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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

LUCIA JANET MARTINEZ,

Defendant and Appellant.

E053559

(Super.Ct.No. RIF148790)

OPINION

APPEAL from the Superior Court of Riverside County. Gary B. Tranbarger,
Judge. Affirmed with directions.

Eric R. Larson, under appointment by the Court of Appeal, for Defendant and
Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney
General, Julie L. Garland, Assistant Attorney General, Garrett Beaumont and Anthony
Da Silva, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant, Lucia Martinez, of first degree murder (Pen. Code, § 187, subd. (a)). She was sentenced to prison for 25 years to life and appeals, claiming the evidence was insufficient to support the verdict, the jury was incorrectly instructed and the order for direct restitution should be clarified to indicate that her liability is joint and severable with the codefendant's. We agree with her last contention and reject the other two. Therefore, we will direct the trial court to amend the abstract of judgment and minutes of the sentencing hearing to indicate that her obligation for direct restitution is joint and severable with the codefendant's. Otherwise, we affirm.

FACTS

The witness to the crime (hereinafter, the witness), who was granted use immunity for her testimony, did not want to testify and said she was afraid, testified that on New Year's Eve, 2008, she had been staying with the defendant and the defendant's boyfriend (hereinafter, the codefendant) at the couple's one bedroom cabin in Poppet Flats. The codefendant called the victim, whom he had met while both had been in prison,¹ to come over to celebrate the New Year, which the victim did. After making an alcohol-run to Walmart, all four returned to the cabin and listened to music in the living room. Either all four or all but the witness began to drink and all four danced to the music. The victim put his hand on the witness's leg and she removed it, then brought this to the defendant's attention. While the codefendant was in the kitchen, the defendant continued to dance and the victim tried to dance with her by putting his hands on her hips. She pushed him

¹ The codefendant testified to this.

away and went into the kitchen. The victim sat down and began talking to the witness. Two minutes later, the defendant and codefendant came out of the kitchen. The codefendant asked the victim to accompany him to the bedroom and both went inside. After a couple of minutes, the defendant joined the codefendant and the victim in the bedroom and closed the door. The witness then heard, coming from the bedroom, one or two thumps, like someone was getting hit, or was hitting something or was bouncing off the floor or walls. The witness turned down the music in the living room to better hear what was going on in the bedroom. The defendant came out of the bedroom, turned up the music, asked the witness not to make or receive any calls from her cell phone, and asked where her cell phone was. She also asked the witness what the latter had heard. The witness told defendant where her cell phone was and that she had heard thumping. The defendant returned to the bedroom, once again closing the door. The witness may have heard² around five sounds of thumping, louder than the initial noise, and lasting for several minutes. The defendant and codefendant then came out of the bedroom. Neither had injuries. They told the witness that she could not go anywhere, she had to stay with them and she could not make any phone calls. They had her cell phone, but she was unsure at what point they had gained possession of it or which of the two had taken it. All three sat down in the living room. With the codefendant right behind her, defendant

² We say “may” because at trial, the witness initially testified to hearing the thumping, but was impeached with her pretrial statements to the case agent and at the preliminary hearing that she did not hear a second set of thumping; she also acknowledged at trial that she had additionally testified at the preliminary hearing that she did hear the second set, then she admitted that she was not “entirely sure.”

told the witness that if the latter said anything, they would “take the closest one to her.”³ At the time, the witness had a four-year-old son. The codefendant went into the bedroom and emerged, dragging the victim’s beaten and lifeless body, which he deposited on the living room floor. The three again sat down and defendant asked the codefendant what they were going to do with the victim’s body. The codefendant replied that they’d figure something out. Defendant and the codefendant told the witness to help with the body and, out of fear, she assisted them in dragging it through the kitchen outside, where it was placed in the victim’s car after the codefendant had parked the car in the garage. While the victim’s body was in his car, the codefendant tied a rope around the wrists, which were placed behind the back, and he tied the rope to a cinder block. All three returned to the cabin and slept in the living room, the witness feeling she had no choice but to remain in their presence.⁴

The next day, the codefendant was gone, and defendant directed the witness to help her clean up some of the blood that was in different places in the bedroom. The witness felt she had no choice but to help. Defendant then had the witness take her in the witness’s car to Banning, where defendant visited with family members. The witness could not get away from defendant and defendant had the witness’s cell phone. That night, defendant, the codefendant and the witness made another attempt to clean up the

³ The witness also testified that she could not remember if defendant had made this threat after the first set of thumps or after all the thumping was over.

