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

<p>THE PEOPLE,</p> <p style="padding-left: 40px;">Plaintiff and Respondent,</p> <p style="padding-left: 40px;">v.</p> <p>SHAWN CHRISTOPHER SHEPHERD et al.,</p> <p style="padding-left: 40px;">Defendants and Appellants.</p>	<p>C065837</p> <p>(Super. Ct. No. 08F04840)</p>
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A jury found two brothers, defendants Shawn Christopher Shepherd (Shawn) and Jason Shepherd (Jason), guilty of second degree murder for killing their uncle, David Bishop. The jury acquitted both defendants of first degree murder and rejected for Jason the lesser included offenses of voluntary and involuntary manslaughter. These lessers were not given as options for Shawn. The jury also found Jason guilty of burglary, identity theft, and forgery and Shawn guilty of identity theft and forgery but not burglary.

On appeal, Shawn and Jason raise numerous contentions relating to the evidence, the instructions, and their attorneys'

performances. Disagreeing with these contentions but agreeing with Shawn that his abstract of judgment is incorrect, we order his abstract modified and affirm the judgments.

FACTUAL AND PROCEDURAL BACKGROUND

In May 2008, Jason and Shawn were living with their uncle Bishop in Bishop's two-bedroom Sacramento apartment. Also living with them were Jason's girlfriend, Monique Sprague, and Sprague's four-year-old son.¹

In the middle of the night on Wednesday, May 7, 2008 (when according to Sprague she and Jason were using methamphetamine), Sprague discovered her underwear missing from the dresser she kept in the living room. She told Jason, and he suspected Bishop was the culprit because a few years back Bishop had taken Jason's daughter's and mother's underwear. Jason said he was going to "kick [Bishop's] ass."²

¹ Sprague testified for the People under a plea agreement where she pled guilty to forgery and being an accessory in exchange for serving a year in custody and testifying truthfully at trial.

² Sprague testified she and Jason used methamphetamine 8 or 10 hours before the eventual fight with Bishop, which was about the missing underwear. Sprague further testified Jason did not sleep that entire night and he was fuming about the missing underwear.

Jason testified he had not used methamphetamine that day. He slept from about 1:00 a.m. (which is when he testified he came back to the apartment) to about 7:30 a.m. Sprague told him in the morning that her underwear was missing.

In addition to the missing underwear allegation, there had been an allegation years before that Bishop had molested his

When Bishop came out of the shower and was in his own bedroom, Jason confronted him, and Bishop asked what he had done. Jason told him that he knew what he had done and that he was going to "kick [his] ass." Bishop then pushed Jason, and Jason hit him in the jaw with his fist. Bishop stumbled back, but then, according to Jason, Bishop came at Jason with a pocketknife and tried to stab him. Jason reached out his hand to stop the knife from coming at him. Jason and Bishop wrestled over the knife, and Jason ended up pushing himself off of Bishop. Jason then grabbed a baseball bat that was near the door and hit Bishop on the side of the head two or three times. Bishop fell to the ground in a fetal position away from Jason with his feet tucked up and his head up by the wall. He was bleeding from his ear. He was not moving but sounded like he was breathing. Jason put the knife in his own pocket.

Jason left Bishop's room, and Sprague bandaged his hand in the hallway, which by Jason's estimation took about 10 minutes.³

sister (Jason and Shawn's mother). Jason thought Bishop was a pervert and a sexual predator.

³ Jason testified he realized his hand was cut from the scuffle at the time he picked up the knife.

In a police interview, Shawn said Jason cut his hand himself while using his own pocketknife.

Sprague testified Jason told her he did not know how he had sustained the cut but he was going to say Bishop came at him with a knife. She further testified that shortly after the scuffle and when she was with Jason in the apartment, Jason made a stabbing motion with his hands to describe what had happened between him and Bishop, and Sprague took his gestures to mean

Jason decided to tie up Bishop "[i]n case he were to . . . wake back up" and retaliate and went back into Bishop's room. Jason had Shawn go into Bishop's room with him and when Shawn did, Shawn stared at their uncle who was still in the same fetal position. Shawn asked Jason "what the hell was going on." Jason yelled at Shawn to either help him find something with which to tie up Bishop or to grab him some rope that was on the floor. Shawn handed Jason some rope. Jason took the rope and grabbed whatever other cords he could find and tied up Bishop's hands, feet, and neck. As Jason was tying Bishop up, he was not fearful of an imminent attack by Bishop. Jason and Shawn were in the bedroom for about 10 minutes.⁴

Jason then went to Circle K to buy cigarettes. He returned 15 to 20 minutes later and asked Shawn to check on Bishop. Shawn did, and according to Jason, Shawn said Bishop was dead. According to Sprague, Bishop had not died yet, as she heard gurgling sounds coming from Bishop's bedroom through the night or the next morning (which was Thursday, May 8). According to a

that Jason had stabbed Bishop. Sprague was aware that Jason owned a number of pocketknives.

