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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS RAFAEL VELIZ, SR., et al.,

Defendant and Appellant.

D059524

(Super. Ct. No. RIF149060)

APPEALS from judgments of the Superior Court of Riverside County, Craig G. Riemer, Judge. Reversed in part; affirmed in part as modified; affirmed in part.

Separate juries convicted Jesus Rafael Veliz, Sr. (Veliz Sr.) and his son, Jesus Rafael Veliz, Jr. (Veliz Jr.), of first degree murder (Pen. Code, § 187, subd. (a)¹) and residential burglary with the target crime of murder (§ 459). A third jury convicted Aaron Morhy of second degree murder (§ 187, subd. (a)) and deadlocked on the burglary charge.

¹ Further statutory references are also to the Penal Code unless otherwise specified.

Veliz Sr. admitted one prior conviction within the meaning of California's "Three Strikes" law (§§ 667, subd. (b)-(i), 1170.12), and the court sentenced him to prison for an indeterminate term of 50 years (25 years doubled) to life on the murder conviction. It stayed the sentence on the burglary conviction (§ 654). The court sentenced Veliz Jr. to an indeterminate term of 25 years to life, and stayed sentencing on the burglary count (§ 654). It sentenced Mohry to an indeterminate term of 15 years to life.

On appeal, Veliz Jr. contends the court prejudicially erred by misinstructing the jury on aiding and abetting liability in response to a jury question. The court informed the jury in the supplemental instruction that in determining Veliz Jr.'s culpability as an aider and abettor, it must consider Veliz Sr.'s mental state rather than Veliz Jr.'s mental state. We agree with Veliz Jr. and reverse his judgment. "[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as that person's own mens rea." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1122 (*McCoy*).

Veliz Sr. and Mohry raise a variety of instructional issues. Further, Veliz Sr. asserts the court miscalculated his custody credits and he is entitled to an additional 21 days of credit. Mohry also contends that since he was only 15 years old when the murder occurred, an indeterminate term of 15 years to life constitutes cruel and unusual punishment under the federal and state constitutions. The People concede the custody credits issue, and we agree. Accordingly, we modify Veliz Sr.'s judgment in that respect and instruct the court to prepare an amended abstract of judgment reflecting the proper

number of custody credits, and forward it to the California Department of Corrections and Rehabilitation. In all other respects, we affirm the judgment against Veliz Sr. We also affirm the judgment against Mohry.

FACTUAL BACKGROUND

Evidence Before All Juries

The events took place in the Enchanted Heights area of Perris. The victim, Charles Sparks (Sparks), lived in the 300 block of Bond Drive, which runs from north to south. His brother, Larry Sparks (Larry), lived in the 500 block of Bond Drive. Veliz Sr. and Veliz Jr. frequently stayed at the home of Veliz Sr.'s girlfriend, Valine Garza, in the 100 block of Barbara Street, which is two blocks west of and parallel to Bond Drive.

Mohammed ("Mike") Harb (Harb) owned and operated a neighborhood market. Harb's brother, Yoseri ("Frank") Harb (Frank), worked at the market and lived in a home behind it. The afternoon of March 17, 2009,² Sparks was stationed in front of the market selling a couple of puppies. At some point, Sparks and Veliz Sr. were in the market at the same time, and Frank saw them exchange a friendly greeting.

At about 7:00 that evening, Garza drove her light tan four-door Nissan Altima to the market to buy beer. She took Veliz Jr., then 14 years of age, and his friend Mohry, then 15 years of age, with her. Shortly after entering the market, Veliz Jr. and Mohry got into a fight with a stranger after he made a gang reference. Harb told them to stop fighting, and they left and continued the fight outside. Mohry had a small wooden baseball bat tucked in the waistband of his pants, and the stranger took it away from him

² Further dates are also in 2009 unless otherwise specified.

and began striking him and Veliz Jr. with it. Sparks intervened and broke up the fight. He then went into the market, bought a beer and told Harb he was going home. The market had an interior/exterior videotape system that recorded the fight.

Garza and the boys returned to her home. They were upset and told Veliz Sr. about the fight. Veliz Sr. and Veliz Jr. stepped outside and spoke privately. According to Garza, Veliz Sr. then left in Garza's car. He returned about 15 minutes later and had his mother get him, Garza, and Veliz Jr. and take them to her home for the night. Garza did not recall much about the rest of the evening. It was her birthday and she had been drinking all day and "smoking weed."³ It was also the last time she saw her Nissan. When she awoke the next day it was gone, and authorities never located it.

After leaving the market, Sparks was in and out of Larry's home, having dinner and doing laundry. Larry estimated he last saw Sparks between about 8:30 and 9:00 p.m. when he departed for his own home.

Cody Spriggs lived near Sparks on Bond Drive. While driving in the area at about 10:30 p.m., Spriggs saw Sparks walking toward his home carrying a basket of laundry.

At around the same time, Ivan Sanchez was walking north in the 300 block of Altura Drive, which is parallel to and between Bond Drive and Barbara Street. The three streets are connected by Weston Street, the cross-street just north of the 300 block, and by an alley in the 300 block that terminates on Bond Drive across the street from Sparks's home. A small "goldish-looking" four-door car going north passed Sanchez and parked on Altura Drive near Weston Street and the alley. From a photograph, Sanchez later

³ Both Mohry and Veliz Jr. reported to their probation officer that they were under the influence of alcohol and marijuana at the time of the murder.

identified the car as Garza's car. Two Hispanic males who appeared to be around 15 years old exited the back seat of the car and a Hispanic male who appeared to be in his mid-thirties exited the driver's door.⁴ The males were cursing and "sounded like they were pissed." The older male said, "We're going to fucking get him. Wait until we see him."

Between about 10:00 p.m. and 11:00 p.m., Veliz Sr. knocked on Larry's front door. Larry saw the shadow of at least one other person with Veliz Sr. Veliz Sr. asked for Sparks, and Larry said he lived down the street.

At around 11:00 p.m., Veliz Sr. and Veliz Jr. showed up at Frank's home in Garza's car, along with another young male Frank did not know. Veliz Sr. said he was upset about the fight and wanted to find Sparks to ask if he knew the stranger involved. Frank was about to run an errand that would take him by Sparks's home, and he offered to have Veliz Sr. follow him there. When Frank pointed out Sparks's home, Veliz Sr. pulled over and Frank drove off.

Johnny Zacarias and his mother, Sylvia Banos, lived two doors north of Sparks on the same side of Bond Drive, at its intersection with Weston Street. Sometime after 11:00 p.m., Zacarias heard someone scream out his name. He went outside and found Veliz Sr. standing at his gate and a tan or champagne-colored car he had seen at Garza's home parked in front. Zacarias saw another person seated in the car, but could not identify the person. Veliz Sr. asked Zacarias if Sparks lived there. Zacarias pointed out Sparks's home to Veliz Sr.

⁴ Veliz Sr. was 31 years old at the time.

At about 11:30 p.m., Banos heard a noise outside. She looked through a front window and saw three or four males "running pretty fast" north on Bond Drive toward Weston Street, where they got into a small four-door car parked at the corner and quickly drove off. Banos then heard a man yelling directly across the street from Sparks's home, and she saw him grab onto a fence and collapse. She called 911.

Jose Jara Rodriguez (Jara) lived on Bond Drive directly across the street from Sparks's home. Jara's home is adjacent to the alley connecting Barbara Drive with Bond Drive. At about 11:00 p.m., Jara's dogs began barking loudly in the front yard and he called them inside. About 15 minutes later, Jara let the dogs outside and they again began barking. He saw a man covered with blood grab onto his fence and collapse. Jara also called 911.

