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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

TRAVELL DARROLLE WILLIAMS et al.,

Defendants and Appellants.

D057746

(Super. Ct. No. RIF 130895)

APPEALS from judgments of the Superior Court of Riverside County, Elisabeth Sichel, Judge. Affirmed as to Williams. Affirmed as to Caddell as modified.

A jury convicted Travell Darrolle Williams and Cayson Lamont Caddell of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)) with the special circumstance that the murder was committed for criminal street gang purposes (§ 190.2, subd. (a)(22)). The jury also convicted Williams and Caddell of attempted first degree murder (§ 664/187, subd. (a)) and active participation in a criminal street gang (§ 186.22, subd. (a)).

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<sup>1</sup> Statutory references are to the Penal Code unless otherwise specified.

Additionally, Caddell was found guilty of another count of attempted first degree murder stemming from a separate incident.

The jury sustained allegations that Williams and Caddell acted for the benefit of and at the direction of a criminal street gang (§ 186.22, subd. (b)) with respect to their respective first degree murder and attempted first degree murder convictions. As to Williams's murder and attempted murder convictions, the jury sustained allegations that he vicariously discharged a firearm in a gang context (§ 12022.53, subd. (e)(1)). As to Caddell's murder conviction, the jury found he personally and intentionally discharged a firearm causing death in a gang context (§ 12022.53, subds. (d), (e)(1).) Regarding one of Caddell's attempted murder convictions, the jury found he personally and intentionally discharged a firearm in a gang context (§ 12022.53, subds. (c), (e)(1)). With respect to the other attempted murder conviction, the jury found Caddell personally and intentionally discharged a firearm (§ 12022.53, subd. (c)).

The trial court sentenced Williams to prison for life without the possibility of parole plus 32 years to life plus 20 years. The court sentenced Caddell to prison for 80 years to life plus 40 years.<sup>2</sup>

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<sup>2</sup> Caddell, who was 16 years old at the time of the crimes, was sentenced on the murder count pursuant to section 190.5, subdivision (b), which provides that minors who are 16 or 17 and who are convicted of a special circumstance murder under section 190.2 should be given a no-parole life sentence or, in the trial court's discretion, a sentence of 25 years to life.

Williams appeals. He attacks his convictions for first degree murder and first degree attempted murder based on the natural and probable consequences doctrine of aiding and abetting liability on four grounds. Williams also contends the trial court erred by instructing the jury that his testimony required supporting evidence, telling the jury it could determine the degree of the murder and attempted murder counts from his statements, and giving conflicting instructions on voluntary intoxication. Additionally, Williams claims part of his sentence constituted cruel and/or unusual punishment.

In his appeal, Caddell contends the trial court deprived him of assistance of counsel when it allowed the jury to hear a readback of testimony without proper notice to counsel. Caddell also claims that he was deprived of effective assistance of counsel because the initial attorney appointed to represent him did not investigate the case for more than two years.<sup>3</sup> Additionally, Caddell claims his abstract of judgment should be corrected to reflect which convictions carry two of his firearm enhancements. The Attorney General concedes that the abstract of judgment should be corrected.

We affirm Williams's convictions. We order the trial court to correct the abstract of judgment in Caddell's case and affirm his convictions.

## FACTS

### *Background*

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<sup>3</sup> Caddell joins in Williams's arguments to the extent that he would benefit thereby. (Cal. Rules of Court, rule 8.200(a)(5).)

In June 2006, Williams, then 19 years old, was a member of the Junior Pimp Riders (JPR), a criminal street gang. Williams's moniker was "T-Styles." Caddell, who was 16 years old, was a member of the Sex Cash Money criminal street gang, and his moniker was "Baby Jackpot." The JPR gang and the Sex Cash Money gang were allies.

The charges in this case involve two separate gang-related shootings that occurred on successive nights in Moreno Valley. In the first incident, Caddell shot Kevin Maye in the knee, while he was standing outside a birthday party. Maye was a member of the 1200 Blocc Crips—a rival gang of Sex Cash Money.<sup>4</sup> In the second incident, Williams and Caddell were among various members of the JPR and Sex Cash Money gangs who went uninvited to a high school graduation party. After Williams started a fight with partygoer Paul Anderson, Williams and Caddell, among others, chased Anderson to the street. As Anderson ran down the street, Caddell fired several shots in his direction. One of the bullets struck and killed Brooke McKinney, a 15-year-old who attended the party.

#### *Kevin Maye Shooting*

On the evening of June 9, 2006, Kevin Maye and his wife threw a 20th birthday party for Maye's sister, Brianna Lawton. During the party, Maye's role was akin to a bouncer; he directed partygoers through the back gate and kept "everybody inside the house and not in the neighborhood or any people's yards."

JPR gang member Bryan Smith, who knew Lawton, went to the party with some friends, including fellow JPR members Williams and Cochise Thomas, and Sex Cash Money gang member Jerome McGhee. When they arrived, Maye, who was standing

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<sup>4</sup> Williams was present at the shooting, but was not charged in connection with it.

outside the residence, approached the vehicle and told them to either go inside to the party or leave; Maye did not want them congregating outside.

Smith's group left and went to a nearby gas station, where they encountered a few Sex Cash Money gang members, including Caddell. Both groups drove to Lawton's party in separate vehicles, parked around the corner and walked to the party house. Rather than going inside, they lingered outside. Maye told them to leave. As they were walking away, someone yelled that Maye's "homie" was the 1200 Blocc Crips gang member who had killed Marques Evans, a Sex Cash Money gang member. Caddell immediately walked back to the party house and shot Maye in the left knee.

Later that night, Caddell boasted he shot Maye to retaliate for the killing of Evans. In October 2009, while he was in a holding cell, Caddell bragged about shooting Maye in the knee.

#### *Brooke McKinney's Murder*

On the night of June 10, 2006, Jiutsy Lepe threw a high school graduation party. Among those who attended the party was Paul Anderson and his girlfriend, Bianca King, who has since become his wife. Anderson brought a bottle of Cisco, a drink containing alcohol, to the party and was holding the bottle in his hand while he danced with King on the concrete patio area of the backyard.

Before going to Lepe's party, JPR gang member Christian Noriega drove his fellow gang members Williams, Thomas and Smith to Caddell's house. Noriega told Caddell, who was carrying a gun, that he would not let him ride in his vehicle to the

party. Caddell and his brother, Casey Gross, drove to Lepe's party in Gross's car; Smith rode with them.

While Anderson and King were dancing, Williams put his hand on Anderson's Cisco bottle and asked if he could have a sip; Anderson replied no. Williams then reached into a pocket of his jacket and put his hand on a small handgun. Thomas then walked up to Williams and Anderson. Williams told Thomas that Anderson had said "Fuck JPR."<sup>5</sup> When Thomas asked Anderson if he said that, Anderson said he did not know what he was talking about. In response to another inquiry by Thomas, Anderson said he did not "gang-bang." At that point, Thomas punched Anderson in the chin, causing him to stumble back a few steps.<sup>6</sup>

Upon hearing Thomas yell "[s]hoot him[] cuz," Anderson ran out of the backyard. Williams, Thomas and Caddell followed Anderson. Noriega testified he heard Williams yell "[s]hoot." Smith testified he heard someone yell, "Son, bust on him." Caddell was known to be called "Son" or "Saan" as a truncated version of his first name, Cayson.

Once he was outside the backyard, Anderson heard gunfire and ran down the street. He tried to dodge bullets by running through the front yards of residences on the street and finally took cover behind the tire of a vehicle parked in a driveway until the shooting stopped.

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<sup>5</sup> Anderson was not sure whether he heard Williams say "JPR" or "JBR." According to King, Williams said "JPR."

<sup>6</sup> Thomas was to be prosecuted for McKinney's murder and the attempted murder of Anderson along with Williams and Caddell, but his case was severed shortly before trial began. Thomas is not a party to this appeal.

King testified that she saw three males, including Williams, standing in the middle of the street and she deduced they were shooting in Anderson's direction based on how their arms and hands were extended, the sound of gunfire, and muzzle flashes of light she saw. According to Smith's and Noriega's testimony, Caddell started shooting while he was in the sidewalk area and continued shooting as he moved toward the middle of the street.<sup>7</sup> Further, Smith and Noriega testified that although Williams was out in the street when the shooting occurred, Williams did not shoot a firearm. At trial, the prosecution's theory, as reflected in its argument to the jury, was that Caddell—not Williams—fired at Anderson and fatally shot McKinney.

After the shooting stopped, McKinney was discovered lying on a sidewalk in a pool of blood. Her location was on the same path Anderson had taken when he ran from the party. McKinney died from a gunshot wound to the back of her head. The trajectory of the bullet was consistent with McKinney running away from a person shooting in her direction.

Smith testified that immediately after the shooting, he and Lepe were in the backyard of the party house when an intoxicated Williams returned there, brandished a small gun and said: "Yeah, that was me, me and my niggas." Amber Valmonte told a

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<sup>7</sup> Smith and Noriega were the only nonparty witnesses who identified Caddell as the shooter standing in the middle of the street. None of the other witnesses except Williams so identified Caddell. Smith and Noriega testified for the prosecution in exchange for reduction on their own sentences in other cases.

sheriff's department's investigator that Williams had a small gun in his hand when he entered the backyard and said: "It was me. I did it. I did it."<sup>8</sup>

Partygoer Miana Graves, who had fled the backyard when the shooting began, encountered Williams when she was returning to the party residence. At the time, Graves did not know that McKinney had been shot. Williams was carrying a balled-up jacket. Graves heard Williams say: "I have to go wipe off the burner." Graves understood "burner" to refer to a gun. Graves started scolding Williams for shooting a gun at the party and possibly hurting someone. When Graves started walking away, Williams grabbed her and asked for her phone number. A car pulled up and Graves heard someone inside the car say, "T-Styles, we have to go."

#### *Gang Evidence*

Detective Lance Colmer of the Riverside County Sheriff's Department opined that Williams was a JPR member in 2006. Colmer testified the gang had been active in the Moreno Valley until 2002 when most JPR members were incarcerated. In 2006, Colmer said the gang had only three or four members and was trying to reestablish itself after its dormant period. The detective said a gang can reestablish itself by committing "a high profile act of violence," starting fights, going to parties and "put[ting] your name out there." Colmer also testified that one way for a gang with a small number of members "to survive is to clique up with a much larger gang like Sex Cash [Money]."

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<sup>8</sup> Lepe testified that no one had spoken with her in the backyard and taken responsibility.

Riverside County Deputy Sheriff George Reyes testified Sex Cash Money was a criminal street gang, which in 2006 had more than 100 active members, including Caddell. Caddell went by the monikers of "Baby Jackpot" and "Lil Saan." The gang's primary activities were assaults with deadly weapons, robberies, burglaries, possession of illegal firearms and drug sales.

Reyes noted Sex Cash Money had a rivalry with the 1200 Blocc Crips gang. Reyes opined that the Maye shooting was committed for the benefit of Sex Cash Money because it retaliated for the murder of Sex Cash Money member Evans by a 1200 Blocc member. According to Reyes, the Maye shooting also benefited Sex Cash Money because it enhanced the gang's notoriety and increased the community's level of fear toward the gang.

Reyes opined that the McKinney murder was done for the benefit of Sex Cash Money and JPR because the violent crime enhanced both gangs' notoriety and increased the community's level of fear toward both gangs. Reyes testified the evidence that the crime was committed to benefit the gang was stronger with the Maye shooting.

#### *Williams's Defense Evidence*

Testifying in his own defense, Williams denied he was a member or associate of JPR. Williams also denied he mentioned JPR during the confrontation with Anderson. Williams testified he was drunk during the party. Although he and Thomas chased Anderson out of the backyard, Williams testified the two of them stopped once they reached the street. As Williams and Thomas were walking back to the party, Caddell ran past them and began shooting in the street with a .40-caliber semiautomatic handgun.