The knife that apparently was used in the scuffle had blood on the blade. The blade had DNA from Bishop's blood and DNA from Jason, but Jason's DNA was not from his blood.

⁴ Jason testified he did not ask Shawn to help him tie up Bishop and that Shawn did not help him do so. However, Jason told police he had Shawn help tie up Bishop, and they used whatever was accessible to do it. Sprague testified she heard Jason telling Shawn to find something with which to tie up Bishop and then telling Shawn to tie up Bishop's legs and hands.

neighbor who lived beneath Bishop's apartment, somewhere between 8:00 a.m. and 10:00 a.m. on Friday, May 9, which was the neighbor's birthday, she heard a loud thud upstairs followed by a male's voice moaning in pain. The moaning petered out about 10 to 15 minutes later.

Upon Jason's return from Circle K, Jason told Shawn that he was going to cash Bishop's IRS refund check and use the money to leave. Jason asked Shawn and Sprague to help him search for it. Jason found the check, and Sprague forged Bishop's signature on the check. Jason then called a friend and asked him how to cash a check without identification. The friend told him to use a Vcom machine, which is similar to an ATM machine and permitted cashing a government check.

According to Jason, he then made two trips to Vcom machines to cash the check. However, photographs taken by the Vcom machines showed a different person trying to cash the check on each of the two occasions (one appeared to be Jason and the other Shawn) and there was handwriting on the back of one of the Vcom receipts that contained Bishop's identifying information that appeared not to be Jason's handwriting (and could have matched Shawn's). The check was declined both times. Jason pawned Bishop's pool cue to get money to leave town.

On May 9, 2008, at 9:09 a.m., Jason and Shawn rented a U-Haul truck in Sacramento. They drove the U-Haul truck back to Bishop's apartment and loaded his dead body into a garbage can and then into the truck. Jason and Shawn dumped Bishop's body off a bridge in Jackpot, Nevada.

On June 16, 2008, Bishop's body was discovered by kayakers in Twin Falls, Idaho. His body was extensively decomposed. His neck, arms, legs, and ankles were bound together with one continuous rope. The way the rope was tied, if Bishop were to have moved his arms and legs, a slip knot would have tightened around his neck. There was also a green bungee cord wrapped around each ankle and an electric cord wrapped twice around his left foot. There was a laceration on his right frontal scalp and beneath that laceration his skull was fractured. The cause of death was blunt force head injuries that could have been caused by a baseball bat.

DISCUSSION

I

*The Court's Instruction On The Right To Self-Defense
By An Initial Aggressor (CALCRIM No. 3471) Was Correct*

Jason contends the court's instruction on the right to self-defense by an initial aggressor was incorrect, in violation of his federal constitutional rights. The court instructed pursuant to CALCRIM No. 3471 that "If you decide that the defendant, Jason Shepherd, started the fight using non-deadly force and the opponent responded with such sudden and deadly force that the defendant *could not withdraw from the fight*, then the defendant had the right to defend himself with deadly force and was not required to stop fighting." (Italics added.) Jason argues the court erred in using the words "'could not withdraw from the fight'" instead of "could [not] retreat *in safety*." We

reject Jason's contention because the California Supreme Court has used these terms interchangeably.

Specifically, in *People v. Hecker* (1895) 109 Cal. 451, the court stated the defendant was entitled to an instruction justifying the murder if the defendant "was put in such sudden jeopardy by the acts of deceased that *he could not withdraw . . .*" (*Id.* at p. 461, italics added.) Later in the opinion, the court explained the same concept as follows: "the counter assault [by the deceased] be so sudden and perilous that no opportunity be given to decline or to make known to his adversary his willingness to decline the strife, *if he cannot retreat with safety*, then as the greater wrong of the deadly assault is upon his opponent, he would be justified in slaying, forthwith, in self-defense." (*Id.* at p. 464, italics added.)

Based on our Supreme Court's usage of the two terms interchangeably, we reject Jason's contention the instruction on self-defense was wrong.

