the jury that it could consider evidence of her voluntary intoxication only in deciding whether she (1) acted with the intent to kill, (2) acted with deliberation and premeditation, or (3) intended to permanently deprive Jackson of his property. According to defendant, "[t]his instruction was erroneous because it failed to inform jurors that: (1) evidence of voluntary intoxication could be considered in determining whether [she] acted with express or *implied* malice, and (2) it could consider evidence of voluntary intoxication in determining whether [she] formed the specific intent necessary for aiding and abetting."

Defendant did not object to this instruction at trial. "Failure to object to instructional error forfeits the issue on appeal unless the error affects defendant's substantial rights. [Citations.] The question is whether the error resulted in a miscarriage of justice under *People v. Watson* (1956) 46 Cal.2d 818. [Citation.]" (*People v. Anderson* (2007) 152 Cal.App.4th 919, 927.) Assuming defendant is correct that the instruction was incomplete in the foregoing respects, the error did not

result in a miscarriage of justice because there was no substantial evidence she was intoxicated at the time of the murder.

Penal Code section 22, subdivision (b), provides:

"Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, or, when charged with murder, whether the defendant premeditated, deliberated, or harbored *express malice aforethought*." (Italics added.) However, as defendant points out, at the time of the murder, this subdivision provided:

"Evidence of voluntary intoxication is admissible solely on the issue of whether or not the defendant actually formed a required specific intent, premeditated, deliberated, or harbored malice aforethought, when a specific intent crime is charged."

(Stats. 1982, ch. 893, § 2, pp. 3317-3318; *People v. Mendoza* (1998) 18 Cal.4th 1114, 1124-1125.)

In *People v. Whitfield* (1994) 7 Cal.4th 437, our Supreme Court held that second degree murder with implied malice was a specific intent crime within the meaning of former Penal Code section 22, subdivision (b), and that evidence of voluntary intoxication could be considered by the jury on the issue of whether the defendant harbored implied malice, i.e., subjective knowledge that her conduct endangered the life of another and conscious disregard for that life. (*Id.* at pp. 450-451; see also *People v. Cameron* (1994) 30 Cal.App.4th 591, 599-600.) But

even under this prior version of the subdivision, she was entitled to a voluntary intoxication instruction only if there was substantial evidence that she was intoxicated to such a degree that it affected her actual formation of specific intent. (*People v. Horton* (1995) 11 Cal.4th 1068, 1119; see also *People v. Verdugo* (2010) 50 Cal.4th 263, 295.) Indeed, even prior to the abolition of the diminished capacity defense, our Supreme Court held that "merely showing that the defendant had consumed alcohol or used drugs before the offense, without any showing of their effect on him, [was] not enough to warrant an instruction on diminished capacity." (*People v. Pensinger* (1991) 52 Cal.3d 1210, 1241; *People v. Carr* (1972) 8 Cal.3d 287, 294-295.)

"[T]he jury is presumed to disregard an instruction if the jury finds the evidence does not support its application." (*People v. Frandsen* (2011) 196 Cal.App.4th 266, 278; *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1381.) Here, while there was evidence defendant drank some alcohol at Jackson's apartment, there was no evidence as to the quantity consumed. Nor was there any evidence revealing the effect of this alcohol on defendant's ability to form the specific intent necessary to convict her of the charged crimes. And while there was evidence that defendant smoked crack cocaine in general, there was no evidence that she smoked any of the substance prior to the murder.

Because there was no evidence that defendant was intoxicated at the time of the murder, we presume the jury disregarded this instruction. Informing the jury that such nonexistent evidence could also be considered in determining whether defendant acted with implied malice or formed the specific intent necessary for aiding and abetting would not have changed the result.

IV

Defense Request to Re-Open Closing Argument

Defendant further asserts that the trial court violated her constitutional rights when it denied her request to re-open closing argument after providing the jury with clarifying instructions on the natural and probable consequences doctrine. We are not persuaded.

"The Sixth and Fourteenth Amendments to the United States Constitution and article I, section 15 of the California Constitution guarantee a criminal defendant the right to the effective assistance of counsel at all critical stages of the proceedings. [Citations.] To effectuate the constitutional rights to counsel and to due process of law, an accused must be informed of the crimes with which he [or she] is charged in order to have a reasonable opportunity to prepare a defense and respond to the charges. [Citations.]" (*People v. Bishop* (1996) 44 Cal.App.4th 220, 231.) Because defense counsel must be given an opportunity to intelligently argue the case to the jury, "if

a supplemental jury instruction given in response to a jury's question introduces a new theory to the case, the parties should be given an opportunity to argue the new theory." (*United States v. Fontenot* (9th Cir. 1994) 14 F.3d 1364, 1368; *United States v. Horton* (4th Cir. 1990) 921 F.2d 540, 546-548; *People v. Ardoin* (2011) 196 Cal.App.4th 102, 129.) However, "[a] supplemental instruction which merely clarifies an existing theory does not mandate additional arguments." (*United States v. Fontenot, supra*, 14 F.3d at p. 1368.)