Williams testified that once Caddell started shooting, he dropped to the ground. Williams denied he encouraged Caddell to shoot.

After the shooting, Williams returned to the party residence to look for Noriega, who had driven him to the party. Although he may have spoken with someone in the backyard, Williams denied he claimed responsibility for the shooting.

Williams acknowledged he had a postshooting conversation with Graves, but testified the only time he mentioned a "burner" was when Noriega drove up to give him a ride. Williams said he told Noriega to not allow Caddell to "get in the car with that burner."

#### *Caddell's Defense Evidence*

Caddell's mother, his girlfriend in 2006 and his brother's girlfriend in 2006 provided an alibi for Caddell on the night Kevin Maye was shot. They testified on June 9, 2006, the brothers and the girlfriends were hanging out in the family home from 2:00 p.m. until after midnight. According to Caddell's mother, the girlfriends left at 12:20 a.m. or 12:25 a.m. Caddell's mother testified that he was still in the house when she went to bed about 15 or 20 minutes later.

## DISCUSSION

### I. WILLIAMS'S APPEAL

#### A. Introduction

Williams raises four arguments related to his main proposition that first degree murder—as well as first degree attempted murder—cannot be a natural and probable consequence of aiding and abetting a simple assault. First, Williams contends the jury

instructions on the natural and probable consequences doctrine improperly allowed the jury to convict him of murder and attempted murder based on a finding he aided and abetted a misdemeanor. Second, Williams asserts the natural and probable consequences doctrine jury instructions allowed him to be convicted of murder and attempted murder without a finding of malice, which is antithetical to the proscription against common law crimes in California. Third, Williams claims the use of the natural and probable consequences doctrine in this case involving murder liability for aiding and abetting assaultive crimes violated the longstanding merger rule of *People v. Ireland* (1969) 70 Cal.2d 522. Fourth, Williams maintains his convictions for first degree murder and first degree attempted murder cannot stand because the instruction on the natural and probable consequences doctrine did not specify first degree murder.

Because Williams's murder and attempted murder convictions are premised on principles of derivative liability, it is instructive to begin with general principles of aiding and abetting liability. There are two types of aider and abettor liability. Here, the prosecution's case against Williams for murder and attempted murder was based on both types.

The first type of aider and abettor liability "exists when a person who does not directly commit a crime assists the direct perpetrator by aid or encouragement, with knowledge of the perpetrator's criminal intent and with the intent to help him carry out the offense." (*People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) In considering whether one is an aider and abettor, relevant factors include presence at the scene of the crime, companionship, conduct before and after the offense. (*People v. Campbell* (1994)

25 Cal.App.4th 402, 409.) An aider and abettor is a principal in the crime and shares the guilt of the actual perpetrator. (§ 31.) "[Aider and abettor] liability is 'derivative,' that is, it results from an act by the perpetrator to which the [aider and abettor] contributed." (*People v. Prettyman* (1996) 14 Cal.4th 248, 259 (*Prettyman*).)

Aider and abettor liability can also be found under the natural and probable consequences doctrine, which provides "an aider and abettor is guilty of not only the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the actual perpetrator. The defendant's knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. [Citation.] The elements of aider and abettor liability under this theory are: the defendant acted with (1) knowledge of the unlawful purpose of the perpetrator, and (2) the intent or purpose of committing, encouraging, or facilitating the commission of a predicate or target offense; (3) the defendant by act or advice aided, promoted, encouraged or instigated the commission of the target crime; (4) the defendant's confederate committed an offense other than the target crime; and (5) the offense committed by the confederate was a natural and probable consequence of the target crime that the defendant aided and abetted." (*People v. Miranda, supra*, 192 Cal.App.4th at pp. 407-408.)

"This derivative criminal liability of an aider and abettor centers on causation. The law's policy is simply to extend criminal liability to one who knowingly and intentionally encourages, assists, or influences a criminal act of another, if the latter's

crime is naturally and probably caused by (i.e., is the natural and probable consequence of) the criminal act so encouraged, assisted, or influenced." (*People v. Brigham* (1989) 216 Cal.App.3d 1039, 1052-1053.) Put another way, the natural and probable consequences doctrine "is based on the recognition that 'aiders and abettors should be responsible for the criminal harms they have naturally, probably and foreseeably put in motion.'" (*Prettyman, supra*, 14 Cal.4th at p. 260.)

B. *Murder Predicated on Aiding and Abetting Misdemeanor*

The jury was instructed it could rely on three different target offenses to convict Williams of the murder of McKinney and the attempted murder of Anderson: battery; assault likely to produce great bodily injury; and assault with a firearm. Battery is a misdemeanor and the other two target offenses are wobblers, which can be felonies or misdemeanors. (§ 242, 245.) Williams contends that neither his murder conviction nor his attempted murder conviction can properly be based on aiding and abetting an offense that is or can be punished as a misdemeanor. The contention is without merit.

Williams's contention is based on his reading of legislative intent—namely, that it would undercut the Legislature's homicide scheme, which provides that, in the absence of malice, only crimes that are inherently dangerous to human life can serve as a predicate offense for murder. (See, e.g., § 189.) Williams claims that if his murder and attempted murder convictions are allowed to stand, it would be akin to creating a misdemeanor-murder rule. Williams argues that such a result is "patently inconsistent with the carefully calibrated Legislative scheme governing homicide which specifically limits homicide liability to manslaughter where the underlying offense is a misdemeanor."

Williams also argues that allowing the prosecution to use the natural and probable consequences doctrine to convict a defendant of murder based on aiding and abetting a misdemeanor also would "effectively repeal . . . the statutory crime of first degree felony murder . . . and the statutory crime of second degree felony murder."

Williams is mistaken. The legislative scheme governing homicide defines separate and distinct crimes resulting in death. The focus is on direct conduct, not the defendant's status. In contrast, the statutes concerning aiding and abetting (§§ 31, 971) are not concerned with a specific area of substantive offenses, but can be applied to virtually all crimes depending on the defendant's status. Aiding and abetting is one means under which derivative liability for the commission of a criminal offense by another is imposed. Aiding and abetting is not a separate criminal offense. (*People v. Brigham, supra*, 216 Cal.App.3d at p. 1049.)<sup>9</sup> In section 31, the "legislative direction" is that derivative liability is to be imposed " 'on some person other than the actor.' " (*People v. Lee* (2003) 31 Cal.4th 613, 632.) " '[S]ection 31 . . . fixes responsibility on an aider and abettor for a crime personally committed by a confederate.' " (*Ibid.*) The legislative intent behind section 31 is that aiders and abettors, by virtue of their status, are principals and therefore guilty of the charged crime. The derivative liability of aiders and abettors does not undermine the legislative scheme for homicide.

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<sup>9</sup> For this reason, we reject Williams's criticism of the use of the "judge-made" natural and probable consequences doctrine to impose murder liability where the target offense is a misdemeanor as violative of section 6 by creating a common-law crime. Section 6 provides that there are no nonstatutory crimes in California. But neither aiding and abetting liability nor the natural and probable consequences doctrine creates new crimes. (*People v. Brigham, supra*, 216 Cal.App.3d at p. 1049.)

Williams argues unpersuasively it was the Legislature's intent that only a felonious target crime could lead to murder liability under the natural and probable consequences doctrine. To support his argument, Williams cites the first degree felony-murder rule (see § 189 for list of specified felonies), the second degree felony-murder rule (see *People v. Patterson* (1989) 49 Cal.3d 615, 620-621 [felonies inherently dangerous to life], and the misdemeanor-manslaughter rule (see § 192, subd. (b)). But first degree felony murder, second degree felony murder, and involuntary manslaughter stemming from a misdemeanor are concerned with the liability of the perpetrator—not the aider and abettor. Section 31 does not in any sense weaken these legal rules concerning liability for unlawful homicide. The natural and probable consequences doctrine operates independently of the felony murder rules. (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322.)

Williams argues he would have been appropriately charged with involuntary manslaughter under the misdemeanor-manslaughter rule rather than with murder under the natural and probable consequences doctrine. However, the misdemeanor-manslaughter rule is intended for cases in which the killing is carried out without malice. (§ 192, subd. (b).) The murder of McKinney and the attempted murder of Anderson were committed with malice. Given the number of shots fired by Caddell, there is no doubt he fired his gun with malicious intent. Thus, the misdemeanor-manslaughter rule has no application here. Williams's reliance on cases such as *People v. Munn* (1884) 65 Cal. 211 and *People v. Satchell* (1971) 6 Cal.3d 28, overruled on other grounds in *People v. Flood*

(1998) 18 Cal.4th 470, for the proposition that a killing arising from a misdemeanor cannot be murder is misplaced because neither case involved aider and abettor liability.

Furthermore, contrary to Williams's arguments, the law does not proscribe use of a misdemeanor target offense to support a murder conviction under the natural and probable consequences doctrine. The only requirement for applying the natural and probable consequences doctrine "is that defendant share the intent to facilitate the *target* criminal act and that the crime committed be a foreseeable consequence of the target act." (*People v. Godinez* (1992) 2 Cal.App.4th 492, 501, fn. 5; see also *People v. Montes* (1999) 74 Cal.App.4th 1050, 1055; *People v. Caesar* (2008) 167 Cal.App.4th 1050, 1058, disapproved on other grounds in *People v. Superior Court (Sparks)* (2010) 48 Cal.4th 1, 18.)

The foreseeability test is objective—that is, would a reasonable person in the defendant's position have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted by the defendant—rather than subjective. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 531.) Whether a particular crime can be a natural and probable consequence of the target offense is a question of fact for the jury. (*Id.* at pp. 530-531.) In order to find the natural and probable consequences doctrine applies, the jury must find there is "a close connection between the target crime aided and abetted and the offense actually committed." (*Prettyman, supra*, 14 Cal.4th at p. 269; see also *People v. Montes, supra*, 74 Cal.App.4th at p. 1055.) The jury must consider the totality of the circumstances in determining whether the murder was a natural and probable consequence of the target offense.

(*People v. Nguyen, supra*, at p. 531.) Courts have recognized that a defendant's gang membership is among the circumstances to be considered in determining whether a charged offense is a natural and probable consequence of a target offense. (See, e.g., *People v. Olguin* (1994) 31 Cal.App.4th 1355, 1376.)

There is no blanket rule against the use of misdemeanors as target offenses for murder liability under the natural and probable consequences doctrine. To be sure, in *Prettyman, supra*, 14 Cal.4th at page 269, our Supreme Court stated that "[r]arely, if ever," is it true that a serious offense committed by an aider and abettor's confederate is the natural and probable consequence of a " 'trivial' " activity. "Murder, for instance, is *not* the 'natural and probable consequence' of 'trivial' activities. To trigger application of the 'natural and probable consequences' doctrine, there must be a close connection between the target crime aided and abetted and the offense actually committed." (*Ibid.*) It is important, in the context of Williams's argument, to note that the *Prettyman* court did not equate "trivial" with misdemeanors. Moreover, as the Supreme Court recently observed in *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254, 299, the *Prettyman* opinion did "not directly address what crimes can or cannot provide liability for murder under the [natural and probable consequences] doctrine. . . . To be sure, we cautioned that a conviction for murder under the natural and probable consequences doctrine could not be based on ' "trivial" ' activities [citation], but nowhere did we suggest that simple assault [a misdemeanor] must be considered trivial for these purposes."

This is borne out by California cases, which have upheld convictions for murder or attempted murder where the jury was instructed a defendant's liability could result from

aiding and abetting an assault or a battery. (See, e.g., *People v. Medina* (2009) 46 Cal.4th 913, 919 [fistfight]; *People v. Caesar, supra*, 167 Cal.App.4th 1050, 1058 [assault and battery]; *People v. Gonzales* (2001) 87 Cal.App.4th 1, 10-11 [assault—fistfight]; *People v. Montes, supra*, 74 Cal.App.4th 1050 [assault, breach of the peace]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 732-733 [misdemeanor brandishing a gun]; *People v. Olguin, supra*, 31 Cal.App.4th 1355 [assault—single knockdown punch]; *People v. Godinez, supra*, 2 Cal.App.4th 492 [fistfight].)