II

The Court's Instruction On Corpus Delicti

(CALCRIM No. 359) Was Correct

Jason contends the court undercut the People's burden of proof when it instructed that the jury could determine the degree of homicide solely from his statements to police. Specifically, the court instructed that "[a] defendant may not be convicted of any crime based on his out of court statements alone" but that "[i]dentity of the person who committed the crime and the degree of the crime may be proved by the

defendant's statement alone." (CALCRIM No. 359.) Jason is wrong because of California Supreme Court precedent to the contrary.

Specifically, in *People v. Cooper* (1960) 53 Cal.2d 755, our Supreme Court rejected the defendant's contention that the People must establish that the murders were of the first degree by evidence other than his extrajudicial statements. (*Id.* at p. 765.) The court explained as follows: "[The] corpus delicti in a case involving first degree murder consists of two elements, namely, the death of the victim and the existence of some criminal agency as the cause. [Citations.] Once prima facie proof of the corpus delicti is made, the extrajudicial statements, admissions, and confessions of a defendant may be considered in determining whether all the elements of the crime have been established.' [Citation.] 'The corpus delicti of the crime of murder having been established by independent evidence, . . . extrajudicial statements of the accused . . . may be used to establish the degree of the crime.'" (*Ibid.*)

Based on our Supreme Court's approval of a defendant's extrajudicial statements to establish the degree of murder, we reject Jason's contention the instruction on corpus delicti was wrong.

III

The Court Did Not Err In Refusing To Sua Sponte Instruct On Voluntary Intoxication, And Jason's Counsel Was Not Ineffective

Jason contends the trial court's failure to provide instructions on intoxication relating to imperfect self-defense

and heat of passion and his counsel's failure to request those instructions violated his constitutional rights to a fair trial and effective assistance of counsel. We disagree.

The court must instruct sua sponte on the effect voluntary intoxication can have upon a defendant's ability to form the requisite criminal intent "when the evidence warrants and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Ivans* (1992) 2 Cal.App.4th 1654, 1661.) If the evidence of intoxication is "at most minimal" the court is not required to give the instructions. (*People v. Williams* (1988) 45 Cal.3d 1268, 1311.) "However, an intoxication instruction is not required [even] when the evidence shows that a defendant ingested drugs or was drinking, unless the evidence also shows he became intoxicated to the point he failed to form the requisite intent or attain the requisite mental state." (*Ivans*, at p. 1661.)

Here, the evidence of intoxication was minimal and did not show that Jason was intoxicated to the point he could not form the requisite specific intent. Sprague testified she and Jason used methamphetamine 8 or 10 hours before the fight with Bishop. She did not know whether the methamphetamine had any effect on Jason. When Jason was under the influence of methamphetamine, Sprague recalled he would be moody, irritable, and unable to sleep. Jason testified he had not used methamphetamine that day. He slept from about 1:00 a.m. to about 7:30 a.m. and was not in a "crazed state" when he fought with Bishop. From this evidence, the most that can be said is that even if Jason had

consumed methamphetamine, it was 8 to 10 hours before the fight and there was no evidence on this occasion it affected him by the time he fought Bishop. The court therefore had no sua sponte duty to instruct on voluntary intoxication.

Similarly, defense counsel was not ineffective for deciding not to ask for instructions on voluntary intoxication because his decision was a rational trial tactic. (See *People v. Bradford* (1997) 14 Cal.4th 1005, 1052 [appellate courts reverse convictions on the ground of inadequate counsel only if the record affirmatively discloses that counsel had no rational tactical purpose for his act or omission].) In closing, defense counsel decided to argue that Sprague was lying about Jason's drug use on the night before the fight. Sprague's testimony that Jason had ingested methamphetamine was part and parcel of her testimony that she found her underwear missing when she and Jason were getting high and told Jason about it at that time. If the jury credited Sprague's testimony, it might have decided that Jason had more time to premeditate and deliberate about killing Bishop, with little chance the jury would find Jason was in fact still under the influence of methamphetamine during the killing that occurred many hours later, thereby leading to a first degree murder conviction.

IV

The Court Properly Did Not Instruct

On Unlawful Act Involuntary Manslaughter

Jason contends the trial court erred in failing to instruct on unlawful act involuntary manslaughter. His theory is that

the jury could have found he assaulted Bishop with a deadly weapon (the baseball bat) but without malice or intent to kill.