When officers with the Riverside County Sheriff's Department arrived, they found Sparks clad only in boxer shorts and "writhing around on the ground." He struggled to speak but was gasping for air and unable to do so. He was transported to a hospital and died a short time later from multiple sharp force injuries. In addition to 26 stab wounds, he suffered several blunt force injuries.

Officers found a trail of blood coming from Sparks's home, and bloodstains in the entryway, down a hallway, on a living room couch, and on a pillow on the couch. The day after the murder Jara found a Home Essentials brand knife in the alley next to his home, and officers found another knife in the alley. Several knives were taken from the kitchen of Garza's home, including a Home Essentials brand knife.

Additionally, four pairs of black and white Converse tennis shoes were seized from under Garza's bed. She had seen both Veliz Sr. and Veliz Jr. wear the shoes, and a surveillance video from the market the day of the fight shows Veliz Jr. wearing the same type of shoes. A presumptive test for blood indicated the presence of blood on two of the pairs, designated pairs A (size 9) and D (size 8.5), and DNA that matched Sparks's DNA profile was extracted from the *right shoe of both pairs*. DNA extracted from another spot of blood on pair D was a mixture from at least three persons. Sparks was included as a likely contributor, Veliz Jr. could not be included or excluded, and Veliz Sr. and Mohry were excluded.

*Additional Evidence Before Veliz Sr.'s Jury*⁵

Detective Edwin Baeza interviewed Veliz Sr. on March 20. He denied any involvement in the murder. He said Garza and the boys got back to her home after the fight around 9:00 p.m., and she was hysterical and crying. Veliz Jr. had visible injuries and was bleeding. He told Veliz Sr. about the fight and that Sparks had helped him out.

Veliz Sr. walked to Larry's home alone to find out where Sparks lived. Larry pointed out Sparks's home, and Veliz Sr. went there and whistled for Sparks. Sparks invited Veliz Sr. into his living room, where they talked for 10 to 15 minutes. Veliz Sr. thanked him and asked whether he knew the identity of the third person involved in the fight. Sparks replied, "I know that fool," but he would not reveal the name. He told Veliz Sr., "[D]on't trip, fool. . . . [H]e'll get his." Veliz Sr. replied, "[A]ll right, cool." This was the last time Veliz Sr. saw Sparks.

⁵ Detectives interviewed defendants separately after giving them the advisements required by *Miranda v. Arizona* (1966) 384 U.S. 436, 444-445.

Veliz Sr. walked back to Garza's home, and at around 10:00 p.m. he called his mother to get him, Veliz Jr., and Garza to spend the night at her home. The following morning someone called Veliz Sr. and told him Sparks was murdered. Veliz Sr. surmised the killer was the stranger in the fight at the market, and thus Veliz Jr. may be in danger. Veliz Jr.'s mother lived in Arizona, and the day after the murder Veliz Sr. had her come here to get Veliz Jr. and take him back to Arizona with her.

According to Veliz Sr., Garza's car broke down earlier on the day of the fight and she immediately had it hauled away for scrap. She supposedly borrowed a neighbor's car to go to the market. Veliz Sr. later admitted, however, that *after* the fight he drove Garza's car to Frank's house behind the market to get directions to Sparks's home.

Additional Evidence Before Veliz Jr.'s Jury

Detective Baeza interviewed Veliz Jr. on March 22 after his mother returned him from Arizona. He denied any involvement in the murder but gave inconsistent statements.

Baeza told Veliz Jr. that Sparks was dead and Baeza wanted to know why. Veliz Jr. responded, "[W]ho the hell is Charlie Sparks?" Veliz Jr. then said, "He was right there at the fight, no?" He said he only saw Sparks once that evening, during the fight.

Veliz Jr. said he reported the fight to Veliz Sr., and he either drove or walked to Sparks's home alone, where they drank some beers together. Veliz Sr. returned to Garza's home and said he thanked Sparks for intervening in the fight, and Sparks did not know the identity of the stranger in the fight. Veliz Sr. and Veliz Jr. spent the rest of the evening at Garza's home. He denied there was any possibility that someone saw him

running from the direction of Sparks's home. The day after the murder, Veliz Jr.'s mother came from Arizona to take him to her home because he had been suspended from school and gotten into the fight.

After additional questioning, Veliz Jr. admitted he had gone to Sparks's home. He said Veliz Sr. decided to make a second trip to Sparks's home, and he told Veliz Jr., "Let's go." Veliz Jr. and Mohry stood in the alley across the street from Sparks's home while Veliz Sr. went inside. Detective Baeza said, "I know you didn't wait in the alley, 'cause I told you three people were seen running out of there [Sparks's yard]. I can guarantee you that one of them was not [Sparks]. How close did you get to the house?" Veliz Jr. responded that he and Mohry "stood by the gate" and waited while they discussed their anger about the fight and the "the guy with the bat." Veliz Jr. then admitted he went to Sparks's front door because he heard loud noises. He intended to go inside, but Veliz Sr. came running out of the home. The three of them ran to Garza's car on Weston Street and returned to Garza's home. Veliz Jr. then walked to his grandmother's home and spent the night there. He did not know what happened to the clothes he wore to Sparks's home.

Additional Evidence Before Mohry's Jury

Detective Jason Corey interviewed Mohry on March 20. Mohry gave several different stories. He first said he went with Veliz Sr. and Veliz Jr. in Garza's car to try to find Sparks so Veliz Sr. could thank him for helping his son. They first went to Frank's house, and Frank led them to a house he said belonged to Sparks. The house Frank pointed out, however, was not Sparks's home. They went to a second house, which was

also not Sparks's home. Mohry went to the door of one of the houses with Veliz Sr., and a "guy came out and his mom came out thinking that we were trying to cause problems." They returned to Garza's home without finding Sparks. Mohry walked home from there, arriving shortly after 11:00 p.m. He later heard Sparks was shot to death in front of his home.

Mohry next admitted they did locate Sparks's home. Mohry and Veliz Jr. waited in the car while Veliz Sr. went to talk to Sparks. Mohry heard Veliz Sr. and Sparks talking at the door, but he could not hear what was said. Veliz Sr. remained in Mohry's view. Veliz Sr. returned to the car and they drove back to Garza's home.

"[S]ome girl" told Mohry that Sparks did not get shot, he "got stabbed." Mohry agreed the stabbing occurred while he and Veliz Jr. were waiting in front of Sparks's home and Veliz Sr. was out of the car. Mohry said Veliz Sr. did not do the stabbing "as far as I know," and he was not bloody or short of breath when he returned to the car. Mohry denied going into the home but realized the timing of the stabbing "looks like a really big problem."

In the third rendition, Mohry admitted there was a second visit to Sparks's home, which culminated in his death. During the first visit, Veliz Sr. went inside to talk with Sparks while Veliz Jr. and Mohry waited in Garza's car. A few minutes later, Veliz Sr. returned to the car and they drove back to Garza's home. Veliz Sr. said nothing about the talk, but Mohry surmised "[s]omething had to have happened." After about 15 minutes, Veliz Sr. said, "[S]trap up, we're going [back]." Veliz Sr. went to a kitchen drawer and took two knives, and Veliz Jr. and Mohry each took a knife.