Here, the jury was instructed on aiding and abetting, including the natural and probable consequences doctrine, prior to closing arguments. Defense counsel was given an opportunity to argue against this theory of liability in her closing argument to the jury. However, because the prosecutor did not argue the aiding and abetting theory, neither did defense counsel. It was not until the jury asked for clarification about accomplice liability that defense counsel asked to re-open closing argument to address the theory. Thus, the supplemental instructions given to address the jury's questions did not introduce "a new theory to the case," but "merely clarifie[d] an existing theory." (*United States v. Fontenot, supra*, 14 F.3d at p. 1368.) Defense counsel's decision not to address the aiding and abetting theory in her closing argument was a tactical decision. Counsel apparently decided she should not highlight a theory of liability upon which the prosecution chose not to rely

in her argument. We may not second-guess such reasonable tactical decisions on appeal. (See *People v. Williams* (1997) 16 Cal.4th 153, 219.)

Defendant's reliance on *United States v. Gaskins* (9th Cir. 1988) 849 F.2d 454 is misplaced. There, Gaskins was convicted of possessing and manufacturing methamphetamine. The jury was not instructed on aiding and abetting principles prior to closing arguments. In response to a question from the jury, the district court provided an aiding and abetting instruction over defense counsel's objection and denied her request to re-open closing argument. (*Id.* at pp. 456-457.) The United States Court of Appeals for the Ninth Circuit reversed, explaining that "the district judge's decision to give the aiding and abetting instruction during jury deliberations, after initially stating . . . that he would not, unfairly prevented Gaskin's counsel from arguing against an aiding and abetting *theory* to the jury." (*Id.* at p. 460.) Unlike *Gaskins*, in this case, the jury was instructed on the aiding and abetting theory prior to closing arguments. Thus, the trial court did not prevent defense counsel from arguing against this theory in her closing argument. Defense counsel chose not to argue against the theory. The trial court simply held her to this decision after clarifying the aiding and abetting theory for the jury. There was no violation of defendant's constitutional rights to counsel and a fair trial.

Read Back of Bishop Hinkson's Testimony

During the jury's deliberations, the court reporter mistakenly read back testimony provided by Bishop Hinkson during a hearing under Evidence Code section 402, the purpose of which was to enable the trial court to determine whether the clergy-penitent privilege precluded Hinkson from testifying as to the content of defendant's statements to him. Defendant asserts this erroneous read back violated her constitutional rights and requires reversal. We disagree.

Without question, the jury should not have been allowed to consider extrinsic evidence in reaching its verdict. (*People v. Gamache* (2010) 48 Cal.4th 347, 396; see also *Turner v. Louisiana* (1965) 379 U.S. 466, 472 [13 L.Ed.2d 424, 429] ["requirement that a jury's verdict 'must be based upon the evidence developed at the trial' goes to the fundamental integrity of all that is embraced in the constitutional concept of trial by jury"].) Where, as here, the extrinsic evidence "finds its way into the jury room through party or court error," as opposed to juror misconduct, there is no presumption of prejudice and "the burden remains with the defendant to demonstrate prejudice under the usual standard for ordinary trial error," i.e., that there is a "reasonable possibility the outcome would have been different absent the error." (*People v. Gamache, supra*, 48 Cal.4th at pp. 397-399; *People v. Cooper* (1991) 53 Cal.3d 771, 836.)

Defendant has not carried this burden. First, the trial court instructed the jury to disregard the hearing testimony they inadvertently received. We presume the jury followed this instruction. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852.) Second, the hearing testimony was nearly identical to the testimony the jury heard at trial. And while, as defendant points out, Hinkson testified at the hearing that he had previously told Detective Jasperson that he believed defendant came to his church seeking "forgiveness" and "to talk about something that was on [her] conscience," it is likely the jury had already inferred as much from the fact that defendant went to a church and confessed her involvement in a murder to a clergyman. Moreover, the jury was informed about defendant's apparent remorse and desire for forgiveness through other sources at trial. For example, when Tyree drove defendant around in the police bait car, defendant stated that she told Person about the murder because she "was feeling guilty about it that day." Person confirmed this when she told Jasperson that she and defendant discussed asking "God for forgiveness." And Joseph also told Jasperson that defendant "confessed" to her because she wanted to "get it off her chest."

We conclude there is no reasonable possibility the outcome would have been different had the jury not heard Hinkson's hearing testimony.

VI

Admissibility of Tyree's Out-of-court Statement

Nor do we agree with defendant's assertion that the trial court improperly admitted into evidence Tyree's out-of-court statement that defendant threatened to kill another man.