Involuntary manslaughter of the unlawful act variety requires a killing during “an unlawful act, not amounting to a felony,” i.e., a misdemeanor, that is dangerous to human life under the circumstances of its commission. (*People v. Cox* (2000) 23 Cal.4th 665, 667, 675-676.) “If a defendant commits an act endangering human life, without realizing the risk involved, the defendant has acted with criminal negligence. By contrast where the defendant realizes and then acts in total disregard of the danger, the defendant is guilty of murder based on implied malice. [Citation.] Thus the pivotal question here [for an instruction on involuntary manslaughter] was whether there was sufficient evidence for a reasonable juror to find [the defendant] acted without consciously realizing the risk to [the victim’s] life.” (*People v. Evers* (1992) 10 Cal.App.4th 588, 596.)

In *Evers*, there was not. The defendant argued that his two-year-old stepson’s death “was the result of his inexperience as a parent in handling children and not the product of his conscious disregard of the risk to [the child’s] life.” (*People v. Evers, supra*, 10 Cal.App.4th at pp. 593, 596-597.) The *Evers* court disagreed: “The severity of [the victim’s] injuries on this occasion makes clear that whoever abused [him] had to know such abuse would likely cause serious injury or death. The undisputed evidence showed [the victim] was physically abused

with 'major force' causing injuries equivalent to those resulting from a 10- to 30-foot fall." (*Id.* at p. 597.)

The same is true with respect to the force and injuries here. While Jason testified he did not know at the time that hitting Bishop with a baseball bat two to three times "up side the head" could kill him, the severity of the injuries leaves no doubt that Jason had to have been aware of the risk. An upset and angry Jason swung a baseball bat and hit Bishop two or three times on the side of the head, causing Bishop's skull to fracture. Bishop died from the blunt force head injuries. Blunt force trauma causing the victim's skull to fracture was certainly severe enough that the court could have concluded Jason had to know such an attack would likely cause serious injury or death, thereby obviating the need to instruct on unlawful act involuntary manslaughter.

V

The Court Accurately Instructed On Accomplice Testimony

Jason and Shawn contend the trial court violated their right to due process of law by permitting the jury to convict them of murder based solely on the uncorroborated testimony of an accomplice (Sprague).

The instruction about which defendants complain was CALCRIM No. 334, which here stated as follows: "If you decide that Monique Sprague was an accomplice, then you may not convict the defendants of forgery based on her statements or testimony alone. [¶] . . . [¶] You may use the statement or testimony of an accomplice to convict the defendant only if[:] [¶] One.

The accomplice's statement or testimony is supported by other evidence that you believe. [¶] Two. Supporting evidence is independent of the accomplice's statement or testimony. [¶] And three. That supporting evidence tends to connect the defendant to the commission of the crimes."

There was nothing wrong with the court limiting the accomplice corroboration requirement to forgery because Sprague was an accomplice only to forgery. "An accomplice is . . . one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111.) Sprague was an accomplice to forgery because it was she who forged Bishop's signature on the check. Conversely, there was no evidence Sprague was involved in Jason's beating of Bishop or Jason's and Shawn's tying up of Bishop. Where, as here, the witness (Sprague) was an accomplice to only one of the crimes she testified about, the corroboration requirement applied only to that one crime and not the others she testified about. (See, e.g., *People v. Wynkoop* (1958) 165 Cal.App.2d 540, 545-546.) "In such cases, the court may insert the specific crime or crimes requiring corroboration in the first sentence." (Bench Notes to CALCRIM No. 334 (2012) p. 111.) The court's instruction in keeping with these principles did not violate defendants' rights.

VI

*The Trial Court Properly Instructed That Certain Defenses And
Lesser Included Offenses Applied Only To Jason*

Shawn contends the trial court improperly limited certain defenses and lesser included offense instructions to Jason only, which were those on self-defense, voluntary manslaughter, and involuntary manslaughter. As we explain, there was no error in not giving these instructions on Shawn's behalf.

A

Self-Defense

The court was required to instruct on self-defense "'only if it appears that the defendant is relying on such a defense, or if there is substantial evidence supportive of such a defense and the defense is not inconsistent with the defendant's theory of the case.'" (*People v. Breverman* (1989) 19 Cal.4th 142, 157.) Here, the only claim of self-defense was Jason's, which was that Bishop came at him with a knife and tried to stab him. Only then did Jason hit Bishop on the side of the head with the baseball bat. Shawn became involved in Bishop's death after the alleged knife attack, i.e., when he gave Jason a rope and possibly helped tie Bishop up. At that time, Bishop was bleeding and had fallen into a fetal position away from Jason with his feet tucked up and his head up by the wall. He was not moving. Jason had put the knife in his own pocket. He had also spent 10 minutes having Sprague bandage his hand. There was no evidence that by the time Shawn became involved, Bishop posed a

threat to Shawn or Jason. Therefore, no self-defense instruction was required as to Shawn.