Mohry initially said Veliz Sr. drove him and Veliz Jr. back to Sparks's home, but he later said Veliz Sr. drove alone and he and Veliz Jr. walked in the alley to Sparks's home and met Veliz Sr. there. In both renditions, Garza's car was parked on the corner of Bond Drive and Weston Street.

The three arrived at Sparks's home sometime between 11:00 p.m. and midnight. The interior of the home was dark, but a porch light was on. Veliz Jr. unscrewed the light bulb and handed it to Mohry, who placed it on the porch. Mohry had picked up a rock in the alley to break into the house if it was locked. It was unlocked, however, and Mohry quietly entered the front door, followed by Veliz Sr. and Veliz Jr. Mohry and Veliz Jr. were wearing bandanas over their faces and socks on their hands to eliminate fingerprints.

The three went to the living room, where Sparks was asleep on a couch. Mohry heard a "thumping" sound, which was Sparks "getting stabbed over and over and over." He also heard "little cries" and "little screams" from Sparks. Mohry did not participate in the stabbing; he lost his knife somewhere before entering the home. He did, however, strike Sparks "[i]n his side" between two and five times with the rock, which he left at the scene.

The three returned to Garza's car and drove back to her house to clean up. Veliz Sr. threw two bloody knives into the sink, turned the water on them, and left them to soak. Mohry's clothes were bloody, and Veliz Sr. gave him clean clothes. Veliz Sr. drove Mohry home, and on the way he threw his bloody clothes into a dumpster. Veliz Sr. never explained why he stabbed Sparks and Mohry did not ask any questions. Mohry

did hear Veliz Sr. tell Garza the incident was Sparks's fault. Mohry gave no explanation for striking Sparks with the rock. Officers found a softball-size rock under a bloody pillow on Sparks's couch.⁶

DISCUSSION

I

Instructional Issues

Defendants challenge the jury instructions in numerous respects. We apply a de novo standard of review to instructional rulings. (*People v. Souza* (2012) 54 Cal.4th 90, 118.)

A

Aiding and Abetting (Veliz Jr.)

"All persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed." (§ 31.) Veliz Jr. concedes the trial court properly instructed his jury with CALCRIM Nos. 400 and 401 on the elements of aiding and abetting liability.⁷ He contends, however, that the court's later supplemental instruction on aiding and abetting constitutes reversible error.

⁶ Defendants presented no witnesses and rested after the prosecution's cases-in-chief.

⁷ The court instructed Veliz Jr.'s jury with CALCRIM No. 400, as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Malice may be either express or implied. Express malice is based on an intent to kill, and implied malice is based on a conscious disregard for life. (*People v. Stone* (2009) 46 Cal.4th 131, 139-140.) A "willful, deliberate, and premeditated killing" is murder in the first degree. (§ 189.) "Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.]" (*People v. Chun* (2009) 45 Cal.4th 1172, 1181; § 187, subd. (a).)

In its second day of deliberations, the jury sent this message to the court: "In determination of 1st or 2nd degree murder, are actions of the perpetrator [*sic*] to be applied to any defendant who aided and/or abetted in the crime?" The court responded with this supplemental instruction:

of a crime whether he or she committed it personally or aided and abetted the perpetrator."

Further, the court instructed the jury with CALCRIM No. 401, as follows: "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] 1. The perpetrator committed the crime; [¶] 2. The defendant knew that the perpetrator intended to commit the crime; [¶] 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; [¶] AND [¶] 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone 'aids and abets' a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. [¶] . . . [¶] [¶] If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor."

"If I understand your question correctly, you are asking the following:

"If a defendant is found guilty as an aider and abettor, *whose mental state do you consider when evaluating whether the murder was willful, deliberate, and premeditated: that of the perpetrator, or that of the aider and abettor?*

"The answer is that you are to consider the mental state of the perpetrator. If the perpetrator committed a first-degree murder, and if the defendant knowingly and intentionally aided and abetted the perpetrator's commission of that murder, then the defendant is guilty of first-degree murder.

"I hope that this answers your question. If not, please rephrase your inquiry."
(Italics added.)

Shortly thereafter, the jury sent this note to the court: "Does aiding and abetting apply to the burglary charge? i.e. [*sic*]: if our defendant [*sic*] personally entered into the building or not." The court responded as follows: "The concept of aiding and abetting applies to both murder and to burglary. Therefore, you must consider whether the defendant is guilty of burglary either as a direct perpetrator or as an aider and abettor." Within about 15 minutes, the jury rendered its verdicts.

Veliz Jr. asserts the supplemental instruction on mens rea "misdescribes the prosecution's burden in proving the aider and abettor's guilt of first degree murder by eliminating its need to prove the aider and abettor's (1) intent, (2) willfulness, (3) premeditation and (4) deliberation, the mental states for murder." (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165 (*Samaniego*)). He claims the supplemental instruction "foreclosed consideration of relevant evidence of [his] less culpable mental state [and] foreclosed conviction of second-degree murder."

The People argue Veliz Jr. forfeited appellate review of the supplemental instruction by not requesting a modification. When an instruction is generally accurate, but potentially incomplete or misleading under the particular circumstances, the defendant must ordinarily request a modification or suffer forfeiture. (*People v. Loza* (2012) 207 Cal.App.4th 332, 350 (*Loza*)). If a defendant's substantial rights are affected, however, we may review a claim of instructional error without exception having been taken in the trial court. (§ 1259.) That is the situation here, and thus we address the merits.

In a specific intent crime such as murder (*People v. Butler* (2010) 187 Cal.App.4th 998, 1006), "the aider and abettor must share the specific intent of the perpetrator. . . . [A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 560.)

In most instances, a person who aids another person to commit a crime is " 'equally guilty' " of that crime. (*Samaniego, supra*, 172 Cal.App.4th at p. 1165, italics omitted; *Loza, supra*, 207 Cal.App.4th at pp. 349-350; *People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118.) In certain circumstances, however, an aider may be found guilty of a greater or lesser crime than the direct perpetrator, depending on the aider's own mental state. (*McCoy, supra*, 25 Cal.4th at pp. 1114, 1119-1122 [greater crime]; *Samaniego, supra*, at pp. 1164-1165 [lesser crime]; *Loza, supra*, 207 Cal.App.4th at

p. 351 [lesser crime].) "[W]hen a person, with the mental state necessary for an aider and abettor, helps or induces another to kill, that person's guilt is determined by the combined acts of all the participants as well as *that person's own mens rea*." (*McCoy, supra*, 25 Cal.4th at p. 1122, italics added.) "[A]lthough joint participants in a crime are tied to a "single and common *actus reus*," "the individual *mentes reae* or levels of guilt of the joint participants are permitted to float free and are not tied to each other in any way. If their *mentes reae* are different, their independent levels of guilt . . . will necessarily be different as well." ' ' ' (*Id.* at pp. 1118-1119.) Thus, an aider and abettor may be convicted of second degree murder when the direct perpetrator is convicted of first degree murder, and vice versa. (*Id.* at p. 1119; *Samaniego, supra*, at p. 1164.)

In *People v. Nero* (2010) 181 Cal.App.4th 504 (*Nero*), a murder case, the jury asked if it could find an aider and abettor guilty of a greater or lesser offense than the direct perpetrator. In response, the trial court reread a former jury instruction (CALJIC No. 3.00) that described the aider and abettor and the perpetrator as "equally guilty." (*Nero, supra*, at p. 517.) The appellate court found prejudicial error, noting that "where, as here, the jury asks the specific question whether an aider and abettor may be guilty of a lesser offense, the proper answer is 'yes' she [or he] can be." (*Id.* at p. 519.)