As noted by the Court of Appeal in *People v. Canizalez* (2011) 197 Cal.App.4th 832, 854: "Given that the natural and probable consequences doctrine looks to the reasonable likelihood that the nontarget murder will result from the target offense, it would appear that applying the label 'felony' or 'misdemeanor' to the target offense is not talismanic in deciding whether the aider and abettor can be convicted of a nontarget murder. The key factor is the ability to anticipate the likelihood that the nontarget offense will result from the target offense. We cannot look to the naked elements of the target crime but must consider the full factual context in which appellants acted. [Citation.] The requirement that the nontarget offense be reasonably foreseeable from the nature of the target offense ensures that in most circumstances, aiding and abetting a misdemeanor will not have murder as its natural and probable consequence, but it does not mandate it."

In cases such as this one involving criminal street gangs, the courts have generally found that because of the escalating nature of gang violence, the evidence may show that it is reasonably foreseeable some gang members will carry guns, and encounters that

begin with verbal challenges and fistfights may result in shootings. (See, e.g., *People v. Medina, supra*, 46 Cal.4th 913; *People v. Gonzales, supra*, 87 Cal.App.4th 1; *People v. Montes, supra*, 74 Cal.App.4th 1050; *People v. Olguin, supra*, 31 Cal.App.4th 1355; *People v. Godinez, supra*, 2 Cal.App.4th 492.) Here, the deadly shooting attack was caused by what JPR gang member Williams perceived as a lack of respect by Anderson in not sharing his drink. Williams called over fellow JPR gang member Thomas, who punched Anderson. After recovering from the punch, Anderson began running away, with Williams and Thomas chasing him. The initial punch and subsequent chase of Anderson prompted other gang members who were present, including the armed Caddell, to join in the chase. Urged by other gang members to shoot at the fleeing Anderson, Caddell obliged. The result was McKinney's murder.

To establish Williams's culpability for murder as an aider and abettor under the natural and probable consequences doctrine, the prosecution was required to show that it was reasonably foreseeable to Williams that a gun would be used to commit a crime other than his intended act of participating and assisting in the assault against Anderson. Given the great potential for escalating violence in gang confrontations and the likelihood that one of the participating gang members with whom he came to the party was armed with a gun, the prosecution met its burden to demonstrate that it was reasonably foreseeable that Williams's actions would cause other gang members to join in the attack and attempt to

kill Anderson intentionally in gang fashion.<sup>10</sup> The initial punch and chase on one hand, and the murder and attempted murder on the other were closely connected both in time and place. (*Prettyman, supra*, 14 Cal.4th at p. 269.) Under these circumstances the assault or battery of Anderson was not, as a matter of law, too trivial an offense to support a first degree murder conviction pursuant to the natural and probable consequences doctrine. (See *People v. Montes, supra*, 74 Cal.App.4th at p. 1055.)

### C. Absence of Malice

Williams contends his murder and attempted murder convictions must be reversed because the jury instruction on the natural and probable consequences doctrine did not require the prosecution to prove anyone—either he or Caddell—harbored malice.

The Attorney General argues Williams forfeited this claim because he did not object to the instruction below. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1124-1125; Evid. Code, § 353.) However, an appellate court has the discretion to review an instruction given even if no objection was made if the instruction affected the substantial rights of the defendant. (§ 1259.) We choose to exercise our discretion and reach the merits.<sup>11</sup>

The instruction at issue is CALCRIM No. 403, which as given, read in pertinent part:

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<sup>10</sup> In this case, the prosecution more than met its burden to prove the likelihood that one of the participating gang members was armed. Williams knew that Caddell had a gun and was aware that Caddell had shot at a rival gang member the previous night.

<sup>11</sup> Similarly, in Williams's other claims of instructional error where no objection was lodged below, we exercise our discretion under section 1259 and reach the merits.

"This instruction applies to a defendant whom you decide aided and abetted a crime other than *homicide or attempted homicide*. The People allege that the defendant aided and abetted a crime that led to a *homicide and/or attempted homicide*.

"[¶] . . . [¶]

"To prove that the defendant is guilty of a *homicide* of [McKinney] and/or *attempted homicide* of [Anderson], the People must prove:

"1. The defendant is guilty of battery, assault likely to produce [great bodily injury] or assault with a firearm;

"2. During the commission of battery, assault likely to produce [great bodily injury] or assault with a firearm a coparticipant other than the defendant in that battery, assault likely to produce [great bodily injury] or assault with a firearm committed the crime of *homicide or attempted homicide*;

"AND

"3. Under all of the circumstances, a reasonable person in defendant's position would have known that the commission of the *homicide or attempted homicide* was a natural and probable consequence of the commission of the battery, assault by means likely to produce [great bodily injury] or assault with a firearm." (Italics added.)

Williams objects to the use of *homicide* and *attempted homicide* rather than murder or attempted murder and claims such use allowed the jury to convict him of murder without the requisite finding of malice.

Williams is mistaken because he ignores the other instructions given by the court. In determining whether instructional error has occurred, we must consider the record as a whole, including other instructions and argument by counsel. (*People v. Cain* (1995) 10 Cal.4th 1, 35-37.) "Jury instructions must be read together and understood in context as presented to the jury. Whether a jury has been correctly instructed depends upon the entire charge of the court. [Citations.]" (*People v. Tatman* (1993) 20 Cal.App.4th 1, 10.)

Further, jurors are presumed to be intelligent persons capable of understanding and correlating jury instructions. (*People v. Yoder* (1979) 100 Cal.App.3d 333, 338.)

" 'Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation.' " (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111-1112.) An erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury. (Cal. Const., art. VI, § 13; *Tatman, supra*, at p. 10.)

Before instructing the jury on murder and the lesser-included offenses of murder, the trial court read CALCRIM No. 500, an introductory instruction on homicide, which explained homicide is the killing of one human being by another and can be justified or unjustified. The instruction specifically informs the jury that if the homicide is justified there is no crime, and if the homicide is not justified, the crime is murder or manslaughter. (CALCRIM No. 500.) The court then proceeded to instruct the jury with CALCRIM No. 520, the standard instruction on murder with malice aforethought, which explains the requisite element of malice. The court also instructed the jury pursuant to CALCRIM No. 600, the standard instruction for attempted murder. Thus, when the instructions are considered together, it is clear the jury was informed that malice was required if it was to return verdicts of murder and attempted murder. Furthermore, the prosecutor argued that Williams could only be convicted of murder if Caddell murdered McKinney. Under these circumstances there is no reasonable possibility that the use of "homicide" and "attempted homicide" in CALCRIM No. 403 caused the jury to convict

Williams of murder without a finding that Caddell—the perpetrator—had the requisite malice.

#### D. *The Merger Rule*

Williams contends that predicating murder liability on aiding and abetting assault crimes under the natural and probable consequences doctrine violated the merger rule set forth in *People v. Ireland, supra*, 70 Cal.2d 522, which held that when the nature of the underlying felony is assaultive, the felony assault merges with the homicide and cannot be the basis for a felony-murder instruction.

In *People v. Ireland, supra*, 70 Cal.2d at p. 539, the Supreme Court held that felony-murder cannot be based on a felony that is an integral part of the homicide because doing so would preclude the jury from considering malice aforethought whenever there has been a homicide as a result of a felonious assault.

Williams's contention fails because the merger rule does not apply to aider and abettor liability under the natural and probable consequences doctrine. (*People v. Karapetyan* (2006) 140 Cal.App.4th 1172, 1177-1178; *People v. Culuko, supra*, 78 Cal.App.4th at p. 322; *People v. Francisco* (1994) 22 Cal.App.4th 1180, 1190; *People v. Luparello* (1986) 187 Cal.App.3d 410, 435-438.)

As the Court of Appeal explained in *People v. Karapetyan, supra*, 140 Cal.App.4th at page 1178, the merger doctrine does not apply because "the natural and probable consequences doctrine operates independently of the second degree felony-murder rule. [Citation.] The natural and probable consequences doctrine does not merge all assaults into the felony-murder rule. Rather, it 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."

E. *Omission of Premeditation Element*

As noted in Part I.C., *ante*, the jury instruction on the natural and probable consequences doctrine referred to the nontarget offense as "homicide" and "attempted homicide" and not to first degree murder and first degree attempted murder. Williams contends his first degree (deliberate and premeditated) murder and first degree (deliberate and premeditated) attempted murder convictions must be reversed because this jury instruction omitted the premeditation element of these crimes.<sup>12</sup> Williams claims the instruction was insufficient to inform the jury that to convict him of first degree murder under the natural and probable consequences doctrine it would have to find that deliberate and premeditated murder, as well as deliberate and premeditated attempted murder, was a natural and probable consequence of the target offense. (See fn. 11, *ante*.)

There is a split of authority on the issue in the Courts of Appeal, and the question is currently before the California Supreme Court. (See *People v. Favor* (2010) 190 Cal.App.4th 770, review granted Mar. 16, 2011, S189317; *People v. Hart* (2009) 176

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<sup>12</sup> The jury was instructed as to the deliberation and premeditation elements of first degree murder and first degree attempted murder in other instructions.

Cal.App.4th 662 [reference to degree required]; *People v. Cummins* (2005) 127

Cal.App.4th 667 [reference not required].)<sup>13</sup>

Assuming, without deciding, that the instruction properly should have referenced first degree murder (and first degree attempted murder), we find such an error would be harmless. It is not reasonably likely that had the instruction been given with the reference to degree of murder (and attempted murder) a more favorable result for Williams would have ensued. (*People v. Prince* (2007) 40 Cal.4th 1179, 1267; *People v. Breverman* (1998) 19 Cal.4th 142, 165 [failure to instruct on lesser included offense in a noncapital case is subject to the *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of harmless error].)

Williams, who started the series of events leading to the death of McKinney and the shooting at Anderson, was aware that Caddell was armed. Noriega, who drove Williams to the party that night, refused to let Caddell ride in the car because Caddell told him he was carrying a gun. After the confrontation with Anderson moved to the street, various gang members urged Caddell to fire his gun at the fleeing Anderson. Williams was one of them; he yelled "shoot." Moreover, Williams, having observed Caddell shoot Maye the night before, knew Caddell had no compunction against shooting people for a gang purpose. Under these circumstances, the evidence supports a finding that a

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<sup>13</sup> Williams's reliance in his reply brief on *People v. Caesar, supra*, 167 Cal.App.4th 1050, an opinion issued by this court, is misplaced. In *People v. Caesar, supra*, at pages 1058-1059, we reduced the defendant's conviction of attempted premeditated murder to attempted unpremeditated murder because the jury found the perpetrator was guilty of attempted unpremeditated murder. The case did not involve alleged error with the foreseeability component of the natural and probable consequences instruction and does not assist Williams's position.

reasonable person in Williams's position would have or should have foreseen premeditated murder by Caddell if nothing unusual intervened. Although murder may not always be a natural and probable consequence of battery or assaultive crimes, under certain factual circumstances, particularly in the gang context, a jury is entitled to find that it was. (*People v. Medina, supra*, 46 Cal.4th at pp. 927-928.)

Premeditation and deliberation can occur in a brief span of time. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1166.) A reasonable jury could have concluded under the facts of this case that the spur of the moment, intentional murder of a partygoer who had irked Caddell's gang buddies was objectively foreseeable. Regardless whether the degree of murder was referenced in the instruction, we conclude the jury was likely to find the murder of McKinney and the attempted murder of Anderson were deliberate and premeditated—that is, first degree.