⁴ The previous night, she had slept in the bedroom while defendant and the codefendant slept in the living room.

blood in the bedroom. They discussed what to do with the victim's body and decided to put it in a nearby lake. Beneath the cover of darkness, the codefendant drove the victim's car, with the victim's body in the passenger seat, and the witness, driving her car with defendant as her passenger, followed. After parking near the lake, all three carried the victim's body to a bridge and dropped it into the lake. Continuing to drive her car with defendant as her passenger, the witness followed the codefendant, who drove the victim's car, to Joshua Tree. Defendant still had possession of the witness's cell phone. The women lost sight of the codefendant but eventually picked him up after he had abandoned the victim's car in a sparsely populated area. The codefendant had a red gas can and he smelled of gasoline. They stopped at a gas station where the codefendant paid to have the witness's car gassed up. The following day, the codefendant went to work and the witness and defendant again went to Banning, but defendant gave the witness her cell phone back as the latter was applying for a drug treatment program and needed it.

On January 7, 2009, the victim's clothes and wallet were found in a dumpster at a fenced-in job site where the codefendant worked. When asked by coworkers, the codefendant twice denied knowing the victim.

Surveillance video of the four at Walmart and the three at the gas station were shown to the jury. The station was a few miles from where the victim's car had been abandoned. Inside the car was a wet residue in areas that would be touched by someone using the car, and an envelope on which had been written the address of the cabin. There was gasoline residue inside the car. A web map from the victim's home in Brea to the cabin was found on the victim's home computer. There were calls on the victim's cell

phone for December 31, 2008 to the codefendant's cell phone. The codefendant told law enforcement a variety of stories about his interaction with the victim around the time of the latter's death. The victim's DNA was found in the bedroom of the cabin. Calls between the codefendant's cell phone and defendant's cell phone for January 1, 2009, traced the movement the witness claimed they had made from the cabin to where the victim's car had been abandoned. Areas of the carpet in the cabin's bedroom had been cleaned and dyed. About two months after the murder, the victim's body, filled with gasses from decomposition, floated to the surface of the lake. Cinderblock and rope similar to that attached to the victim's body were found at the cabin. Calls made on defendant's cell phone between January 10 and 16, 2009 traced a journey from Banning to Pennsylvania. In April 2009, defendant was found by law enforcement in Georgia. Voicemail messages left by the codefendant for the victim after the victim was dead were played for the jury. In the voicemails, the codefendant expresses love for the victim.

Defendant presented no evidence and did not testify. The codefendant testified that the witness had begun a relationship with the victim over the phone prior to New Year's Eve, 2008. Before going to Walmart, the witness and the victim had gone into the bedroom of the cabin and when the witness emerged, she told the codefendant that the victim was "a weenie" because he talked "lovey-dovey" to her. The codefendant informed the victim that the witness had said that she wanted to have fun "without strings," so the victim should not try to romance her. The codefendant offered to sleep on the couch in the living room while the victim and the witness used the bed in the bedroom. The codefendant told the victim he would smooth things out between the

victim and the witness. That was achieved after the trip to Walmart, as the four danced in the living room. After having drinks, the witness grabbed the victim's hand and they walked into the bedroom. Two minutes later, the sound of a loud smack came from inside the bedroom, and defendant told the codefendant to go in there. Both went in and saw the witness and the victim standing face to face, yelling at each other. The codefendant jokingly asked the victim if he had "struck out." Defendant told the codefendant that the witness had told her that the victim had "tried to take the pussy." The situation dissolved, as will be described in more detail later in this opinion, ultimately resulting in the victim's death and the extensive cover-up engaged in by defendant, the codefendant and the witness.

ISSUES AND DISCUSSION

1. Insufficient Evidence

Defendant asserts that there is insufficient evidence to support either theory of her guilt as propounded by the prosecution. In fact, the prosecutor argued to the jury that there were three ways in which a juror could find her guilty of first degree murder, i.e., as an aider and abettor of the codefendant's commission of such a murder, as an aider and abettor of the codefendant's battery of the victim, which naturally and probably resulted in the victim's first degree murder and as a perpetrator of first degree murder, in that she inflicted blow(s) on the victim that resulted in his death. In arguing there was insufficient evidence of the first theory, defendant asserts that there was no evidence that she hit the victim. Therefore, we will begin with that theory.

As to the act involved in this theory, we disagree with defendant that there was no evidence she inflicted any of the blows that resulted in his death.⁵ According to the witness's testimony, there were no thumping noises while defendant was outside the bedroom, only when she was inside. The witness also testified that defendant later complained that she had broken her fingernail. The jury was entitled to reject the codefendant's claims that defendant did nothing other than slap the victim in the face and she was upset hours later when the codefendant told her that the victim was dead. Even if the latter was believed by the jury, that would not suggest that defendant did not deliver any of the significant blows—only that the consequences of her actions were beginning to be apparent to her. The mental element of this theory is the same as that for the first theory of guilt, i.e., aiding and abetting first degree murder, and we will discuss it in that context.