In *Loza, supra*, 207 Cal.App.4th 332, another murder case, this court held the defendant's counsel rendered ineffective assistance by not objecting to a former version of CALCRIM No. 400 with the "equally guilty" language, and by not opposing the court's proposed response to a jury question. (*Loza, supra*, at p. 349.) During deliberations, "the jury specifically inquired whether it was required to, or should,

consider the state of mind of an aider and abettor, and asked a question that indicated that the jury believed [the defendant] may have been less culpable than the direct perpetrator, and the trial court failed to provide the jury with an adequate response." (*Id.* at p. 352.) The opinion explains the defendant's "state of mind was a crucial issue in this case. Counsel's failure to ensure that the jury was properly informed that it was required to determine the intent of an aider and abettor separately from that of the perpetrator cannot reasonably be deemed to have been a tactical error." (*Id.* at p. 355.)

We conclude the supplemental instruction here was erroneous because it allowed the jury to convict Veliz Jr. of first degree murder without considering his mental state. " 'An instruction that omits or misdescribes an element of a charged offense violates the right to jury trial guaranteed by our federal Constitution, and the effect of this violation is measured against the harmless error test of *Chapman v. California* (1967) 386 U.S. 18, 24. . . . [Citation.]' [Citation.] Under that test, we ask whether beyond a reasonable doubt the jury verdict would have been the same absent the error." (*Nero, supra*, 181 Cal.App.4th at pp. 518-519.)

In *Loza, supra*, 207 Cal.App.4th at p. 356, we found prejudicial error when the "jury's questions indicated that it may not have considered [the defendant's] intent at all in finding her guilty of first degree murder under an aiding and abetting theory." We explained: "It is possible that the jury instead believed that [she] assisted [the direct perpetrator] in some way during the incident, and was under the impression that her assistance, *even in the absence of a specific intent to aid and abet a first degree murder*, was sufficient to subject her to culpability for the crime that the jury found [he] had

committed. . . . [¶] Moreover, the jury's questions indicated that if it had been properly instructed, it may have considered a verdict other than first degree murder for [her]. . . . [I]f the jury had been properly instructed that an aider and abettor's guilt must be based on his or her personal state of mind, the jury might have considered [her] to have been guilty of an offense less serious than first degree murder." (*Ibid.*)

Likewise, on this record, we cannot say beyond a reasonable doubt that absent the instructional error the jury would have convicted Veliz Jr. of first degree murder. Despite being instructed with CALCRIM Nos. 400 and 401 on aiding and abetting, the jury was obviously confused on whose mental state was at issue in determining whether the murder was in the first or second degree. Further, the jury's question during deliberations indicates it was considering second degree murder, but after the court gave the supplemental instruction it swiftly rendered a verdict of first degree murder. The supplemental instruction effectively foreclosed a finding of second degree murder for Veliz Jr. if the jury believed Veliz Sr. premeditated the murder.

Moreover, the evidence supports a finding of either first degree or second degree murder based on a rash impulse. In his police interview, Veliz Jr. repeatedly said he was unaware of why he, his dad, and Mohry went to Sparks's home. Veliz Sr. said, "Let's go," and they went. Veliz Jr. denied having a knife or seeing any knives before the killing. He denied that the three of them picked up knives from Garza's kitchen. While there was a spot of Sparks's blood on Veliz Jr.'s shoe, the jury could have reasonably determined he was inside Sparks's home and aided and abetted murder with malice, but without the additional elements of willfulness, deliberation and premeditation. We note

that Mohry's jury found him guilty of second degree murder, even though his statement to police was far more damning than Veliz Jr.'s statement.

Accordingly, we reverse Veliz Jr.'s first degree murder conviction. We also reverse his burglary conviction because, given the supplemental instruction, it was likely based on Veliz Sr.'s mental state in entering Sparks's home rather than on Veliz Jr.'s mental state. (*Loza, supra*, 207 Cal.App.4th at p. 355 [jury must determine aider and abettor's intent as to each offense the defendant is accused of aiding and abetting].) "Every person who enters any house, . . . with intent to commit . . . any felony is guilty of burglary." (§ 459.) Veliz Jr. is subject to retrial on both the murder and burglary charges.⁸

B

Provocation (Veliz Sr.)

The trial court instructed Veliz Sr.'s jury on first degree and second degree murder. He contends the court erred by denying his request that the jury also be instructed with CALCRIM No. 552, which may reduce first degree murder to second degree murder based on the victim's provocation.⁹

⁸ Given our holding, we are not required to consider Veliz Jr.'s additional contentions on appeal.

⁹ CALCRIM No. 522 provides in pertinent part: "Provocation may reduce a murder from first degree to second degree [and may reduce a murder to manslaughter]. The weight and significance of the provocation, if any, are for you to decide. [¶] If you conclude that the defendant committed murder but was provoked, consider the provocation in deciding whether the crime was first or second degree murder. [Also, consider the provocation in deciding whether the defendant committed murder or manslaughter.]"

"Where an intentional and unlawful killing occurs 'upon a sudden quarrel or heat of passion' (§ 192, subd. (a)), the malice aforethought required for murder is negated, and the offense is reduced to voluntary manslaughter—a lesser included offense of murder. [Citation.] Such heat of passion exists only where 'the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an " 'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " ' [Citation.] To satisfy this test, the victim must taunt the defendant or otherwise initiate the provocation." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.)

"In a related vein, the ' "existence of provocation which is not 'adequate' to reduce the class of the offense [from murder to manslaughter] may nevertheless raise a reasonable doubt that the defendant formed the intent to kill upon, and carried it out after, deliberation and premeditation" '—an inquiry relevant to determining whether the offense is premeditated murder in the first degree, or unpremeditated murder in the second degree. [Citations.] First degree willful, deliberate, and premeditated murder involves a cold, calculated judgment, including one arrived at quickly [citation], and is evidenced by planning activity, a motive to kill, or an exacting manner of death. [Citation.] Such state of mind 'is manifestly inconsistent with having acted under the heat of passion—even if that state of mind was achieved after a considerable period of provocatory conduct.' " (*People v. Carasi, supra*, 44 Cal.4th at p. 1306.)

"The test of whether provocation or heat of passion can negate malice so as to mitigate murder to voluntary manslaughter is objective. . . . 'The test of whether provocation or heat of passion can negate deliberation and premeditation so as to reduce first degree murder to second degree murder, on the other hand, is subjective. [Citations.]' 'If this were not so, the provocation would be a *defense* to murder and would be sufficient to reduce the crime to manslaughter.' " (*People v. Padilla* (2002) 103 Cal.App.4th 675, 678.)

In requesting a provocation instruction, to potentially reduce first degree murder to second degree murder, Veliz Sr. argued: "There was some evidence suggesting that there was an argument in that room [at Sparks's home]. That [Sparks] didn't give the information to [Veliz Sr.]. And that argument, *if the jury believes that [Veliz Sr.] only went there one time*, and that argument led to murder, that . . . provoked [Veliz Sr.] enough to act rashly and under the influence of that intense emotion."

In rejecting the request, the court explained, "I don't think there's any evidence from which the jury could find beyond a reasonable doubt that the provocation would have caused a person of average disposition to act rashly and without deliberation." Veliz Sr. asserts the court erred by applying an objective test rather than a subjective test.