F. *Instruction on Need for Supporting Evidence Regarding Williams's Testimony*

Williams contends the trial court interfered with his right to present a defense by instructing the jury it could not consider his testimony alone to prove any fact. The contention is without merit. (See fn. 11, *ante*.)

Williams complains specifically about CALCRIM No. 301, which as given, read: "*Except for the testimony of Christian Noriega or Mr. Williams which require supporting evidence if you determine he is an accomplice, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.*" (Italics added.) The trial court added the italicized language pursuant to CALCRIM No. 301's bench notes, which provide that

such language should be used "if the testimony of an accomplice or other witness requires corroboration." (Judicial Council of Cal., Crim. Jury Instns. (Fall 2010 ed.) Bench Notes to CALCRIM No. 301, p. 69.) This directive is in keeping with *People v. Chavez* (1985) 39 Cal.3d 823, 831.

The trial court's reading of CALCRIM No. 301 immediately followed its reading of CALCRIM No. 334, which explained that accomplice testimony must be corroborated:

"Before you may consider the statement of Christopher Noriega, Cayson Caddell and/or Travell Williams as evidence against the defendants, you must decide whether each was an accomplice to the particular crimes. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if,

"1. He or she knew of the criminal purpose of the person who committed the crime;

"AND

"2. He or she intended to and did in fact, aid, facilitate, promote, encourage or instigate the commission of the crime;[]

"[¶] . . . [¶]

"If you decide that a witness or declarant was not an accomplice, then supporting evidence is not required and you should evaluate his statement or testimony as you would that of any other witness.

"If you decide that any or all of these people were an accomplice, then you may not convict the defendants based on statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if:

"1. The accomplice's statement or testimony is supported by other evidence that you believe;

"2. That supporting evidence is independent of the accomplice's statement or testimony;

"AND

"3. That supporting evidence tends to connect the defendant to the commission of the crimes."<sup>14</sup>

There is no dispute that the trial court correctly instructed the jury pursuant to CALCRIM No. 334. A defendant cannot be convicted on the testimony by an accomplice unless that testimony is corroborated. (§ 1111.) Corroboration is " 'independent evidence,' that is, evidence that 'tends to connect the defendant with the crime charged' without aid or assistance from the accomplice's testimony. . . . " "[T]he

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<sup>14</sup> The remainder of CALCRIM No. 334 as given read: "Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice. [¶] Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence."

corroborative evidence may be slight and entitled to little consideration when standing alone." ' ' " (*People v. Avila* (2006) 38 Cal.4th 491, 562.)

Williams contends CALCRIM No. 301, as given, constituted prejudicial error because it stated his testimony as an accomplice required supporting evidence, without specifying that the corroboration requirement applied *only* to his testimony that incriminated Caddell. Williams argues that the jurors would infer from CALCRIM No. 301 that all of his testimony—including his exculpatory evidence, which is not covered by section 1111—should be viewed with caution and not be accepted unless it was corroborated. We disagree.

We presume jurors are not only intelligent, but specifically "capable of understanding and correlating jury instructions" (*People v. Martin* (1983) 150 Cal.App.3d 148, 158) and that they do so. (See *People v. Holt* (1997) 15 Cal.4th 619, 677 [reviewing court must assume jury understood and applied instructions as a whole]; see also CALCRIM No. 200 ["Pay careful attention to all of these instructions and consider them together."].)

In reviewing claims of instructional error, "[w]e must consider whether it is reasonably likely that the trial court's instructions caused the jury to misapply the law. [Citation.] '[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.' [Citations.]" (*People v. Carrington* (2009) 47 Cal.4th 145, 192.) The test is "whether there is a 'reasonable likelihood' that the jury understood the charge as the defendant asserts." (*People v. Kelly* (1992) 1 Cal.4th 495, 525, quoting *Estelle v.*

*McGuire* (1991) 502 U.S. 62, 72.) Our inquiry is not whether it is possible that the jury could interpret the challenged instruction in a particular way—that is, whether an appellant's interpretation "could be teased out of the instruction[]." (*People v. Avena* (1996) 13 Cal.4th 394, 417.)

Considering CALCRIM No. 301 in light of CALCRIM No. 334, the instruction that immediately preceded it, we conclude it is not reasonably likely that the jury misinterpreted CALCRIM No. 301 to require corroborating evidence before any of Williams's testimony could be used to prove a fact in support of his own defense. CALCRIM No. 334 informed the jury the corroboration requirement for accomplice testimony applied *only* when such testimony tended to incriminate a defendant. CALCRIM No. 334 makes this clear in two sections. First, the instruction reads: "[Y]ou may not convict the defendant[ ] based on [the] statement or testimony [of an accomplice] alone. You may use the statement or testimony of an accomplice to convict the defendant only if . . . [¶] [t]he accomplice's statement or testimony is supported by other evidence that you believe . . . ." Second, CALCRIM No. 334 unequivocally instructed "[a]ny statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution."

Given the proximity of the two instructions when the trial court charged the jury and the presumptions regarding jury intelligence and ability to correlate instructions, we conclude the jury properly interpreted CALCRIM No. 301 to apply only with respect to Williams's testimony that tended to incriminate Caddell. It is not reasonably likely that the jury misapplied CALCRIM No. 301 to require supporting evidence before any of his

testimony could be used to prove any other fact. Reasonably read, CALCRIM No. 334 and CALCRIM No. 301 adequately informed the jurors that *only* incriminatory testimony of an accomplice must be corroborated. After all, one cannot be an accomplice to oneself. Jurors would not have understood CALCRIM No. 301 in the manner urged by Williams.

Williams relies on *Cool v. United States* (1972) 409 U.S. 100 (*Cool*), where the high court reversed a counterfeiting conviction based on a jury instruction concerning an accomplice's testimony; the accomplice had admitted his guilt and said the defendant neither knew about nor participated in the criminal conduct. (*Id.* at pp. 100-101, 104.) The instruction, in effect, directed the jury to accept the accomplice's exculpatory defense testimony if "you are convinced it is true *beyond a reasonable doubt*." (*Id.* at p. 102.)<sup>15</sup>

Noting "the clear implication of this instruction was that the jury should disregard [the accomplice's] testimony unless it was 'convinced it is true beyond a reasonable doubt,'" the Supreme Court held the instruction "places an improper burden on the defense and allows the jury to convict despite its failure to find guilt beyond a reasonable doubt." (*Cool, supra*, 409 U.S. at pp. 102-103, fns. omitted.) The Supreme Court found

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<sup>15</sup> The trial court in *Cool, supra*, 409 U.S. at p. 102, instructed the jury on the definition of " 'accomplice' " and warned that the testimony of an accomplice "is 'open to suspicion.' " The court then added the following remarks, which were at issue on appeal: " 'However, I charge you that the testimony of an accomplice is competent evidence and it is for you to pass upon the credibility thereof. If the testimony carries conviction and you are convinced it is true *beyond a reasonable doubt*, the jury should give it the same effect as you would to a witness not in any respect implicated in the alleged crime and you are not only justified, but it is your duty, not to throw this testimony out because it comes from a tainted source.' " (*Ibid.*, original italics.)

the challenged instruction violated the defendant's Sixth Amendment right to present exculpatory accomplice testimony by "impermissibly obstruct[ing] the exercise of that right by totally excluding relevant evidence unless the jury makes a preliminary determination that it is extremely reliable." (*Id.* at p. 104; see also *Washington v. Texas* (1967) 388 U.S. 14.) Additionally, the challenged instruction effectively reduced the prosecution's burden of proof. (*Cool, supra*, at p. 104.)<sup>16</sup>

Contrary to Williams's arguments, *Cool, supra*, 409 U.S. 100, is not controlling and does not establish that it was error to instruct the jury here with CALCRIM No. 301. The overriding concern of the high court in *Cool* was the improper use of the "beyond a reasonable doubt" language in the instruction. (*Cool, supra*, 409 U.S. 100.) CALCRIM No. 301, as given, was not comparable to the challenged instruction in *Cool*. The jury here was not told that Williams's exculpatory testimony had to be proved beyond a reasonable doubt. Rather, CALCRIM No. 301 reminded the jury that, as set forth in CALCRIM No. 334, accomplice testimony, including the testimony of Williams, required corroboration if it incriminated his codefendant. The clear implication is that Williams's testimony exonerating his own conduct did not require corroboration.

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<sup>16</sup> In a footnote, the Supreme Court also criticized another portion of the jury charge in which the trial court stated: "I further instruct you that testimony of an accomplice may alone and uncorroborated support your verdict of guilty. . . ." (*Cool, supra*, 409 U.S. at p. 103, fn. 4.) The high court observed that given the accomplice testimony was exculpatory, "this instruction was confusing to say the least," and concluded the charge was "fundamentally unfair in that it told the jury that it could convict solely on the basis of accomplice testimony without telling it that it could acquit on this basis." (*Ibid.*)

The high court in *Cool* recognized that instructions warning a jury to treat accomplice testimony " 'with care and caution' " are properly given. (*Cool, supra*, 409 U.S. at p. 103.) "In most instances, they represent no more than a commonsense recognition that an accomplice may have a special interest in testifying, thus casting doubt upon his veracity." (*Ibid.*) Further, our conclusion that Williams's reliance on *Cool* is misplaced is bolstered by the high court's language: "[T]here is an essential difference between instructing a jury on the care with which it should scrutinize certain evidence in determining how much weight to accord it and instructing the jury, as the judge did here, that as a predicate to the consideration of certain evidence, it must find it true beyond a reasonable doubt." (*Id.* at p. 104.)

#### G. *Corpus Delicti Rule Instruction*

Williams, joined by Caddell (see fn. 3, *ante*), contends the trial court erred by instructing the jury pursuant to CALCRIM No. 359—*corpus delicti* instruction. Specifically, Williams isolates one sentence—"The identity of the person who committed the crime and *the degree of the crime may be proved by the defendant's statement alone*"—from the rest of CALCRIM No. 359, and argues the sentence lowered the prosecution's burden of proof with respect to show premeditation—the element that is required for first degree murder and first degree attempted murder. The contention is without merit. (See fn. 11, *ante*.)

CALCRIM No. 359, as given, provides: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on a defendant's out-of-court statements to convict him if you conclude that other evidence

shows that the charged crime or a lesser included offense was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

CALCRIM No. 359 correctly expresses the corpus delicti rule. (*People v. Reyes* (2007) 151 Cal.App.4th 1491, 1498.) " ' "The corpus delicti of a crime consists of two elements[:] the fact of the injury or loss or harm, and the existence of a criminal agency as its cause." ' ' (*People v. Zapien* (1993) 4 Cal.4th 929, 985-986.) Under the corpus delicti rule, "every *conviction* must be supported by some proof of the corpus delicti *aside from or in addition to* [defendant's extrajudicial] statements, and . . . the jury must be so instructed." (*People v. Alvarez* (2002) 27 Cal.4th 1161, 1165.) The purpose of the corpus delicti rule is "to ensure that one will not be falsely convicted, by his or her untested words alone, of a crime that never happened." (*Id.* at p. 1169.) The corpus delicti rule is satisfied by a slight or prima facie quantum of independent proof. (*Id.* at p. 1171.) "There is no requirement of independent evidence 'of every physical act constituting an element of an offense,' so long as there is some slight or prima facie showing of injury, loss, or harm by a criminal agency. . . . [O]nce the necessary quantum of independent evidence is present, the defendant's extrajudicial statements may then be considered for their full value to strengthen the case on all issues." (*Ibid.*)

It has long been held that the corpus delicti rule does not include the degree of the crime, which may be shown by a defendant's statements alone. (*People v. Miller* (1951) 37 Cal.2d 801, 806 ["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 committed."]; *People v. Cooper* (1960) 53 Cal.2d 755, 765 [same]; see also *Ureta v. Superior Court* (1962) 199 Cal.App.2d 672, 676 [defendant's statements alone may establish malice element of murder]; 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 47, pp. 253-254.)