B

Voluntary Manslaughter -- Imperfect Self-Defense

"Imperfect self-defense is the killing of another human being under the actual but unreasonable belief that the killer was in imminent danger of death or great bodily injury."

(*People v. Booker* (2011) 51 Cal.4th 141, 182.) Here, there was no evidence Shawn actually believed he or Jason was in imminent danger of death or great bodily injury. As we have just stated, when Shawn became involved, Bishop was bleeding and had fallen into a fetal position away from Jason with his feet tucked up and his head up by the wall. Jason had the knife that Bishop had allegedly used to attack Jason, and Bishop had not done anything in the 10 minutes Jason had spent getting his hand bandaged by Sprague. Thus, there was no basis for instructing Shawn acted in imperfect self-defense.

C

Voluntary Manslaughter -- Heat Of Passion/Provocation

The factor distinguishing the heat of passion form of voluntary manslaughter from murder is provocation. (*People v. Souza* (2012) 54 Cal.4th 90, 116.) The passion must be that which ""would naturally be aroused in the mind of an ordinarily reasonable person under the given facts and circumstances" (Ibid.)

There was no evidence to support an instruction that Shawn was acting under the heat of passion when he handed Jason the

rope and possibly helped tie up Bishop. There was no evidence there was any recent feud between Shawn and Bishop and Shawn's counsel in closing argued there was no animosity between the two, no evidence of any arguments or threats between them and that in fact, the two "got along pretty good."

D

Involuntary Manslaughter

"Involuntary manslaughter based on the commission of a lawful act that might produce death 'without due caution and circumspection' requires proof of criminal negligence -- that is, 'aggravated, culpable, gross, or reckless' conduct that creates a high risk of death or great bodily injury and that evidences a disregard for human life or indifference to the consequences of the conduct." (*People v. Garcia* (2008) 162 Cal.App.4th 18, 27.)

Here, Shawn giving Jason the rope that Jason and possibly Shawn used to tie up Bishop could not be construed as lawful acts done with criminal negligence because handing the rope and possibly tying him up were deliberate acts and there was no dispute Bishop was gravely injured when Shawn gave Jason the rope and possibly tied him up. (See, e.g., *People v. Evers*, *supra*, 10 Cal.App.4th at p. 598 [intentional use of violent force against the victim, knowing the probable consequences of one's actions precludes an instruction for involuntary manslaughter]; *People v. Huynh* (2002) 99 Cal.App.4th 662, 679 [a defendant's plainly deliberate acts with knowledge that the confederate's acts could result in death precludes a finding

that a defendant's acts were criminally negligent and therefore an instruction on involuntary manslaughter].)

As we have just explained, as to Shawn, involuntary manslaughter instructions based on a criminal negligence theory were not required because the conduct was greater than just criminal negligence. When Shawn became involved (by handing Jason a rope and possibly also helping to tie up Bishop), Bishop was already visibly gravely injured. Bishop was bleeding and had fallen into a fetal position with his feet tucked up and his head up by the wall. Jason had the knife that was supposedly used in the prior scuffle. Bishop posed no risk to anybody. The record contains no evidence there might have been something in Shawn's background that prevented him from understanding the risk to Bishop from the rope or that Shawn was in any way impaired so that he could not understand the risk that the rope posed to Bishop's life. This was not a case, as Shawn seems to argue, where the pertinent fact is only that Shawn handed Jason the rope. It is a case where Shawn handed Jason the rope (and possibly even helped tie up Bishop with the rope) knowing Bishop was gravely injured and defenseless. Where, as here, the only possible inference the jury could draw from the evidence was that the defendant knew the probable consequences of his action, the court does not err in refusing involuntary manslaughter instructions. (*People v. Evers, supra*, 10 Cal.App.4th at p. 597.)

Our reasoning that Shawn's actions were not simply criminal negligence disposes of Shawn's related subarguments that the

court should have given other involuntary manslaughter instructions based on Shawn's alleged criminal negligence, such as death as a result of the noninherently dangerous felony of false imprisonment committed with criminal negligence, death as a result of misdemeanor false imprisonment committed with criminal negligence, and death as a result of misdemeanor battery committed with criminal negligence.

VII

The Aiding And Abetting Instructions Were Correct

Shawn contends there were four errors with the aiding and abetting instructions given in this case.

One, he contends the court erred in instructing in a manner that permitted the jury to convict him as an aider and abettor of implied malice murder, independent of the natural and probable consequences doctrine. He claims this error stems from CALCRIM Nos. 400, 401, and 520 given in this case, which he argues improperly told the jury one could directly aid and abet implied malice murder.