While the instruction appears faulty, the court may give a pinpoint instruction on provocation only when substantial evidence supports the theory. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 823.) "It is settled that a court must instruct on general principles of law that are closely and openly connected with the facts of the case." (*People v. Perez* (1992) 2 Cal.4th 1117, 1129.)

The evidence does not suggest Veliz Sr. "actually, subjectively, kill[ed] under the heat of passion." (*People v. Steele* (2002) 27 Cal.4th 1230, 1252.) "The subjective element requires that the actor be under the actual influence of a strong passion at the time of the homicide." (*People v. Wickersham* (1982) 32 Cal.3d 307, 326-327, disapproved on another point in *People v. Barton* (1995) 12 Cal.4th 186, 200-201.)

No witness testimony suggested any heat of passion. To the contrary, in his police interview Veliz Sr. denied he was upset with Sparks for refusing to reveal the identity of the third party who fought his son. Veliz Sr. said he thanked Sparks for intervening in the fight, and when Sparks declined to reveal the name of the third party, Veliz Sr. responded "[A]ll right, cool." He denied he had any animosity toward Sparks, explaining, "That was my homeboy, he helped out my son."

Further, Veliz Sr. ignores that at trial his provocation theory was dependent on the jury believing he went to Sparks's home only *once*, and he killed Sparks immediately on his refusal to reveal the identity of the third party. Veliz Sr. now concedes the evidence shows he went to Sparks's home twice. During the initial visit, Sparks refused to reveal the identity of the third party to Veliz Sr, and he "left [Spark's] house, but he soon returned and allegedly stabbed [Sparks] to death."

The evidence also shows that between the two visits, Veliz Sr. preplanned the murder. Hispanic males resembling defendants were seen getting out of a car that matched the description of Garza's car. The older male, the driver, had parked the car near an alley that led to Sparks's home a block away. They were cussing and appeared angry, and the driver stated, "We're going to fucking get him. Wait until we see him."

Additionally, a Home Essentials brand knife was found in the alley near where Sparks collapsed, the same brand of knife seized from Garza's home.

Such a scenario indicates premeditation and deliberation, not conduct based "upon a 'sudden and unconsidered impulse[.]' " (*People v. Wickersham, supra*, 32 Cal.3d at p. 330.) "[I]f sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return, the killing is not voluntary manslaughter." (*Id.* at p. 327.) Evidence of preplanning shows the defendant's passion had *subjectively* cooled before the murder. (*People v. Golsh* (1923) 63 Cal.App. 609, 617.)

Contrary to Veliz Sr.'s position, the prosecution's argument that Sparks's refusal to reveal the third party's identity motivated Veliz Jr. to return to his home and kill him does not indicate provocation. The prosecution argued Sparks's refusal may have angered Veliz Sr. and given him a motive, however trivial, to kill Sparks. While proof of motive is not an element of murder, motive is a category of "evidence relevant to resolving the issue of premeditation and deliberation." (*People v. Streeter* (2012) 54 Cal.4th 205, 242.) In any event, "It is axiomatic that argument is not evidence." (*People v. Stanley* (2006) 39 Cal.4th 913, 961, fn. 10.) The court properly refused to instruct the jury with CALCRIM No. 522.

C

Benefit of Reasonable Doubt (Veliz Sr.)

Additionally, Veliz Sr. contends the trial court violated its sua sponte duty to instruct the jury with CALJIC No. 8.71, which at the time of trial provided: "If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder

has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree [as well as a verdict of not guilty of murder in the first degree]." (CALJIC No. 8.71 (Fall 2010 ed.))¹⁰

Here, however, without any objection the court instructed the jury exclusively with CALCRIM instructions. "The California Judicial Council withdrew its endorsement of the long-used CALJIC instructions and adopted the new CALCRIM instructions, effective January 1, 2006." (*People v. Thomas* (2007) 150 Cal.App.4th 461, 465.) "The California jury instructions approved by the Judicial Council are the official instructions for use in the state of California. The goal of these instructions is to improve the quality of jury decision making by providing standardized instructions that accurately state the law in a way that is understandable to the average juror." (Cal. Rules of Court, rule 2.1050(a).) "Use of the Judicial Council instructions is strongly encouraged." (*Id.* at rule 2.1050(e).) "The Judicial Council's adoption of the CALCRIM instructions simply meant they are now endorsed and viewed as superior." (*People v. Thomas, supra*, at pp. 465-466.)

Further, the Judicial Council cautions that "The CALJIC and CALCRIM instructions should *never* be used together. While the legal principles are obviously the same, the organization of concepts is approached differently. Mixing the two sets of instructions into a unified whole cannot be done and may result in omissions or confusion

¹⁰ Further references to CALJIC are also to this edition.

that could severely compromise clarity and accuracy." (Judicial Council of Cal.Crim. Jury Instns. (2012) Guide for Using etc., p. xxvi.)

CALCRIM No. 521 is the newer counterpart to CALJIC No. 8.71. (See e.g., *People v. Larsen* (2012) 205 Cal.App.4th 810, 836, fn. 2.) The court instructed the jury with a modified version of CALCRIM No. 521 as follows:

"If you decide that the defendant has committed murder, you must decide whether it is murder of the first degree or of the second degree.

"The defendant is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The defendant acted 'willfully' if he intended to kill. The defendant acted 'deliberately' if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant acted 'with premeditation' if he decided to kill before completing the acts that caused death.

"[¶] . . . [¶]

"All other murders are of the second degree.

"The People have the burden of proving *beyond a reasonable doubt* that the killing was first-degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first-degree murder." (Italics added.)

Since the Judicial Council encourages the use of CALCRIM instructions, and they should not be mingled with CALJIC instructions, the court surely had no sua sponte duty to instruct the jury with CALJIC No. 8.71. Thus, Veliz Sr. was required to object to preserve the issue for appeal. " 'Generally, a party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language.' " (*People v. Guiuan* (1998) 18 Cal.4th 558, 570.)

Even without forfeiture, however, we would find against Veliz Sr. He asserts CALCRIM No. 521 "did not explain the effect of reasonable doubt on the choice between the greater and lesser included offense." CALCRIM No. 521, however, informed the jury it must find Veliz Sr. not guilty of first degree murder absent proof beyond a reasonable doubt. Further, the court instructed the jury with CALCRIM No. 220, which explains: "A defendant in a criminal case is presumed to be innocent. This presumption requires that the People prove a defendant guilty beyond a reasonable doubt. Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt. [¶] Proof beyond a reasonable doubt is proof that leaves you with an abiding conviction that the charge is true. . . . [¶] In deciding whether the People have proved their case beyond a reasonable doubt, you must impartially compare and consider all the evidence. . . . Unless the evidence proves the defendant guilty beyond a reasonable doubt, he is entitled to an acquittal and you must find him not guilty."

Veliz Sr. has not shown error. The CALCRIM instructions given served the same purpose as CALJIC No. 8.71, and the jury knew Veliz Sr. was entitled to the benefit of any doubt it may have had between first and second degree murder. "[W]e presume a jury follows its instructions." (*People v. Thompson* (2010) 49 Cal.4th 79, 138.)