" "[T]he correctness of jury instructions is to be determined from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction." " (*People v. Musselwhite* (1998) 17 Cal.4th 1216, 1248.) "An instruction can only be found to be ambiguous or misleading if, in the context of the entire charge, there is a reasonable likelihood that the jury misconstrued or misapplied its words." (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237.)

CALCRIM No. 359's correct statement of the law that the degree of the crime may be proved by extrajudicial statements alone does not reduce the prosecution's burden of proof on premeditation to less than guilt beyond a reasonable doubt. The instruction merely constitutes a statement that the corpus delicti rule does not preclude reliance on the defendant's out-of-court statements alone to prove the degree of the crime beyond a reasonable doubt. The court instructed the jury with CALCRIM No. 220, which defines reasonable doubt, informs the jury that it must consider all the evidence, and instructs the jury the defendant is entitled to an acquittal unless the evidence proves him guilty beyond

a reasonable doubt. Further, CALCRIM No. 359 advised the jury it could "not convict the defendant unless the People have proved (his/her) guilt beyond a reasonable doubt." Reasonable jurors would have understood from the entirety of the charge that the prosecution was required to prove the degree of the crime beyond a reasonable doubt after examination of all the evidence. CALCRIM No. 359 was not misleading, and it did not reduce the prosecution's burden of proof for establishing premeditation.

Williams's reliance on *Francis v. Franklin* (1985) 471 U.S. 307, is misplaced. That case found constitutionally infirm instructions that created a rebuttable presumption of intent from proof of other elements of the crime. (*Id.* at pp. 315-316.) There was no similar instruction here.

#### H. *Intoxication Instructions*

Williams contends the trial court gave conflicting instructions on voluntary intoxication.<sup>17</sup> The contention is without merit. (See fn. 11, *ante.*)

Pursuant to CALCRIM No. 404, the trial court instructed the jury, "If you conclude that the defendant was intoxicated at the time of the alleged crime, you may consider this evidence in deciding whether the defendant: [¶] A. Knew that Cayson Caddell intended to commit one of the target offenses; [¶] AND [¶] B. Intended to aid and abet Cayson Caddell in committing one of the target offenses. [¶] Someone is

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<sup>17</sup> The parties dispute whether Williams was intoxicated. However, the trial court implicitly found there was sufficient evidence of his intoxication to warrant jury instructions on voluntary intoxication. As an appellate court, our role is to determine whether the intoxication evidence was legally sufficient to warrant an instruction. (*People v. Breverman, supra*, 19 Cal.4th at p. 177.) Here, the evidence of Williams's intoxication was legally sufficient.

intoxicated if he used any drug, drink, or other substance that caused an intoxicating effect. [¶] Do not consider evidence of intoxication in deciding whether murder or attempted murder is a natural and probable consequence of one of the target offenses."

Pursuant to CALCRIM No. 625, the trial court instructed the jury, "You may consider evidence, if any, of the defendant's voluntary intoxication only in a limited way. You may consider that evidence only in deciding whether the defendant acted with an intent to kill, or the defendant acted with deliberation and premeditation. [¶] A person is voluntarily intoxicated if he or she becomes intoxicated by willingly using any intoxicating drug, drink, or other substance knowing that it could produce an intoxicating effect, or willingly assuming the risk of that effect. [¶] *You may not consider evidence of voluntary intoxication for any other purpose.*" (Italics added.)

It was proper to give two instructions on voluntary intoxication because Williams was prosecuted on both theories of aider and abettor liability.

CALCRIM No. 625, as given, was a correct statement of the law based on Caddell's liability as a direct perpetrator and Williams's liability as an aider and abettor of murder. As to the murder charge, evidence of voluntary intoxication was admissible "solely on the issue of . . . whether the defendant premeditated, deliberated, or harbored express malice aforethought." (§ 22, subd. (b); see *People v. Mendoza* (1998) 18 Cal.4th 1114, 1125.)<sup>18</sup>

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<sup>18</sup> Section 22, subdivision (b) reads: "(b) 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."

Williams was also prosecuted on an aider and abettor theory under the natural and probable consequences doctrine, which required a different instruction on voluntary intoxication—namely CALCRIM No. 404. (See *People v. Mendoza, supra*, 18 Cal.4th at pp. 1133-1134.) CALCRIM No. 404 was a correct statement of law in this regard. To establish aider and abettor liability under the natural and probable consequences doctrine, the prosecution need only prove the defendant had knowledge of his or her confederate's criminal purpose and the intent to encourage or facilitate that purpose. Once the jury makes these findings, it can convict a defendant of the intended crime and any other crime committed that was a natural and probable consequence of the intended crime. (*People v. Mendoza, supra*, at p. 1123.) A jury may consider evidence of a defendant's voluntary intoxication in deciding whether he or she had the knowledge and intent necessary for aiding and abetting commission of the target offense. (*Id.* at pp. 1118, 1131.) This is so regardless of whether the target crime required general or specific intent. (*Id.* at p. 1132.)

Williams sees a conflict between CALCRIM No. 404 and CALCRIM No. 625 solely on the basis of the last sentence of CALCRIM No. 625: "You may not consider evidence of voluntary intoxication for any other purpose." Williams argues this sentence effectively nullified CALCRIM No. 404—thereby allowing the jury to convict him of murder and attempted murder without considering evidence of his intoxication.

Williams is mistaken. Purportedly erroneous instructions are reviewed in the context of the entire charge to determine whether it is reasonably likely the jury misconstrued or misapplied the challenged instructions. (*People v. Castillo* (1997) 16

Cal.4th 1009, 1016-1017.) We presume that jurors are intelligent and capable of understanding and correlating all jury instructions given. (*People v. Kegler* (1987) 197 Cal.App.3d 72, 80.) When read together (see *People v. Smithey* (1999) 20 Cal.4th 936, 963) the instructions contained in CALCRIM Nos. 404 and 625 provided adequate guidance to the jury. We find no reasonable likelihood that the last sentence in CALCRIM No. 625 could have been understood in the manner that Williams suggests. Despite the last sentence of CALCRIM No. 625, it is not reasonably likely that the jury would have concluded from the two instructions that it could not consider the intoxication evidence on the issue whether Williams had the requisite mental state for an aider and abettor under the natural and probable consequences doctrine. Any reasonable juror would have understood the final sentence of CALCRIM No. 625 as meaning that the jury could not consider the voluntary intoxication evidence for any purpose other than those expressly authorized by CALCRIM Nos. 404 and 625.

#### *I. Cruel and/or Unusual Punishment*

Subdivision (d) of section 12022.53 mandates imposition of a 25-year-to-life sentence enhancement for personal and intentional firearm use in connection with certain enumerated felonies where great bodily injury or death results. Under section 12022.53, subdivision (e)(1), this 25-year-to-life enhancement applies to aiders and abettors who commit murder for the benefit of a criminal street gang if " 'any principal' " in the crime personally and intentionally discharged a firearm causing death. (*People v. Hernandez* (2005) 134 Cal.App.4th 474, 480.) "[T]his statute is expressly drafted to extend the enhancement for gun use in any enumerated serious felony to gang members who aid and

abet that offense in furtherance of the objectives of a criminal street gang." (*People v. Gonzales, supra*, 87 Cal.App.4th at p. 15.)

Williams contends imposition of the 25-year-to-life enhancement for gang-related vicarious firearm use under section 12022.53, subdivision (e), violated the federal and state constitutional guarantees against cruel and/or unusual punishment. The contention is without merit.

Article I, section 17 of the California Constitution provides: "Cruel or unusual punishment may not be inflicted. . . ." A prison sentence violates Article I, Section 17, if it is "so disproportionate to the crime for which it is inflicted that it shocks the conscience and offends fundamental notions of human dignity." (*In re Lynch* (1972) 8 Cal.3d 410, 424, fn. omitted.) In applying this test, we look to (1) the nature of the offense and the offender, (2) a comparison with the penalty for more serious crimes in the same jurisdiction, and (3) a comparison with punishment imposed for the same offense in different jurisdictions. (*Id.* at pp. 425-427.) "[The] defendant must overcome a 'considerable burden' to show the sentence is disproportionate to his level of culpability. [Citation.] Therefore, '[f]indings of disproportionality have occurred with exquisite rarity in the case law.'" (*People v. Em* (2009) 171 Cal.App.4th 964, 972.)

Williams acknowledges that first degree murder is the most serious crime in California. But he points out he was an aider and abettor—not the shooter. Further, Williams notes he was only 19 years old at the time and did not have a history of

participating in violent gang crimes.<sup>19</sup> The lack of a significant criminal record is not determinative. (*People v. Martinez* (1999) 76 Cal.App.4th 489, 497.) Williams's attempt to minimize the nature of his crime and his blameworthiness is unavailing. This is especially so given Williams's pivotal role in the shooting death.

Williams went uninvited with fellow gang members to the graduation party, looking for a way to enhance the reputation of the newly reconstituted JPR gang. By picking a fight with Anderson, Williams set in motion the series of events that led to the murder of McKinney. Williams called over Thomas, whom he knew would resort to violence if told that Anderson disrespected JPR. Williams also knew Caddell was at the party, was armed with a gun and had shot at a rival gang member the night before. And Williams told Caddell to shoot Anderson.

Williams argues that because of section 12022.53, subdivision (e) his sentence is much more severe than the sentence that would be imposed under California law on an actual killer who committed murder without a firearm. Such an argument has been rejected in *People v. Gonzales, supra*, 87 Cal.App.4th at page 18: "The Legislature determined in enacting section 12022.53 that the use of firearms in commission of the designated felonies is such a danger that, 'substantially longer prison sentences must be imposed . . . in order to protect our citizens and to deter violent crime.' The ease with which a victim of one of the enumerated felonies could be killed or injured if a firearm is involved clearly supports a legislative distinction treating firearm offenses more harshly

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<sup>19</sup> Williams previously had been convicted of first degree burglary and assault likely to cause great bodily injury.

than the same crimes committed by other means, in order to deter the use of firearms and save lives." Williams's distinction "does not render section 12022.53[, subdivision (e)] cruel or unusual punishment." (*People v. Martinez, supra*, 76 Cal.App.4th at p. 498.)

Williams also argues that the punishment imposed under section 12022.53, subdivision (e) for aiders and abettors who have not personally and intentionally used a firearm is greater than sentencing schemes in other states. This argument was also rejected in *People v. Gonzales, supra*, 87 Cal.App.4th at page 18: "That California's punishment scheme is among the most extreme does not compel the conclusion that it is unconstitutionally cruel or unusual. This state constitutional consideration does not require California to march in lockstep with other states in fashioning a penal code. It does not require "conforming our Penal Code to the 'majority rule' or the least common denominator of penalties nationwide." [Citation.] Otherwise, California could never take the toughest stance against repeat offenders or any other type of criminal conduct. [¶] [T]he needs and concerns of a particular state may induce it to treat certain crimes or particular repeat offenders more severely than any other state. . . .'"

The Court of Appeal in *People v. Gonzales, supra*, 87 Cal.App.4th at page 19, continued: "The Legislature has chosen to severely punish aiders and abettors to crimes by a principal armed with a gun committed in furtherance of the purposes of a criminal street gang. It has done so in recognition of the serious threats posed to the citizens of California by gang members using firearms." The seriousness of the danger is aptly demonstrated by the murder of 15-year-old McKinney—an innocent victim of gang

violence who caught a deadly stray bullet. The penalty imposed on Williams was not out of proportion and does not represent cruel or unusual punishment.