Two, in a related contention, he contends the court erred in failing to fully inform the jury that direct aiding and abetting of murder required proof Shawn acted with the specific intent to kill.

Three, he contends the court erred in instructing that an aider and abettor is equally guilty as the perpetrator.

And four, he contends the court erred in instructing that the duration of murder for aiding and abetting purposes continued as long as the victim was alive and the duration of

homicide for direct aiding and abetting purposes ended when the fatal blow was struck.

We begin with the instructions at issue and then explain why there was no error here.

A

The Instructions At Issue Here

As is relevant to the above contentions, the court instructed in pertinent part as follows:

CALCRIM No. 400

"A person may be guilty of a crime in two ways.

"One. He or she may have directly committed the crime. I will call that person the perpetrator.

"Two. He or she may have aided and abetted a perpetrator, which directly committed the crime.

"A person is equally guilty of the crime whether he or 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

"To prove that a defendant is guilty based on aiding and abetting such a crime, the People must prove.

"One. That the perpetrator committed the crime.

"Two. That defendant knew that the perpetrator intended to commit the crime.

"Three. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime.

"And, four. 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 he or she knows of the perpetrator's unlawful purpose and he or she specifically intended to and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator's commission of . . . that crime."

CALCRIM No. 403

"In addition to simple aiding and abetting, a defendant may be guilty of the charged offense of murder, if he aided and abetted an offense and the natural and probable consequences of that offense would be murder.

"Before you may decide whether Shawn Shepherd is guilty of murder, Penal Code section 187 under a theory of natural and probable consequences, you must decide whether he is guilty of Penal Code section 236, false imprisonment.

"To prove that the defendant is guilty of murder, the People must prove.

"One. The defendant is guilty of false imprisonment, Penal Code section 236.

"Two. During the commission of the false imprisonment a co-participant in the false imprisonment committed the crime of murder.

"Three. Under all the circumstances, a reasonable person in the defendant Shawn Shepherd's position, would have known that the commission of the murder was a natural and probable consequence of the commission of the false imprisonment."

CALCRIM No. 520

"The defendant is charged in Count One with murder in violation of Penal Code section 187.

"To prove that a defendant is guilty of this crime, the People must prove.

"That one. The defendant committed an act that caused the death of another person.

"Two. When the defendant acted, he had a state of mind called malice aforethought.

"Three. He killed without lawful excuse or justification.

"There are two kinds of malice aforethought, express and implied malice. Both proof of either is sufficient to establish the state of mind required for murder.

"The defendant acted with express malice if he unlawfully intended to kill.

"The defendant acted with implied malice if.

"One. He intended to commit the act.

"Two. The natural and probable consequences of the act were dangerous to human life.

"Three. At the time he acted he knew his act was dangerous to human life.

"Four. He deliberately acted with conscious disregard for human life."

Aiding And Abetting -- Timing

"This instruction applies to second degree murder and first degree willful, deliberate and premeditated murder.

"A person may aid and abet a murder after the fatal blow is struck as long as the aiding and abetting occurs before the victim dies. After the victim dies, what would be aiding and abetting legally turns into being an accessory after a felony has been committed. The victim's death is an essential element of murder, therefore, the crime is not complete until the victim dies.

"It is up to you, the jury, to determine whether such conduct . . . occurring after the fatal blow is struck but before the victim dies amounts to aiding and abetting."

B

The Aiding And Abetting Instructions

Correctly Stated The Requisite Intent

Shawn contends the court erred in instructing in a manner that permitted the jury to convict him as an aider and abettor of implied malice murder, independent of the natural and probable consequences doctrine. He claims this error stems from the aiding and abetting instructions given in this case, which he argues improperly told the jury one could directly aid and abet implied malice murder. In a related contention, he contends the court erred in failing to fully inform the jury that direct aiding and abetting of murder required proof Shawn acted with the specific intent to kill.

As we will explain, the standard CALCRIM instructions given here on aiding and abetting accurately stated the law, and the authorities Shawn relies on (*People v. Mendoza* (1998) 18 Cal.4th 1114 and *People v. Lee* (2003) 31 Cal.4th 613) do not support his contentions.

"[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) CALCRIM No. 401 correctly conveys this law. It states that a defendant aids and abets a crime "if he or 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." (Italics added.) There is no defect in this instruction. (See *People v. Stallworth* (2008) 164 Cal.App.4th 1079, 1103 [rejecting the argument that CALCRIM No. 401 was constitutionally defective because it did not explicitly state that mere presence or knowledge was insufficient to establish aiding and abetting].) It plainly states that the aider and abettor must have the specific intent to aid in the commission of the particular crime involved.