D

Lesser Included Offenses (Mohry)

1

Involuntary Manslaughter

Mohry contends the court violated its sua sponte duty to instruct his jury on the "misdemeanor manslaughter" theory of involuntary manslaughter under CALCRIM No. 580. "Manslaughter is the unlawful killing of a human being without malice." (§ 192.) It is of three types, including voluntary, involuntary, and vehicular. (§ 192, subd. (a)-(c).) "Involuntary manslaughter is a lesser offense of murder, distinguished by its mens rea. [Citation.] The mens rea for murder is specific intent to kill or conscious disregard for life. [Citation.] Absent these states of mind, the defendant may incur homicide culpability for involuntary manslaughter. [Citations.] Through statutory definition and judicial development, there are three types of acts that can underlie commission of involuntary manslaughter: a misdemeanor, a lawful act, or a noninherently dangerous felony. [Citation.] . . . [F]or all three types of predicate acts, the required mens rea is criminal negligence." (*People v. Butler, supra*, 187 Cal.App.4th at p. 1006.)

Misdemeanor manslaughter is statutorily defined as an unlawful killing without malice in the commission of an unlawful act not amounting to felony. (§ 192, subd. (b).) "The misdemeanor manslaughter clause of section 192 applies whenever the victim's death results from a misdemeanor that is 'dangerous to human life under the

circumstances of its commission.' " (*People v. Murray* (2008) 167 Cal.App.4th 1133, 1143.)

When a misdemeanor manslaughter instruction is required, the court must also specify the predicate misdemeanor. (*People v. Murray, supra*, 167 Cal.App.4th at p. 1143.) Mohry asserts the predicate misdemeanor is "misdemeanor battery or misdemeanor assault," based on his admission that he struck Sparks with a rock between two and five times. He reasons that if the jury agreed with his argument he did not intend to aid and abet one or both codefendants in killing Sparks, it could find him guilty of involuntary manslaughter.

"[A] trial court errs if it fails to instruct, sua sponte, on all theories of a lesser included offense which find substantial support in the evidence. On the other hand, the court is not obliged to instruct on theories that have no such evidentiary support." (*People v. Breverman* (1998) 19 Cal.4th 142, 162.) The "existence of 'any evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. [Citations.] 'Substantial evidence' in this context is ' "evidence from which a jury composed of reasonable [persons] could . . . conclude[]" ' that the lesser offense, but not the greater, was committed." (*Ibid.*) "Speculation is an insufficient basis upon which to require the giving of an instruction on a lesser offense." (*People v. Wilson* (1992) 3 Cal.4th 926, 941.)

Substantial evidence does not support Mohry's misdemeanor manslaughter theory.

"Involuntary manslaughter, like other forms of homicide, also requires a showing that the defendant's conduct proximately caused the victim's death. [Citations.] When there are concurrent causes of death, the defendant is criminally responsible if his or her conduct was a substantial factor contributing to the result." (*People v. Butler, supra*, 187 Cal.App.4th at p. 1009.) The parties stipulated that Sparks's blunt-force injuries from the rock did not cause or contribute to his death. Thus, even if the rock attack could be considered a misdemeanor, a notion we reject under the circumstances,¹¹ the jury could not find Mohry guilty of involuntary manslaughter based on his own conduct. Mohry's liability for Sparks's death was based on aiding and abetting liability; he facilitated the stabbing of Sparks, which was by no means a misdemeanor.

2

Voluntary Manslaughter

¹¹ Felony assault is an assault with a deadly weapon or instrument "by any means of force likely to produce great bodily injury." (§ 245, subd. (a)(4).) "In determining whether an object not inherently deadly or dangerous is used as such, the trier of fact may consider the nature of the object, the manner in which it is used, and all other factors relevant to the issue." (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1054.) The focus is not on whether actual injury occurred, but on whether the force used was *likely* to result in great bodily injury. (*People v. Aguilar* (1997) 16 Cal.4th 1023, 1028.) "Objects which are not inherently dangerous but which have been found to be a deadly weapon include ' . . . a large rock.' " (*People v. Montes, supra*, at p. 1054; *People v. Gardeley* (1996) 14 Cal.4th 605, 625; *People v. White* (1963) 212 Cal.App.2d 464, 465.) Even if the jury could reasonably find the injuries were insufficient for a finding of felony battery, it would necessarily find felony assault. With a baseball-sized rock, Mohry inflicted numerous blunt force injuries to Sparks's forehead, right shoulder, and upper and lower extremities. He beat Sparks in a manner *likely* to produce great bodily injury, particularly since he was already in a dire situation: one or both codefendants were concurrently and repeatedly stabbing him. The evidence does not suggest a simple battery or assault gone awry.

"A defendant lacks malice and is guilty of voluntary manslaughter in 'limited, explicitly defined circumstances: either when the defendant acts in a 'sudden quarrel or heat of passion' (§ 192, subd. (a)), or when the defendant kills in "unreasonable self-defense"—the unreasonable but good faith belief in having to act in self-defense [citations].'" (*People v. Lasko* (2000) 23 Cal.4th 101, 108.)

The court refused to instruct the jury on the lesser included offense of voluntary manslaughter because there was no evidence Sparks provoked Mohry or that he acted in the heat of passion. He does not challenge that ruling, but he contends the court violated its sua sponte duty to instruct his jury on a nonstatutory category of voluntary manslaughter based on a killing without malice during the commission of a felony assault.

Mohry relies on *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*). In *Garcia*, during a confrontation the defendant hit the victim in the face with the butt of a shotgun, causing him to fall, hit his head on the sidewalk, and later die. The defendant testified he did not intend to aim for the victim's face or to kill him. Rather, he " 'just reacted' " and hit the victim in response to the victim's lunge at the gun. (*Id.* at p. 25.) The jury was instructed on murder and voluntary manslaughter, and it found him guilty of the latter crime. (*Id.* at pp. 23, 25-26.)

On appeal, the defendant in *Garcia* claimed the trial court erred by not instructing the jury on *involuntary* manslaughter. The defendant argued the instruction was required because there was substantial evidence the killing "was committed without malice and

without either an intent to kill or conscious disregard for human life and, therefore, was neither murder nor voluntary manslaughter." (*Garcia, supra*, 162 Cal.App.4th at p. 26.) *Garcia* rejected the argument, concluding an "unlawful killing during the commission of an inherently dangerous felony, even if unintentional, is *at least* voluntary manslaughter." (*Id.* at p. 31, italics added.)

Garcia's statement that the crime in that case was "at least voluntary manslaughter" is dictum. The only question before the court was whether evidence showing an unintentional killing without implied malice during commission of an inherently dangerous felony could support an instruction for *involuntary* manslaughter. The court held such an instruction was unwarranted, explaining that because the victim's death "did not occur in the commission of either a dangerous misdemeanor [citation], or a lawful act in an unlawful manner or without due caution and circumspection, it does not fall within the statutory definition of involuntary manslaughter (Penal Code, § 192, subd. (b).)" (*Garcia, supra*, 162 Cal.App.4th at p. 32.) As the People observe, "the court in *Garcia* was not announcing a new basis for voluntary manslaughter, but rather, was showing by deduction that *Garcia's* crime was not involuntary manslaughter." We conclude the court was not required to give an instruction under *Garcia* as there was no sound legal basis for doing so.¹²

E

Residential Burglary (Mohry)

¹² Mohry also cites this court's opinion in *People v. Bryant* (2011) 198 Cal.App.4th 134 (*Bryant*), which relied on *Garcia* in concluding the trial court erred by not giving a voluntary manslaughter instruction. The California Supreme Court, however, has granted review in that case. (*People v. Bryant*, review granted Nov. 16, 2011, S196365.)