The Eighth Amendment to the United States Constitution prohibits "cruel and unusual punishments." It applies to the states through the Fourteenth Amendment and "contains a 'narrow proportionality principle' that 'applies to noncapital sentences.' " (*Ewing v. California* (2003) 538 U.S. 11, 20.) The Eighth Amendment " 'does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are 'grossly disproportionate' to the crime.' " (*Id.* at p. 23.) As with claims under our state Constitution, a court, in determining whether a sentence violates the federal constitutional guarantee against cruel and unusual punishment, may consider "the gravity of the offense and the harshness of the penalty." (*Solem v. Helm* (1983) 463 U.S. 277, 292.) "Outside the context of capital punishment, successful challenges to the proportionality of particular sentences [under the federal Constitution will be] exceedingly rare." (*Rummell v. Estelle* (1980) 445 U.S. 263, 272.)

Regarding Williams's challenge to his sentence on federal grounds, we conclude the sentence imposed here is not one of the extreme and exceedingly rare cases where the sentence is grossly disproportionate to the offense. (*Harmelin v. Michigan* (1991) 501 U.S. 957, 1001, 1005 [upholding life sentence without parole for possession of a large amount of drugs by a first-time felon]; *Ewing v. California, supra*, 538 U.S. at pp. 19-20, 28 [holding California's "Three Strikes" sentence of 25 years to life for \$1,200 felony theft with prior thefts and burglary, was not cruel and unusual]; *Rummell v. Estelle*,

*supra*, 445 U.S. 263 [upholding life sentence for a recidivist thief].) Williams's claim of cruel and unusual punishment under the Eighth Amendment fails.

## II. CADDELL'S APPEAL

### A. *Readback of Testimony*

Caddell contends his convictions must be reversed because the trial court deprived him of assistance of counsel when it allowed the jury to hear a readback of testimony without notice to counsel of the testimony that was to be read back. Although Caddell is correct the trial court erred, we conclude the error was not prejudicial.

#### *Factual Background*

Caddell's trial counsel signed a stipulation form on December 28, 2009, the day the jury began deliberating. The stipulation read in relevant part: "After the jury has begun deliberations, upon receiving a request from the jury for read back of testimony, any judge of this Court may direct the Court Reporter who reported the relevant proceedings to enter the jury deliberation room and read back the requested testimony (or portion thereof approved by the Court) outside the presence of the parties or their counsel. In such instances, the Court Reporter will be deemed to have been instructed to read back the entire portion of testimony approved by the Judge and not to respond directly to any questions or statements from the jury; and such instructions be deemed entered in the minutes of the Court."

The trial court then inquired of all counsel: "If there is a request for readback, then is it all right if I simply notify all counsel through my clerk that the request has been

made and go ahead and authorize the readback if it's testimony. I won't authorize readback of argument generally. If there's any other questions, we'll call you.

Counsel for Williams agreed "[a]s long as I have time to make some input to the readback, if needed."

The court replied: "Yes. If you call and say that you want to be heard, then we'll wait and call everybody. But generally if they want . . . a portion, I'll let them go ahead and tell the court reporter what they're looking for. We'll tell you what they're asking for. If you have an objection, then I won't authorize it until everyone has a chance to get in here. Otherwise, I'll take it as a yes and send the court reporter in. Is that all right with everyone?"

All counsel agreed to this procedure.

Later that day, the jury sent the court a note requesting transcripts for the closing argument by counsel for Williams and the first day of Bryan Smith's testimony.

The court minutes indicate there was no objection to the readback of Smith's testimony, but such consent did not take place during a recorded proceeding. When counsel reconvened in the courtroom, the trial court told them the jury was provided with Smith's first day of testimony. After soliciting views from counsel whether the request for readback of the closing argument should be granted, the court denied the request.

The following colloquy ensued:

"[WILLIAMS'S COUNSEL]: Your honor, just for clarification, Bryan Smith's transcript or testimony, what was actually read back?"

"THE COURT: Well, they asked for the whole first day of his testimony. So I'm assuming that's what was read back—or is being read back, but I'm not in the jury room. I don't know. It would not be unusual for the jury to want a specific part or they're looking for something specific, but I don't know for a fact.

"[WILLIAMS'S COUNSEL]: And I don't recall if that was [the prosecutor's] direct.

"THE COURT: I don't know.

"[WILLIAMS'S COUNSEL]: Any way we can inquire? . . . .

"THE COURT: Are you asking whether it was direct or indirect or cross or what part it was?

"[WILLIAMS'S COUNSEL]: Yes.

"THE COURT: I can tell you that, I think. So hold on.

"THE COURT REPORTER: I did not read back the first day of testimony."

After an off the record discussion, the colloquy continued:

"THE COURT: I asked the court reporter off the record what day of the testimony it was, and she indicated that it wasn't the first day. They thought it was, but it wasn't the first day, and it turned out to be the last day of his testimony.

"[WILLIAMS'S COUNSEL]: For instance, did they ask an attorney's line of questioning, or did they ask for cross-examination?

"THE COURT: I'm not going to reveal that at this point. I don't think that would be appropriate. Their deliberations are supposed to be in secret.

"[WILLIAMS'S COUNSEL]: The question is supposed to be disclosed to the attorneys. And I'm not sure if they specifically said the last day of testimony or . . . questioning [by Caddell's counsel].

"THE COURT: You have what I have. This is the question they presented. . . .

"[CADDELL'S COUNSEL]: Your Honor, I would just—because it is ambiguous, the last day. Was that the last day meaning when I called him in my case, or was it the last day when he first testified?

"THE COURT: I don't know.

"[CADDELL'S COUNSEL]: That's what I think we're entitled to know.

"THE COURT: I don't think it's appropriate to reveal that.

"[CADDELL'S COUNSEL]: If the jury asks for a question and says we want this portion read back, we're unquestionably entitled to know that. We're also then by almost definition laboring under the assumption that that's the part that's read back. If a different part then gets read back, it doesn't stand to reason that that would be kept secret from us.

"THE COURT: I do not feel it's appropriate to reveal their deliberations other than whatever they can indicate to me in writing. And I'm not going to ask further about that.

"[CADDELL'S COUNSEL]: And I'm not asking [the] Court to reveal their deliberations. I'm asking the Court to specifically inform counsel—

"[¶] . . . [¶]

"[CADDELL'S COUNSEL]: All I'm asking the Court is to inform us what the court reporter read to them, which is different materially so than what they asked for.

"THE COURT: Again, Counsel, the question I received asked for Bryan Smith's first day transcript . . . . And you know what I know. And I don't plan to inquire further at this point."

*Legal Principles*

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." A conviction will not be reversed for a violation of section 1138 unless the appellant establishes prejudice. (*People v. Jennings* (1991) 53 Cal.3d 334, 384-385.) The standard of review is the standard set forth in *People v. Watson, supra*, 46 Cal.2d at page 836. (*People v. Ainsworth* (1988) 45 Cal.3d 984, 1020.)

The proscription against ex parte communication between the court and a deliberating jury protects a defendant's rights. "Communication between judge and jury during deliberations without affording defendant and counsel an opportunity to be present impinges on a defendant's constitutional right to the assistance of counsel." (*People v. Hawthorne* (1992) 4 Cal.4th 43, 69.) In the absence of a stipulation to the contrary, a trial court may only entertain communications from the jury in open court after counsel have been notified, so that the parties are apprised of any such communication and may timely object to any irregular action by the court or the jury. (*People v. Hogan* (1982) 31

Cal.3d 815, 848-849, disapproved on another point in *People v. Cooper* (1991) 53 Cal.3d 771, 836.) It is "critically important that a defendant and his attorney be permitted to participate in decisions as to what testimony is to be reread to the jury"; not to do so would tend to "deprive the defendant of his fundamental constitutional right to the assistance of counsel at this critical stage of the proceedings." (*People v. Knighten* (1980) 105 Cal.App.3d 128, 132.)<sup>20</sup> "This rule is based on the precept that a defendant should be afforded an adequate opportunity to evaluate the propriety of a proposed judicial response in order to pose an objection or suggest a different reply more favorable to the defendant's case." (*People v. Garcia* (1984) 160 Cal.App.3d 82, 88.) Because any such error implicates a fundamental federal constitutional right, a reviewing court must reverse unless the error is harmless beyond a reasonable doubt. (*People v. Knighten, supra*, at p. 133.) Violation of a defendant's right to be represented by counsel at all critical stages of trial constitutes federal constitutional error and requires reversal if the error cannot be demonstrated to be harmless beyond a reasonable doubt. (*Rushen v. Spain* (1983) 464 U.S. 114, 117-120; *People v. Hogan, supra*, 31 Cal.3d at p. 850.)

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<sup>20</sup> The actual readback of testimony to a deliberating jury is not a critical stage of a criminal trial. (*People v. Cox* (2003) 30 Cal.4th 916, 963, disapproved on another ground in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22; *People v. Rhoades* (2001) 93 Cal.App.4th 1122, 1124.) However, the discussion between the court and counsel involving what response should be given to a jury's question regarding evidence or instruction is a critical stage of the trial. (*People v. Hogan, supra*, 31 Cal.3d at p. 849; *People v. Rubalcava* (1988) 200 Cal.App.3d 295, 299-300; *People v. Knighten, supra*, 105 Cal.App.3d at p. 132.)

### *Analysis*

The Attorney General offers a forfeiture argument because Caddell did not object below. The Attorney General is mistaken in part, and, under the circumstances presented here, we reject the notion that Caddell's claim was forfeited or waived. Neither Caddell nor Williams objected to a readback of Smith's *first* day of testimony, which was the only jury request for which they received proper notification and a chance to be heard. Significantly, however, counsel were not informed before the fact that the court reporter read the *last* day of Smith's testimony; hence, counsel did not have an opportunity for input of any kind, including objection. Once counsel learned that the court reporter read back the last day of Smith's testimony, they sought further information, and when the court refused to answer their inquiries, they plainly registered their objections. There was no forfeiture.

Even though the record is not fully developed, there is little doubt that the procedure followed below was flawed. The court reporter, upon learning that the jury desired a different readback than the one originally requested, should have reported this change to the court before proceeding with the readback. This is so for two reasons. First, the court—not the court reporter—properly determines what evidence and instructions are to be provided to a deliberating jury. (See *People v. Beardslee* (1991) 53 Cal.3d 68, 97.) Second, if the court reporter had informed the court of the change in the jury's request before proceeding with the readback, the court could have contacted counsel and informed them of the changed request, thereby giving counsel a timely opportunity for input on whether the *last* day of Smith's testimony should be read back or

to make other suggestions. "A statutory or constitutional violation occurs . . . where the court actually provides the jury with instructions or evidence during deliberations without first consulting counsel." (*People v. Mickle* (1991) 54 Cal.3d 140, 174.) The trial court denied Caddell the assistance of counsel at a critical stage of the trial when it allowed evidence to be presented to the jury beyond the scope of what had been previously agreed upon by the parties. (*People v. Rubalcava, supra*, 200 Cal.App.3d at pp. 299-300 [additional instructions].)

The trial court exacerbated the error by refusing to inquire and disclose what portion of Smith's testimony was read back. As a result, exactly what was read back to the jury remained uncertain. This uncertainty prevented counsel from having a meaningful opportunity *after the fact* to make suggestions as to what would be appropriate in light of the improper readback. Again, Caddell's right to assistance of counsel was abridged. Further, the court's actions left the record unclear as to what portion of Smith's testimony was read back, thereby rendering appellate review of this issue more difficult than it otherwise would be. (See *People v. Bradford* (2007) 154 Cal.App.4th 1390, 1420 & fn. 17.)

Having found error, including error involving Caddell's right to assistance of counsel at a critical stage, we must decide whether the error was harmless beyond a reasonable doubt. (*Chapman v. California* (1967) 386 U.S. 18.)

The crux of Caddell's prejudice claim is that the transcript of Smith's last day of testimony on December 1, 2009, included hearings held out of the presence of the jury and testimony that was stricken after objection. In his opening brief, Caddell argues:

"The government cannot show beyond a reasonable doubt that the jury did not hear matters it was not entitled to hear, and that those errors did not prejudice appellant."