Shawn's reliance on *Mendoza* and *Lee* are unpersuasive. *Mendoza* focused on whether Penal Code "section 22 permits defendants tried as aiders and abettors to present, and the jury to consider, evidence of intoxication on the question whether

they had the requisite mental states of knowledge and intent.” (*People v. Mendoza, supra*, 18 Cal.4th p. 1126.) This issue is unrelated to the factual circumstances here. And *Lee* undermines Shawn’s contention because that case specifically approved the formulation of the intent necessary to establish aiding and abetting that is stated in *Beeman* and incorporated into CALCRIM No. 401. (*People v. Lee, supra*, 31 Cal.4th at p. 624 [“the person must ‘know[] the full extent of the [direct] perpetrator’s criminal purpose and [must] give[] aid or encouragement with the intent or purpose of facilitating the [direct] perpetrator’s commission of the crime’”].)

C

Equally Guilty Language

Shawn contends the court erred in instructing pursuant to CALCRIM No. 400 that a person who aids and abets is “equally guilty” of the crime committed by the perpetrator. He claims this language was prejudicially misleading, particularly when considered in light of the other instructions and instructional errors.

We find just the opposite, that the instructions as a whole were not misleading. The court instructed the jury on the basic principle that both direct perpetrators and those who aid and abet the crime are principals under the law. CALCRIM No. 400 as given here did not inform the jury that the requirements for being guilty as a perpetrator and for being guilty as an aider and abettor are identical. CALCRIM No. 401 set out the requirements for the jury to find a defendant guilty as an aider

and abettor. It told the jury it must find defendant knew of the perpetrator's unlawful purpose and specifically intended to aid the perpetrator in the commission of the offense. The court further instructed that only if a reasonable person in Shawn's position would have known that the commission of the murder was a natural and probable consequence of the false imprisonment, then defendant was guilty of murder.

These instructions, which provided the jury with definitions for the required mental states, instructed the jury to evaluate Shawn's culpability based on the acts of the participants and Shawn's own mens rea. Viewed in the context of the instructions as a whole, the "equally guilty" language in CALCRIM No. 400 did not negate or undermine these instructions as Shawn suggests.

Shawn relies on *People v. Samaniego* (2009) 172 Cal.App.4th 1148, which criticized the "equally guilty" language of CALCRIM No. 400. In *Samaniego*, the People argued the defendant and his codefendants drove to a location to kill an individual. However, that individual was not there, so they killed someone else. (*Samaniego*, at p. 1162.) The court found that because there was no evidence of the roles of the three defendants in the murder, CALCRIM No. 400 misled the jury. The instruction eliminated the People's need to prove the aider and abettor's intent, willfulness, premeditation, and deliberation, the mental states required for murder. (*Samaniego*, at p. 1165.) The court found the instruction, "while generally correct in all but the

most exceptional circumstances, is misleading here and should have been modified." (*Ibid.*)

No such exceptional circumstances requiring modification appeared in the present case. The People established Shawn's role in Bishop's murder as being the provider of the rope that was used to bind Bishop and possibly also one of the binders. And, as we have discussed, the instructions correctly stated the intent requirement for aiding and abetting as applied to Shawn. Under these circumstances, CALCRIM No. 400 did not mislead the jury.

D

The Court Correctly Instructed On Duration

As It Relates To Murder

Shawn contends the court erred in instructing that the duration of murder for aiding and abetting purposes continued as long as the victim was alive and the duration of homicide for purposes of direct aiding and abetting purposes (without reference to the natural and probable consequences doctrine) ended when the fatal blow was struck. Specifically, the court instructed as follows: "A person may aid and abet a murder after the fatal blow is struck as long as the aiding and abetting occurs before the victim dies. After the victim dies, what would be aiding and abetting legally turns into being an accessory after a felony has been committed. The victim's death is an essential element of murder, therefore, the crime is not complete until the victim dies."

Shawn notes that if anything, he acted "after the 'scuffle,'" that is, after Bishop had sustained all of the injuries that caused his death. He submits that the murder was complete when the fatal blow was struck and since the jury was instructed that the murder was not complete until after the victim died, the jury had a "legally improper pathway to guilt."