As to the theory that defendant aided and abetted the codefendant's first degree murder of the victim, defendant asserts that there was no evidence he was in possession of a deadly weapon at the time of the crime. In light of the fact that the victim died of injuries inflicted by hands and knees, this is of no moment.

Defendant also points out that there was no evidence she made any statements to the codefendant encouraging him to kill the victim. However, according to the witness,

⁵ Ironically, defendant states this assertion as follows, "There was no evidence that [defendant] physically struck [the victim] inside the bedroom." This is ironic because the only evidence offered at trial in support of defendant's innocence, i.e., the testimony of the codefendant, included his statement that, in the bedroom, after the victim exhorted the codefendant to join him in leaving the women, defendant reached over the codefendant and slapped the victim's face.

everything appeared to be fine before defendant placed his hands on defendant's hips while trying to dance with her—she registered her disapproval with that by pushing him away, then entered the kitchen, where the codefendant was, and after two minutes, the codefendant emerged and asked the victim to go into the bedroom with him.

Defendant points out that the witness testified that she was not sure how long after, first, defendant, then the codefendant, emerged from the bedroom, that she saw the codefendant drag the victim's body out to the living room. Defendant asked the codefendant what they were going to do with the body and he replied that they would figure something out. It appeared to the witness that "right after the incident happened," defendant was afraid "from what just happened."⁶ As stated before, this does not disprove any intent on the defendant's part—just that she feared the consequences to herself of her actions. Equally unimportant is the witness's testimony that before the incident happened, it did not appear to her that it was planned. The witness had not known defendant for long and had been with her only two to three times and she had just met the codefendant the day before. Even the prosecutor did not argue that the intent to kill the victim was formed before the dancing incident.

Defendant asserts there was no evidence that she had the specific intent to kill the victim. However, based on the witness's testimony, a reasonable inference could be drawn that it was defendant's complaint to the codefendant about the victim

⁶ Defendant also points out that the witness testified that the codefendant's hand appeared to be swollen, but she said she did not recall when she noticed this and when she so testified, she had just spoken about what had occurred at the lake the night following the murder.

inappropriately touching her during dancing that provided the impetus for the murder. Even according to the codefendant, his devotion to the defendant was so strong that he would die for her, he had her name tattooed next to his eye and on his wedding ring finger, he considered her to be his common law wife and his belief that the victim was going to come at the defendant after the defendant slapped him caused the codefendant to push the victim across the bedroom and order him, the codefendant's self-proclaimed "best friend," to leave. Even though the codefendant and the victim were in the bedroom initially alone, the witness did not hear any thumping noises until defendant joined them. It was defendant, and no one else, who emerged from the bedroom, told the witness not to make or answer any calls, asked the witness what she had heard and where her cell phone was, turned up the music so as to prevent the witness from hearing the continuation of the beating and may have taken the witness's phone at this point and threatened someone close to her. The jury could reasonably infer that defendant watched as the codefendant, who outweighed the victim by 50 pounds or more, held onto the victim by the latter's shoulders and repeatedly kned him in the chest. If defendant did not threaten the witness when the former had emerged from the bedroom during the beating, she did so after she and the codefendant came out after the beating ended. The two told the witness that she could not leave, that she had to stay with them and she could not make any calls. The defendant would not let the witness out of her sight the next day and she had her phone, all outside the codefendant's presence. This, and defendant's

participation in the disposal of the body and the victim's car and the cleaning of the bedroom⁷ formed the basis for a reasonable conclusion that defendant had the intent to kill the victim. The fact that the victim was a friend of the codefendant's and that it was New Year's Eve did not deter the codefendant from murdering his "best friend," so it would come as no surprise to the jury that these two facts did not deter defendant from also intending to kill the victim. Nor did the fact that defendant and the victim had no prior relationship—apparently the victim's hands on her hips was enough for her.

Next, defendant asserts that there was insufficient evidence to support the theory that she aided and abetted the codefendant's beating of the victim, the natural and probable consequences of which resulted in the victim's death. ““ A person who knowingly aids and abets criminal conduct is guilty of not only the intended crime . . . but also of any other crime the perpetrator actually commits . . . that is a natural and probable consequence of the intended crime. The . . . question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]’ [Citation.] Liability under the natural and probable consequences doctrine ‘is measured by whether a reasonable person in the defendant’s position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.’ [Citation.] [¶] ““ . . . [T]he consequence need not have been a strong probability; a possible consequence which

⁷ Additionally, defendant was in Georgia by the time authorities caught up to her, and she had been in Pennsylvania. According to the codefendant, defendant left the cabin either on January 2 or two days later and never returned, although he remained there until he was arrested for a parole violation.

might reasonably have been contemplated is enough” [Citation.]’ [Citation.]”⁸ (*People v. Medina* (2009) 46 Cal.4th 913, 920.) “[W]hether or not the act committed was the ordinary and probable effect of the [target offense] . . . is a question of fact for the jury, [citations] and if there be any evidence to support the finding of the jury on this question, its determination is conclusive.” (*People v. Durham* (1969) 70 Cal.2d 171, 183, fn. omitted, (*Durham*).