Because of the trial court's decision to not further inquire of the court reporter, Caddell is correct that we do not know what was read back to the jury. Specifically, we cannot be certain whether stricken testimony was read back to the jury. Nor can we be sure whether proceedings held outside the presence of the jury that took place when Smith was on the stand that day were read to the jury. In light of this state of the record, we will assume for our prejudice analysis that the portions of the transcript that contained stricken testimony, sidebar conferences and an Evidence Code section 402 hearing were read to the jury.<sup>21</sup> Our review of the transcript shows 11 such instances, where we will assume that impermissible material was read back to the jury:

1. Near the beginning of cross-examination by Caddell's counsel, the court called for a sidebar conference after counsel asked whether Smith had *committed* any strike crimes in addition to his two strike convictions, prompted objections from Williams's counsel and the prosecutor. During the sidebar, the court sustained the objection on relevancy grounds and under Evidence Code section 352, stating counsel was trying to "back-door character evidence."

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<sup>21</sup> We fully expect a superior court court reporter would not read stricken testimony and proceedings held outside the jury's presence during a readback of testimony to a jury. The presumption under Evidence Code section 664 that official duty has been regularly performed applies to court reporters. (*People v. Wader* (1993) 5 Cal.4th 610, 661.) Nonetheless, because the trial court did not further inquire as to what actually was read, we shall consider the worst case scenario only for purposes of our prejudice analysis.

2. The court sustained an objection to the following question and granted a motion to strike: "Was it an honest act when you kicked a pregnant woman in the stomach five times causing injury to her and resulting in a conviction?" Smith did not answer the question.

3. Caddell's counsel requested a sidebar after the court sustained an objection to the following question: "When you took \$7,000 worth of gold chains from an 18-year-old woman out of her hands and snatched them from her, was that an act of honesty or an act of dishonesty?" During the sidebar, the court and counsel discussed the propriety of introducing evidence of misdemeanor conduct demonstrating moral turpitude (see *People v. Wheeler* (1992) 4 Cal.4th 284, 296-297). Among other things, the prosecutor said Caddell's counsel was trying "to inflame the jurors with specific acts." The court mildly rebuked Caddell's counsel for his tone of voice and inflection in asking questions of Smith and told counsel to use only felony convictions for impeachment. Also during the sidebar, Caddell's counsel sought and received the court's permission to question Smith about a statement he made to police that he did not like guns in light of crimes he committed in which a gun was used.

4. The trial court called for a sidebar after Caddell's counsel asked Smith about what he was told by police who interviewed him—namely, that Williams was facing a 40-year prison sentence and would have to serve at least 31 years—and whether this information put pressure on him to help Williams. During the sidebar, the court told counsel not to ask further questions about possible punishment for the defendants. There

was one mention of "LWOP"—a sentence of life without the possibility of parole—during the discussion.

5. The court sustained an objection and granted a motion to strike Smith's testimony on redirect examination that one of the reasons he was testifying was out of compassion for McKinney's family.

6. The court interrupted the prosecutor during her redirect examination after receiving a note that a child of one of the jurors needed assistance in the courthouse's day care center. After the jury was excused so the juror could deal with his child's problem, the court held a lengthy conference with the parties. Caddell's counsel withdrew an earlier request for an Evidence Code section 402 hearing after it was pointed out that he had misheard an answer by Smith. However, after the parties discussed whether there was a risk that testimony that violated *Aranda-Bruton* (*People v. Aranda* (1965) 63 Cal.2d 518; *Bruton v. United States* (1968) 391 U.S. 123) would be elicited, the court conducted an Evidence Code section 402 hearing in which Smith testified that Williams had not made any statement to him concerning Caddell's involvement in the shootings.<sup>22</sup>

7. During the prosecutor's redirect examination, the court sustained an objection and granted a motion to strike Smith's testimony that he "guess[ed]" the fight started by Coshise Thomas at the party was an example of JPR reestablishing itself.

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<sup>22</sup> *Aranda and Bruton* "stand for the proposition that a 'nontestifying codefendant's extrajudicial self-incriminating statement that inculcates the other defendant is generally unreliable and hence inadmissible as violative of that defendant's right of confrontation and cross-examination.'" (*People v. Jennings* (2010) 50 Cal.4th 616, 652.) Also during the extended discussion outside the presence of the jury, the court discussed possible representation by a court-appointed attorney for an expected witness whose Fifth Amendment right not to testify might arise.

8. During recross-examination by Williams's counsel the court sustained an objection and granted a motion to strike Smith's testimony that in 2006 JPR did not have an interest in shooting anyone from the 1200 Blocc Crips gang.

9. The court also sustained an objection to Smith's testimony during recross-examination that he was the only JPR member who was present at Maye's shooting. The court did not rule on a motion to strike the testimony.

10. The court also sustained an objection to the following question posed by Williams's counsel to Smith: "If a crime was committed by . . . a JPR member back then or another gang, would you know whether or not that crime would somehow help JPR out?" Williams's counsel then asked for a sidebar. During the sidebar, the parties argued whether Smith could act as a gang expert. In the end, the court ruled Smith could not assume the role of an expert.

11. The final instance in which the jury possibly was read back an improper question and answer is italicized in the following excerpt from the transcript:

"[THE PROSECUTOR]: When you had that phone conversation with Mr. Williams wherein he said 'did I do it,' what was his tone or inflection? Can you describe [it] in any more detail?

"[SMITH]: No. It was just, 'Did I do it?'

"[THE PROSECUTOR]: Was it, like, confused, like, I don't know what's going on did I do this or some other tone?

"[SMITH]: No. Just asking, like—just asking, like, did I know, do I know that he didn't do it, like—I don't know.

"[THE PROSECUTOR]: So your impression was Mr. Williams was asking you did I do it, like do you know that I didn't do it was your impression of it.

"[SMITH]: Yes.

"[CADELL'S COUNSEL]: Leading. Misstates the evidence. Prior answer was I don't know.

"[THE COURT]: Overruled.

"[THE PROSECUTOR]: *So it wasn't this—correct me if I'm wrong—some genuine question posed to you, like, did I do this?*

"[SMITH]: *I don't think he was asking me like that. He knew that he didn't do it. He was just, like, just asking me did I know that he didn't do it.*

"[CADELL'S COUNSEL]: Objection. Speculation. Move to strike.

"[THE COURT]: Sustained as to speculation. The answer will be stricken."

The sidebar referenced as number 1 did not involve stricken testimony, but merely an objectionable question. The only potential harmful comment from the sidebar was the court's remark that Caddell's counsel was trying to "back-door character evidence." This criticism of counsel, which dealt with a legal concept, could not have affected the jury's verdicts.

The objectionable question referenced in number 2 was not answered. In light of the jury instruction that the attorneys' questions are not evidence,<sup>23</sup> there was no prejudice.

The objectionable question referenced in number 3 was not answered. During the ensuing sidebar, the prosecutor accused Caddell's counsel of trying to inflame the jurors, but such accusation would not have affected the jury in a material way. Likewise, the court's mild rebuke of Caddell's counsel would not have affected the verdicts. To the extent the sidebar made the jury dislike counsel, or like him less, the effect was de minimis.

The sidebar referenced in number 4 concerned possible punishment—an improper issue to be discussed before the jury. (See *People v. Moore* (1968) 257 Cal.App.2d 740, 750 ["It is fundamental that the trier of fact, be it court or jury, must not consider the subject of penalty or punishment in arriving at its decision of guilt or innocence."].) However, the jury was instructed pursuant to CALCRIM No. 3550: "You must reach your verdict without any consideration of punishment." The jury also was instructed

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<sup>23</sup> The jury was instructed pursuant to CALCRIM No. 104, in pertinent part, as follows: "Nothing that the attorneys say is evidence. In their opening statements and closing arguments, the attorneys will discuss the case, but their remarks are not evidence. Their questions are not evidence. The attorneys' questions are significant only if they help you understand the witnesses' answers. Do not assume that something is true just because one of the attorneys asks a question that suggests it is true. [¶] During the trial, the attorney may object to questions asked of a witness. I will rule on the objections according to the law. If I sustain an objection, the witness will not be permitted to answer, and you must ignore the question. If the witness does not answer, do not guess what the answer might have been or why I ruled as I did. If I order testimony stricken from the record, you must disregard it and must not consider that testimony for any purpose."

pursuant to CALCRIM No. 706: "In your deliberations, you may not consider or discuss penalty or punishment in any way when deciding whether a special circumstance, or any other charge, has been proved." We presume jurors are not only intelligent, but capable of understanding jury instructions and that they do so. (*People v. Holt, supra*, 15 Cal.4th at pp. 677-678; *People v. Martin, supra*, 150 Cal.App.3d at p. 158.) Given the instructions, we find it highly unlikely a single reference to "LWOP" would have affected the jury deliberations.

The essence of the objectionable question and answer referenced in number 5 had been brought out in earlier testimony by Smith. Also given the fact that Smith had admitted he was getting a reduction in his sentence for his testimony, there was no likelihood the jury was impacted from hearing the stricken testimony again.

The lengthy conference outside the presence of the jury referenced in number 6 was largely a legal discussion. The Evidence Code section 402 hearing did not reveal any information harmful to Caddell.

The objectionable question and stricken testimony referenced in number 7 dealt with JPR attempting to reestablish itself and had more to do with Williams than Caddell.

The objectionable question and stricken testimony referenced in number 8 concerned the Maye shooting. To the extent that Smith's testimony tended to disassociate JPR members from the Maye shooting (and by implication associate Sex Cash Money members to the shooting), much stronger evidence to this effect had already been admitted. Any effect on the jury of rehearing the stricken testimony was de minimis.

Although the court sustained an objection to the question and answer referenced in number 9, the court did not rule on the motion to strike the answer. Any effect on the jury of rehearing the objectionable question and answer—that Smith was the only JPR gang member at the Maye shooting—would have been de minimis.

The objectionable question referenced in number 10 was not answered. The jury was instructed an attorney's question is not evidence. (See fn. 23, *ante*.) There could not have been prejudice. Further, the ensuing sidebar concerned a legal question, which was highly unlikely to affect the jury's verdicts.

When read in context, the objectionable question and stricken answer referenced in number 11 were repetitive of other testimony. The jury, having heard the testimony already, would not have been impacted upon hearing it once again during readback.

We are convinced beyond a reasonable doubt that none of the 11 possible instances in the transcript of Smith's last day of testimony that contained stricken testimony, sidebar conferences and the Evidence Code section 402 hearing would have affected the jury's verdicts. We also are convinced beyond a reasonable doubt that the cumulative effect of the 11 instances would not have affected the jury's verdicts. We realize that Smith was an important witness against Caddell, and it was imperative for his defense that his counsel effectively impeach his testimony. Our reading of Smith's entire cross-examination by Caddell's counsel shows counsel accomplished this. Even assuming all of the 11 instances were read back to the jury, the credibility of Smith had been sorely tested during cross-examination by Caddell's counsel. We are satisfied

beyond a reasonable doubt that improper readback of the 11 instances—if it occurred—did not prejudice Caddell and would not have changed the outcome.

Relying on *United States v. Cronin* (1984) 466 U.S. 648, 658-659 (*Cronin*), Caddell urges us to find the deprivation of counsel during a critical stage of the proceedings to be structural error, which would entitle him to automatic reversal. The reliance is misplaced.

In *Cronin, supra*, 466 U.S. at pages 656 to 657, the Supreme Court stated: "[T]he adversarial process protected by the Sixth Amendment requires that the accused have 'counsel acting in the role of an advocate.' [Citation.] The right to the effective assistance of counsel is thus the right of the accused to require the prosecution's case to survive the crucible of meaningful adversarial testing. . . . [I]f the process loses its character as a confrontation between adversaries, the constitutional guarantee is violated." (Fns. omitted.) The Supreme Court noted that in certain situations where there is a breakdown of the adversarial process the error constitutes per se reversible error. (*Id.* at p. 659.) The *Cronin* court identified three such situations: (1) where there had been a "complete denial of counsel"; (2) where "counsel entirely fail[ed] to subject the prosecution's case to meaningful adversarial testing"; and (3) where counsel was called upon to render assistance under circumstances where competent counsel very likely could not. (*Id.* at pp. 659-662.)