Additionally, Mohry contends the court erred by not sua sponte including in CALCRIM No. 1700 on residential burglary, the uncharged offense of felony assault with a deadly weapon. Mohry asserts the "jury could have assumed [he] knew the knives were intended for a deadly attack, and that he entered [Sparks's] house intending to commit murder. [¶] But the jury also could have taken the same facts and inferred a more benign (or less homicidal) intent: that [Mohry] understood from [defendants'] arming themselves with knives that they contemplated committing an assault with deadly weapons on Sparks," and Mohry entered the house with the intent to commit that crime.

A "person who enters any . . . building . . . with intent to commit . . . larceny or *any felony* is guilty of burglary." (§ 459, italics added.) The prosecution alleged murder as the only target offense of burglary, and the court instructed Mohry's jury with the same version of CALCRIM No. 1700 it gave Veliz Jr.'s jury. (See fn. 7, *supra*.) The jury deadlocked on the burglary count, explaining jurors disagreed on whether the prosecution proved beyond a reasonable doubt that Mohry entered Sparks's home with the intent to commit or aid and abet murder. The prosecution dismissed the burglary count, and thus the instructional issue is moot. " ' "A judicial tribunal ordinarily may consider and determine only an existing controversy, and not a moot question or abstract proposition." ' " (*In re I.A.* (2011) 201 Cal.App.4th 1484, 1490.) " 'A case becomes moot when a court ruling can have no practical impact or cannot provide the parties with effective relief.' " (*Ibid.*)

Mohry nonetheless claims prejudice on the ground that had CALCRIM No. 1700 specified the additional target crime of assault with a deadly weapon, the jury would

likely have found he lacked the intent to kill and exonerated him of second degree murder. We do not see the logic. Contrary to Mohry's assertion, the jury's deadlock on the burglary count did not indicate disagreement on second degree murder.

In any event, Mohry's claim that a trial court must on its own motion instruct the jury on "all possible" uncharged felonies as target offenses of burglary is mistaken. Mohry relies on *People v. Prettyman* (1996) 14 Cal.4th 248 (*Prettyman*), which pertains to the natural and probable consequences theory of aiding and abetting liability, a theory the prosecution did not raise here. Even if *Prettyman* could theoretically apply here, it is unavailing because it holds the trial court's sua sponte duty to identify and describe uncharged target offenses for the jury is "quite limited." (*Id.* at p. 269.) The duty arises only when "uncharged target offenses *form a part of the prosecution's theory of criminal liability* and substantial evidence supports the theory." (*Id.* at pp. 266-267, italics added, citing *People v. Failla* (1966) 64 Cal.2d 560, 564.) "The trial court, moreover, need not identify *all* potential target offenses supported by the evidence, but only those that the prosecution wishes the jury to consider." (*Prettyman, supra*, at p. 269.) Mohry misleadingly cites isolated language from *Prettyman* favorable to his cause, while ignoring these limitations on the court's duty.

Our Supreme Court confirmed this limited duty in *People v. Valdez* (2012) 55 Cal.4th 82, citing *Prettyman, supra*, 14 Cal.4th at pp. 266-267, 269, footnote omitted. *Valdez* holds the trial court was not required to specify uncharged target offenses in an instruction on conspiracy, because "the *only* target offense under the prosecution's theory of criminal liability was murder, and that was a *charged* offense. The prosecution never

argued any other target offense and the evidence overwhelmingly pointed only to that target offense." (*Valdez, supra*, at p. 152.)

Here, likewise, the only target offense under the prosecution's theory of criminal liability was murder. Thus, the burglary instruction suffices as given.

F

Flight (Mohry)

Mohry also contends the court erred by instructing the jury with CALCRIM No. 372, as follows: "If the defendant fled immediately after the crime was committed, that conduct may show that he was aware of his guilt. If you concluded that the defendant fled, it is up to you to decide the meaning and importance of that conduct. However, evidence that the defendant fled cannot prove guilt by itself." Mohry submits there was insufficient evidence to merit this instruction.

"In general, a flight instruction "is proper where the evidence shows that the defendant departed the crime scene under circumstances suggesting that his movement was motivated by a consciousness of guilt." [Citations.] "[F]light requires neither the physical act of running nor the reaching of a far-away haven. [Citation.] Flight manifestly does require, however, a purpose to avoid being observed or arrested." [Citations.] "*Mere* return to familiar environs from the scene of an alleged crime does not warrant an inference of consciousness of guilt [citations], but the *circumstances* of departure from the crime scene may sometimes do so." [Citation.]' " (*People v. Smithey* (1999) 20 Cal.4th 936, 982.)

We conclude the instruction was proper. Banos testified that around 11:30 p.m. on the night of the murder she looked out her window and saw three or four males running from the direction of Sparks's home. They got into a car parked at the corner of Bond Drive and Weston Street and drove quickly away. Shortly thereafter, she saw Sparks collapse across the street from his home. In *People v. Jackson* (1996) 13 Cal.4th 1164, 1226, the court held that when the defendant "ran from the scene of the murder down the street to the car," the jury could reasonably infer the defendant's guilt, and thus a flight instruction was proper. Such is the case here.

II

Cruel and/or Unusual Punishment (Mohry)

Lastly, Mohry contends that given his youth, the court erred by refusing to grant him probation and sentencing him to the statutory term of 15 years to life. He contends that since his conviction makes him ineligible for work time or good conduct credits (§ 2933.2), he "has received the functional equivalent of a life sentence without the possibility of parole." (*People v. Ayon* (1996) 46 Cal.App.4th 385, 396 (*Ayon*), disapproved of on another ground in *People v. Deloza* (1998) 18 Cal.4th 585, 600, fn. 10.) Thus, he asserts, the indeterminate sentence violates the federal and state constitutional proscriptions against cruel and unusual punishment.

Preliminarily, we note the quoted language from *Ayon* addresses far different facts. In *Ayon* the defendant, an adult, was sentenced to 240 years to life under the three strikes law for a series of robberies. The defendant could not receive credits that exceeded one-fifth of his total term of imprisonment, and thus he would never be eligible

for parole. (*Ayon, supra*, 46 Cal.App.4th at p. 396.) The court actually held the sentence did not constitute cruel and unusual punishment given the defendant's current offenses and criminal history. (*Id.* at p. 399.) Mohry, in contrast, will be eligible for parole after he serves his 15-year sentence (§ 190, subd. (e)), and thus the sentence is not the functional equivalent of a life sentence without the possibility of parole.

The California Constitution, article I, section 17 prohibits "cruel or unusual" punishment. A sentence may be cruel or unusual 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 (*Lynch*), fn. omitted; *People v. Dillon* (1983) 34 Cal.3d 441, 478 (*Dillon*).)

"The Eighth Amendment [to the United States Constitution], which applies against the States by virtue of the Fourteenth Amendment, . . . provides: 'Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.' " (*Harmelin v. Michigan* (1991) 501 U.S. 957, 962.) A sentence violates the federal Constitution if it is " 'grossly disproportionate' to the severity of the crime." (*People v. Russell* (2010) 187 Cal.App.4th 981, 993.)