We disagree that the instruction was wrong. The idea that a murder is not complete until the victim dies was taken from *People v. Celis* (2006) 141 Cal.App.4th 466. In *Celis*, the defendant wanted an instruction that the murder was complete when the final blow was struck so that the assistance she gave the perpetrator thereafter would make her an accessory after a felony rather than an aider and abettor. (*Id.* at p. 471.) The appellate court found there was no sua sponte obligation to instruct because the murder was not complete when the final blow was struck, but only when the victim died. (*Ibid.*) The court reasoned as follows: "'The crime of murder is defined as 'the unlawful killing of a human being, or a fetus, with malice aforethought.'" (§ 187, subd. (a).) Because the victim's death is a sine qua non of murder, the crime could not have been 'completed' until [the victim] had died. '[A] murder ends with the death of the victim.'" (*Celis*, at p. 471.) We agree with *Celis's* reasoning and follow it here.

VIII

Shawn's Counsel Was Not Ineffective

Shawn contends that if we conclude any of his claims of instructional error were waived, forfeited, or invited, then his counsel was ineffective. Since we have resolved these claims on the merits and have found no error, counsel was not deficient. (See *People v. Waidla* (2000) 22 Cal.4th 690, 718 [counsel's deficient performance is the first prong of an ineffective assistance of counsel analysis].)

IX

There Was Sufficient Evidence Of Corroboration Of Accomplice Testimony For Shawn's Conviction Of Aiding And Abetting Forgery

Shawn contends his forgery conviction must be reversed because there was insufficient evidence to corroborate the accomplice testimony that he aided and abetted the forgery. Shawn stresses the evidence of corroboration relied on by the People "concerned events long after the forgery had occurred" and therefore did not satisfy the requirements of Penal Code section 1111. We disagree the evidence was insufficient.

Penal Code section 1111 provides in part: "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. . . ."

Here, the People rely on circumstantial evidence that it was Shawn who wrote Bishop's identifying information on the back

of the Vcom receipt that was to be used during the second attempt to cash the check and it was Shawn who tried to cash the check during one of the two check-cashing episodes. This evidence was based on the fact that pictures taken at the Vcom machine showed that it was a different person who tried to cash the check on each of the two occasions (one appeared to be Jason and the other Shawn) and that the handwriting on the back of the Vcom receipt that contained Bishop's identifying information was not Jason's (and could have matched Shawn's).

Although this circumstantial evidence of corroboration that tied Shawn to the forgery occurred after Shawn was alleged to have aided and abetted in the forgery by helping look for the check, this does not mean it was insufficient. "The evidence necessary to corroborate accomplice testimony need only be slight, such that it would be entitled to little consideration standing alone. [Citation.] It is enough that the corroborative evidence tends to connect defendant with the crime in a way that may reasonably satisfy a jury that the accomplice is telling the truth. [Citation.] Corroborative evidence may be entirely circumstantial." (*People v. Narvaez* (2002) 104 Cal.App.4th 1295, 1303.)

Narvaez provides a good example of sufficient corroboration, even though the corroboration concerned events after the at-issue crime occurred. There, the appellate court considered the corroboration requirement contained in Penal Code section 1111, holding in a robbery case that an accomplice's testimony that the defendant had served as the getaway driver

was sufficiently corroborated by evidence that the defendant was days later in possession of the recently stolen property.

(*People v. Narvaez, supra*, 104 Cal.App.4th at p. 1304.) The appellate court observed, "In photographs taken the day after the robbery, [the defendant's] girlfriend, was wearing one of [the victim's] stolen bracelets. When [the defendant] and [his girlfriend] were arrested a week later, she had three pieces of [the victim's] stolen jewelry in her possession. When [the defendant] was arrested on April 30, he was wearing jewelry stolen during the robbery." (*Id.* at p. 1303.) The appellate court concluded there was "no legal reason why the evidence is insufficient to corroborate [the accomplice]'s testimony." (*Id.* at p. 1304.)

Similar to *Narvaez* and contrary to Shawn's position, there is no bar to using evidence that occurred after the aiding and abetting has taken place as corroboration for purposes of Penal Code section 1111. Shawn's argument to the contrary is not persuasive.

X

Shawn's Abstract Of Judgment Must Be Amended

Shawn contends his abstract of judgment must be amended to reflect the ordered two-year concurrent term for forgery in count 5 instead of the eight-month concurrent sentence that is currently reflected on his abstract. We agree and order the abstract corrected.

DISPOSITION

The judgments are affirmed. The trial court is ordered to amend Shawn's abstract of judgment to reflect the ordered two-year concurrent term for forgery in count 5 and forward a certified copy to the Department of Corrections and Rehabilitation.

ROBIE, J.

We concur:

HULL, Acting P. J.

BUTZ, J.