The *Cronin* exception to the general rule requiring a showing of prejudice is extremely narrow. (See *Florida v. Nixon* (2004) 543 U.S. 175, 190.) The narrowness is illustrated in *Cronin, supra*, 466 U.S. at pages 662 and 666, where the Supreme Court

reversed a ruling by a Court of Appeals that had presumed the existence of prejudice arising from the inadequate performance of an inexperienced, underprepared attorney in a complex mail fraud trial. A review of post-*Cronic* decisions demonstrates the narrowness of the exception to the general rule requiring a showing of prejudice. The situations in which courts have reversed after applying the structural error analysis of *Cronic* include those in which the attorney: (1) fell asleep during trial (*Javor v. United States* (9th Cir. 1984) 724 F.2d 831, 833); (2) failed to appear for cross-examination of a key witness (*Green v. Arn* (6th Cir. 1987) 809 F.2d 1257, 1263, vacated on other grounds, *Arn v. Green* (1987) 484 U.S. 806); (3) urged the jury to find his client guilty (*United States v. Swanson* (9th Cir. 1991) 943 F.2d 1070, 1073); and (4) failed to object when the court erroneously directed a verdict against his client (*Harding v. Davis* (11th Cir. 1989) 878 F.2d 1341, 1345).

This case is not comparable to the any of the above-cited cases. This case did not involve a total breakdown of the adversarial process. The circumstances surrounding the readback of testimony did not "demonstrate that counsel failed to function in any meaningful sense as the Government's adversary." (*Cronic, supra*, 466 U.S. at p. 666.) *Cronic's* presumption of prejudice is "reserved for situations in which counsel has *entirely* failed to function as the client's advocate." (*Florida v. Nixon, supra*, 543 U.S. at p. 189, italics added.) The situation in this case—counsel not being properly notified of the readback of testimony that was actually read to the jury and not being given the opportunity for input, either before the actual readback or after the fact—did not render

the trial fundamentally unfair. This case is not of the magnitude reserved for the *Cronic* exception.<sup>24</sup>

*B. Purported Ineffective Assistance by Original Counsel Who Failed To Investigate the Case for Almost Three Years*

Caddell contends his conviction for the attempted murder of Kevin Maye must be reversed because his original trial counsel provided ineffective assistance of counsel by failing to interview three alibi witnesses.

*Background*

On September 5, 2006, Caddell was charged with the attempted murder of Maye in a complaint filed in case No. RIF132202. Conflicts Defense Lawyer John Aquilina represented Caddell as early as January 26, 2007, in this case, according to court records. Also in January, Caddell was charged with the murder of McKinney and the attempted murder of Anderson in a complaint filed in case No. RIF134062. Aquilina was appointed to represent Caddell in the murder case within the month.

After preliminary hearings in both cases, the two cases were consolidated on September 5, 2008, with the consolidated case continuing under case No. RIF130895.

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<sup>24</sup> *Riley v. Deeds* (9th Cir. 1995) 56 F.3d 1117, 1119-1122, in which a law clerk decided the readback issue in the absence of the trial judge, is distinguishable on its facts. The Ninth Circuit has since limited the *Riley* ruling finding structural error to its facts. (See *U.S. v. Arnold* (9th Cir. 2001) 238 F.3d 1153, 1155.)

From November 3, 2008, through July 2, 2009, Attorney Aquilina repeatedly moved to continue the trial because of his trial schedule and his need to review the discovery and investigate the case. In his last continuance motion, Aquilina declared he needed more time to review the prosecution's taped interviews and to hire an investigator.

On August 4, 2009, Caddell's case was assigned to attorney Keith Bruno. On August 20, 2009, Bruno moved for a continuance to October 19, 2009. Bruno announced he was ready for trial on October 22, 2009.

At trial, Caddell's defense presented three alibi witnesses. His mother first talked with a defense investigator on October 6, 2009. Caddell's former girlfriend and his brother's former girlfriend talked with defense investigators for the first time within a few weeks of their trial testimony. More than three years had passed between June 9, 2006, and the time these alibi witnesses were interviewed. The two girlfriends were able to isolate that weekend only because of the death of McKinney.

The alibi witnesses could not recall much of the minutiae of the day spent at Caddell's residence while being cross-examined by the prosecutor and Williams's counsel. Caddell's former girlfriend testified she left sometime after midnight when her mother picked up her and the other girl, who was her step-sister. The step-sister testified they left sometime between 12:00 a.m. and 1:00 a.m. Caddell's mother testified the girls left at 12:20 a.m. or 12:25 a.m. and Caddell was still at home when she locked the doors 15 or 20 minutes later.

### *Legal Principles*

"The burden of proving ineffective assistance of counsel is on the defendant."  
(*People v. Babbitt* (1988) 45 Cal.3d 660, 707.) A defendant claiming ineffective assistance of counsel must show that his or her counsel's performance fell below an objective standard of reasonableness under prevailing professional norms and also that it is reasonably probable, but for counsel's failings, the result would have been more favorable to the defendant. (*Strickland v. Washington* (1984) 466 U.S. 668, 687, 694.) "A defendant must prove prejudice that is a 'demonstrable reality,' not simply speculation.' [Citations.] Prejudice requires 'a reasonable probability that a more favorable outcome would have resulted . . . , i.e., a probability sufficient to undermine confidence in the outcome.' [Citations.]" (*People v. Fairbank* (1997) 16 Cal.4th 1223, 1241.)

"[A] court need not determine whether counsel's performance was deficient before examining the prejudice suffered by the defendant as a result of the alleged deficiencies . . . . If it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." (*Strickland v. Washington, supra*, 466 U.S. at p. 697.)

### *Analysis*

"The reason the duty to investigate must be discharged promptly is so witnesses can be interviewed while events are fresh in their memories. . . . '[T]he effects of the passage of time on memory . . . are so familiar that the importance of *prompt* pretrial

preparation cannot be overstated.' " (*People v. Jones* (2010) 186 Cal.App.4th 216, 239.)

The record suggests Attorney Aquilina was working under a staggering workload.

However, an attorney facing a massive caseload that prevents him from investigating one of his cases should attempt to reduce his caseload or file a motion to withdraw from the case. (*In re Edward S.* (2009) 173 Cal.App.4th 387, 413.) Nonetheless, we need not dwell on whether Aquilina provided ineffective assistance of counsel because Caddell cannot meet his burden to show prejudice.

Caddell claims Attorney Aquilina's failure to investigate the case and interview the alibi witnesses prejudiced him because if the alibi witnesses had been interviewed within a reasonable time of the event—not more than three years after the fact—they would have remembered many more details and the interview statements would have been memorialized. Further, Caddell argues such memorialized statements could have been introduced at trial to bolster the witnesses' credibility.

Additionally, Caddell points out that when these witnesses were finally interviewed shortly before trial, their memories of minutiae from the night Maye was shot had faded considerably. Caddell argues the alibi witnesses were not as good defense witnesses as they could have been because their ability to recount in detail the day's events more than three years later was limited. As a result, Caddell asserts the prosecutor and Williams's counsel were able to effectively cross-examine the alibi witnesses about the details of the day and thereby undermine the witnesses' credibility.

By chipping away at the credibility of these witnesses, Caddell argues the prosecutor was able to cast substantial doubt about the most significant part of their testimony—namely, the alibi that Caddell was home at the time Maye was shot. The prosecutor argued that if the two girlfriend alibi witnesses left shortly after midnight Caddell had enough time to be at Maye's residence by 12:40 a.m., which was the time police received a call about the shooting of Maye.<sup>25</sup> As to the testimony of Caddell's mother that the girlfriends had left at 12:20 a.m. or 12:25 a.m., the prosecutor labeled it as "offensive" and insinuated the mother was lying to save her son.

We are not persuaded Caddell was prejudiced by the delay in interviewing the alibi witnesses. Caddell's arguments that there would have been a different result if the alibi witnesses had been interviewed within a reasonable time after June 9, 2006, are merely speculation and, therefore, are insufficient to establish the prejudice requirement for establishment of ineffective assistance of counsel. Caddell has not met his "burden of proving prejudice as a 'demonstrable reality,' not simply speculation as to the effect of the errors or omissions of counsel." (*People v. Williams* (1988) 44 Cal.3d 883, 937.)

To the extent Caddell is proposing the jury would have accepted the alibi if these witnesses had been interviewed in a timely manner, he is speculating. Caddell has not shown that the jury rejected the alibi because the memories of these witnesses had faded

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<sup>25</sup> After the alibi witnesses testified, the prosecution presented the rebuttal testimony of a deputy sheriff who had driven the route between Caddell's residence and Maye's residence by way of the gas station where Caddell met up with Smith, Williams, Thomas and McGhee before proceeding to Maye's residence. The drive took 12 minutes.

over three years. Jurors could have rejected the testimony of the two girlfriends and the mother because of their former and present bias in favor of Caddell. Or, the jurors could have chosen to disbelieve the testimony for other reasons. Perhaps there was something about the witnesses' demeanor and their manner of answering questions that the jurors found untrustworthy. It is difficult to discern from reading a cold transcript the demeanor of witnesses as well as the length of pauses between questions and answers. We simply do not know that the jury would have believed the alibi witnesses if they had been interviewed shortly after the event and had better recall of minutiae of that particular day. For us to conclude that the jury would have done so is to engage in guesswork. Further, it is nothing but rank speculation to suggest that the two girlfriend alibi witnesses would have been able to pinpoint the time they left Caddell's residence if interviewed promptly. In any event, the alibi witnesses still would have undergone cross-examination by the prosecutor and Williams's attorney. Whether timely interviews of the alibi witnesses by the defense would have resulted in a different verdict on the attempted murder of Maye is highly speculative and certainly not such that, as a matter of law, we could find a different result might have occurred.<sup>26</sup>

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<sup>26</sup> Furthermore, we note that the earliest possible date the alibi witnesses could have been interviewed was at least seven months after the shooting of Maye, which took place on June 9, 2006. Caddell was not charged in connection with the Maye shooting until September 5, 2006, and Aquilina was not appointed to represent Caddell on the case until January 2007. Thus, in the best-case scenario for Caddell, there would have been a substantial amount of time between the event and the interview of the alibi witnesses for which memories could have faded.

We decline to consider Caddell's argument, raised for the first time in his reply brief, that the denials of the right to effective assistance of counsel, separately and cumulatively, deprived him of this due process right to a fundamentally fair trial under the Fourteenth Amendment. (See *People v. Zamudio* (2008) 43 Cal.4th 327, 353.)

### *C. Abstract of Judgment*

Caddell contends his abstract of judgment should be corrected because it erroneously listed the gun enhancements imposed pursuant to section 12022.53, subdivision (c) under count 1, the murder count. As acknowledged by the Attorney General, the contention has merit.

Accordingly, we order the trial court to amend Caddell's abstract of judgment to delete the two section 12022.53, subdivision (c) gun enhancements from count 1 and to list one of these enhancements under count 2 (the attempted murder of Anderson) and the other enhancement under count 4 (the attempted murder of Maye). The trial court shall forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation.

## DISPOSITION

The judgment against Williams is affirmed.

As to Caddell's judgment, the trial court is ordered to prepare an amended abstract of judgment as set forth above and forward the amended abstract of judgment to the California Department of Corrections and Rehabilitation. In all other respects, the judgment against Caddell is affirmed.

HALLER, Acting P. J.

WE CONCUR:

McDONALD, J.

O'ROURKE, J.