Under California law, "the three techniques often suggested for determining if punishment is cruel and unusual [the *Lynch* prongs] are (1) the nature of the offense and the offender with regard to the degree of danger present to society, (2) comparison of the challenged punishment with the punishment prescribed for more serious crimes in the jurisdiction, and (3) comparison of the challenged punishment with punishment for the same offense in other jurisdictions." (*People v. Russell, supra*, 187 Cal.App.4th at

p. 993, citing *Lynch, supra*, 8 Cal.3d at pp. 425-427.) "The three prongs of *Lynch* are not absolute rules establishing that a given punishment is cruel and unusual, but are merely guidelines to be used in testing the validity of a particular penalty. [Citations.] The importance of each prong depends on the specific facts of each case and application of the first prong alone may suffice in determining whether a punishment is cruel and unusual." (*In re DeBeque* (1989) 212 Cal.App.3d 241, 249.) Similar criteria are relevant to an analysis under the federal constitution. (*Solem v. Helm* (1983) 463 U.S. 277, 292 ["a court's proportionality analysis under the Eighth Amendment should be guided by objective criteria, including (i) the gravity of the offense and the harshness of the penalty; (ii) the sentences imposed on other criminals in the same jurisdiction; and (iii) the sentences imposed for commission of the same crime in other jurisdictions"].)

"Whether a punishment is cruel or unusual is a question of law for the appellate court, but the underlying disputed facts must be viewed in the light most favorable to the judgment." (*People v. Martinez* (1999) 76 Cal.App.4th 489, 496.) A defendant has a "considerable burden [to] overcome in challenging a penalty as cruel or unusual." (*People v. Wingo* (1975) 14 Cal.3d 169, 174, fn. omitted.) "The doctrine of separation of powers is firmly entrenched in the law of California, and a court should not lightly encroach on matters which are uniquely in the domain of the Legislature." (*Ibid.*) "Findings of disproportionality have occurred with exquisite rarity in the case law." (*People v. Weddle* (1991) 1 Cal.App.4th 1190, 1196.) Likewise, under federal law

"[s]uccessful grossly disproportionate challenges are ' "exceedingly rare" ' and appear only in an ' "extreme" ' case." (*People v. Em* (2009) 171 Cal.App.4th 964, 977.)¹³

Mohry relies exclusively on the first *Lynch* prong, the nature of the offense and the offender. "The nature of the offense is viewed both in the abstract and in the totality of circumstances surrounding its actual commission; the nature of the offender focuses on the particular person before the court, the inquiry being whether the punishment is grossly disproportionate to the defendant's individual culpability, as shown by such factors as age, prior criminality, personal characteristics, and state of mind. [Citations.]" "*People v. Gonzales* (2001) 87 Cal.App.4th 1, 16.)

As to the nature of the offense, murder is, of course, a serious crime that presents a high level of danger to society. (*Dillon, supra*, 34 Cal.3d at p. 479.) Mohry acknowledges the "vicious and excessive" knife attacks on Sparks "are among the most heinous in California," but he seeks to distance himself from codefendants on the ground he did none of the stabbing. Mohry's participation, however, was substantial. He admittedly armed himself with a knife before going to Sparks's home, and he conceded he would have had the knife in his hand during the attack had he not lost it somewhere. He picked up a rock so he could break into the home if it was locked. He led

¹³ Recent United States Supreme Court authority curtails states' ability to impose sentences of life without parole, or the practical equivalent thereof, on juvenile offenders. (*Graham v. Florida* (2010) 560 U.S. __ [130 S.Ct. 2011, 2029-2030, 2034] [categorical ban on life without parole sentences in nonhomicide cases] (*Graham*); *Miller v. Alabama* (2012) 567 U.S. __ [132 S.Ct. 2455, 2464] [ban on mandatory life without parole sentences in homicide cases].) In *People v. Caballero* (2012) 55 Cal.4th 262, 268, in conformance with *Graham*, our high court disapproved of a burglary sentence in which the juvenile would be ineligible for parole for more than 100 years. These opinions are inapplicable here.

codefendants into the home, knowing they were both armed with knives. Instead of intervening when codefendants began stabbing Sparks, he joined in the attack by beating him with a rock. Mohry wore a bandana over his mouth and gloves on his hands to eliminate fingerprints. The circumstances are hardly extenuating.

As to the nature of the offender, Mohry relies on his youth and lack of prior criminal record. He submits that the imposition of a 15-year-to-life sentence on a 15 year old shocks the conscience and offends notions of human dignity. " '[Y]outh is relevant because the harshness of the penalty must be evaluated in relation to the particular characteristics of the offender.' " (*People v. Mendez* (2010) 188 Cal.App.4th 47, 65.) " '[A]s compared to adults, juveniles have a " 'lack of maturity and an underdeveloped sense of responsibility' "; they "are more vulnerable or susceptible to negative influence and outside pressures, including peer pressure"; and their characters are "not as well formed." ' " (*Ibid.*)

Numerous opinions, however, have upheld lengthy sentences for youthful offenders. (See, e.g., *People v. Em, supra*, 171 Cal.App.4th at pp. 971-977 [consecutive 25-year-to-life terms for murder and firearm enhancement imposed on 15-year-old accomplice in gang robbery]; *People v. Demirdjian* (2006) 144 Cal.App.4th 10, 14-16 [consecutive 25-year-to-life sentences for murder and enhancement imposed on 15 year old]; *People v. Thongvilay* (1998) 62 Cal.App.4th 71, 89-89 [25-year-to-life sentence for burglary-murder imposed on 17 year old]; *People v. Ortiz* (1997) 57 Cal.App.4th 480, 486-487 [26-year-to-life sentence for aiding and abetting robbery-murder imposed on 14-year-old gang member]; *People v. Gonzales, supra*, 87 Cal.App.4th at p. 17 [consecutive

25-year-to-life sentences for first degree murder and enhancement imposed on two 16 year olds and one 14 year old].)

Mohry's probation report does not classify him as uniquely immature or vulnerable to pressure from Veliz Sr. to participate in the murder. Rather, the report states Mohry "consciously became involved as a willing accomplice in this senseless act." Further, he "did not appear to be bothered by the fact he heard the victim groan and scream, as well as the knife plunging into the victim's body." Additionally, the officer found Mohry to be unremorseful about the murder. Moreover, the "lack of a significant prior criminal record is not determinative in a cruel and unusual punishment analysis." (*People v. Gonzales, supra*, 87 Cal.App.4th at p. 17.)

We conclude Mohry has not shown the statutory sentence " ' "is so disproportionate to the crime for which it is inflicted that it shocks the conscience," ' " the California standard, or that it "is 'grossly disproportionate to the severity of the crime," the federal standard. (*People v. Russell, supra*, 187 Cal.App.4th at p. 993.) Thus, there is no constitutional violation.

III

Custody Credits (Veliz Sr.)

Veliz Sr. asserts he is entitled to 638 days of custody credits rather than the 617 days the trial court calculated. The People concede the point and we agree.¹⁴

¹⁴ Veliz Sr. purports to join in the arguments of codefendants "that are applicable to him." "Joinder may be broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), but each appellant has the burden of demonstrating error and prejudice." (*Nero, supra*, 181 Cal.App.4th 504, 510, fn. 11; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["Because of the need to consider the particulars of the given case, rather than the

IV

DISPOSITION

The judgment against Veliz Jr. is reversed. The judgment against Veliz Sr. is modified insofar as the calculation of custody credits is concerned. We direct the trial court to prepare an amended abstract of judgment that reflects the correct number of custody credits, and forward it to the California Department of Corrections and Rehabilitation. In all other respects the judgment against Veliz Sr. is affirmed. The judgment against Mohry is affirmed.

McCONNELL, P. J.

WE CONCUR:

HUFFMAN, J.

McDONALD, J.

type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice."].) Veliz Sr. did not comport with this duty. Mohry also filed a global joinder, but he later clarified he only joined in certain arguments by Veliz Jr. that Mohry briefed himself.