Evidence Code section 1101, subdivision (a), provides that "evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion." Subdivision (b) of that section provides that a specific instance of a person's conduct is admissible "when relevant to prove some fact . . . other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).) Subdivision (c) provides: "Nothing in this section affects the admissibility of evidence offered to support or attack the credibility of a witness." (Evid. Code, § 1101, subd. (c).)

Here, over defendant's objection, the prosecutor elicited from Tyree that defendant "made some threats" against a friend of the family named Joe. When the prosecutor asked Tyree about specific statements he made to Detective Jasperson concerning defendant's threats, Tyree responded that he did not remember. For our purposes, one example will suffice. The prosecutor asked Tyree: "Do you remember telling Detective Jasperson about

[defendant] talking to you about killing this old man and how you made the connection between the threat to Joe and killing this old man, that this brought it all back up to you again and that's why you came to the police department?" Tyree responded: "No, I don't remember that. And like I said, uh, that's not why I went to the police department. My whole motivation [was] because [defendant] was just actin' really, really crazy and, um, bein' belligerent and, you know, and I just didn't want that type of stuff around my grandmother and my little sister."

The prosecution also played Tyree's statement to Detective Jasperson for the jury. This statement was admitted as a prior inconsistent statement, offered both to impeach Tyree's trial testimony and for the truth of the matters asserted therein. (See Evid. Code, § 1235; see also *In re Miranda* (2008) 43 Cal.4th 541, 576-577.) In the statement, Jasperson asked Tyree why he waited several months to report defendant's confession. Tyree explained that defendant became upset when Joe and Tyree's little sister stole \$1,200 from a locked trunk defendant kept at Tyree's grandmother's house. According to Tyree, after his little sister returned \$600, defendant said that if Joe did not return the other \$600, she would "have him killed" and that this "ain't gonna be the first time" she had somebody killed. Tyree further explained that this incident reminded him that defendant had previously confessed to killing "that old man" in Oak Park,

and that going to the police department with her confession would be a means of keeping defendant away from his grandmother.

We review the trial court's decision to admit this evidence for abuse of discretion. (*People v. Doolin* (2009) 45 Cal.4th 390, 437; *People v. Gray* (2005) 37 Cal.4th 168, 202.) In general, Tyree's prior statement to Detective Jasperson was relevant to impeach his trial testimony in which he either recanted or claimed not to remember most of what he previously told the detective. The specific statement about defendant's threat to have Joe killed bolstered the credibility of Tyree's statement to Jasperson because it provided Tyree with a legitimate reason to report defendant's confession to police, i.e., he was concerned for the safety of his little sister and grandmother. Nor was the statement unduly prejudicial under Evidence Code section 352. Tyree's credibility was a key issue for the jury to resolve. The probative value of Tyree's prior inconsistent statement on the issue of his credibility outweighed any prejudice caused by its admission. We find no abuse of discretion.

VII

Cumulative Prejudice

We have found no single instance of prejudicial error. Nor has defendant persuaded us that, even if no individual error was prejudicial in isolation, the combination of errors rendered her

trial fundamentally unfair. Thus, her assertion of cumulative prejudice fails.

VIII

Booking and Classification Fees

Finally, defendant contends that we must strike the main jail booking and classification fees imposed by the trial court because there is insufficient evidence of her ability to pay. However, because defendant did not object to the imposition of these fees in the trial court, she may not challenge their imposition on appeal.

"In order to encourage prompt detection and correction of error, and to reduce the number of unnecessary appellate claims, reviewing courts have *required* parties to raise certain issues at the time of sentencing. In such cases, lack of a timely and meaningful objection forfeits or waives the claim." (*People v. Scott* (1994) 9 Cal.4th 331, 351; *People v. Walker* (1991) 54 Cal.3d 1013, 1023 ["`The purpose of the general doctrine of waiver is to encourage a defendant to bring errors to the attention of the trial court, so that they may be corrected or avoided and a fair trial had'"]; see also *In re S.B.* (2004) 32 Cal.4th 1287, 1293, fn. 2 [stating that the correct legal term for loss of right based on failure to assert it in a timely fashion is forfeiture, not waiver].)

This forfeiture doctrine applies to claims that a fee was improperly imposed, not because it was unauthorized by statute,

but because the trial court failed to find an ability to pay. (*People v. Crittle* (2007) 154 Cal.App.4th 368, 371; *People v. Valtakis* (2003) 105 Cal.App.4th 1066, 1071-1072; *People v. Gibson* (1994) 27 Cal.App.4th 1466, 1468-1469; contra, *People v. Pacheco* (2010) 187 Cal.App.4th 1392, 1397.) Accordingly, we conclude defendant's challenge to the booking and classification fees has been forfeited.

DISPOSITION

The judgment is affirmed.

HOCH, J.

We concur:

RAYE, P. J.

MAURO, J.