Except for the codefendant’s periods of incarceration, during which the defendant wrote to him, they had been together since 2002. His children considered her to be their stepmother and her children considered him to be their stepfather. She had his name tattooed on her neck during one of his incarcerations. Although the codefendant and the victim were about the same height, the codefendant out-weighed the victim by 50 or 60 pounds. The codefendant had two convictions for felony evading the police, two for possessing a stolen vehicle, one for possessing ammunition while on parole and possessing methamphetamine. He had been to prison at least three times. Thus, any reasonable person in defendant’s position would have known that the codefendant was not afraid of committing felonies and going to prison, or of engaging in acts in defiance of the police. He was, in short, no wallflower. He was also someone who was very devoted to her, and such a person does not normally take kindly to sexual advances made upon their significant other. Finally, she was aware of his strength and especially of the physical differences between him and the victim. Of the twelve ribs on the victim’s right

⁸ In *Redfoot v. J.T. Jenkins Co.* (1955) 138 Cal.App.2d 108, 119, the appellate court held that it must be more than a mere possibility.

side, three were broken in the front and seven in the back, and of the twelve on his left side, six were broken in both the front and the back. Some were broken in more than one place and some had been hit so hard that there were displaced. The victim's lower left lung and liver had been torn by the broken ribs. His sternum was broken and he had a blunt force laceration on his forehead. The pathologist estimated that this damage had been done by 10 to 16 blows. According to the witness, all these blows were delivered in the presence of the defendant. It was defendant who supplied the incentive for the codefendant to beat the victim. Apparently, whatever damage the codefendant inflicted during the initial part of the beating was sufficient to motivate defendant to go into the living room and attempt to not only intimidate the witness into not reporting what she had already heard, but also to obscure the sounds of the continuation of the beating. As already stated, the jury could reasonably infer that defendant watched while the codefendant held onto the victim by the latter's shoulders and repeatedly kneed him in the chest. Under these circumstances, the jury could reasonably infer that she would have known that the victim's premeditated and deliberated death would be a natural and probable result of that beating.⁹

⁹ Defendant introduces a red herring into the argument by asserting that there was sufficient evidence that defendant directly committed a battery on the victim by, according to the codefendant's version of events, slapping the victim's face. Contrary to defendant's assertion, at no point did the prosecutor argue that this act, in and of itself, constituted the battery that served as the basis for that theory of first degree murder. In speaking about defendant aiding and abetting the *codefendant's* battery that naturally and probably resulted in the death of the victim, the prosecutor said, ". . . [T]he doctrine of natural and probable consequences . . . says . . . that even if you didn't want to aid in that murder, but you did want to aid and abet in a lesser crime, here it would be battery -- the

[footnote continued on next page]

In *People v. LeGrant* (1946) 76 Cal.App.2d 148, 150 (*LeGrant*), the defendant was driving in his car with, inter alia, two companions. As they passed the car containing the victim, a stranger, remarks were exchanged between the occupants of both cars, during which someone in defendant's car challenged the victim to a fight and the victim accepted. (*Ibid.*) The defendant stopped his car near where the victim had been directed by someone in defendant's car to stop his. (*Ibid.*) The defendant and his two companions stood together and when the victim approached, one of defendant's companions hit the victim, knocking him against a plate glass window, cracking it. (*Id.* at p. 151.) The victim rebounded and came forward, but was again struck by this companion, this time so hard that he went through the plate glass window, sustaining fatal injuries. (*Ibid.*) Defendant admitted that before his companion hit the victim, he told the gathering crowd not to interfere, so as to ensure "a fair fight." (*Ibid.*) The appellate court rejected the defendant's contention that there was insufficient evidence to support his conviction of manslaughter on the theory that he aided and abetted an assault and battery, whose natural and probable consequence was the manslaughter, thusly, "It was within [the defendant's] power to have ignored the [victim's] acceptance of [the]

[footnote continued from previous page]

strikes, the hits. Even with the defendant's own testimony, he said that she hit him. All those different things. They were all while committing these crimes. [The victim] was murdered and this is the key part. Under all the circumstances a reasonable person in the defendant's position would have known that the murder was a natural and probable consequence of the crime." This is not the same as saying that the one slap the defendant, according to the codefendant, delivered to the victim's face, somehow resulted in all the fatal injuries that were inflicted on the victim's torso. Certainly, the evidence does not support such a position.

challenge [to fight] . . . and to have driven on, thus entirely avoiding the violent and unlawful controversy which he must have known might follow if both such cars stopped. Nevertheless, he . . . got out of his car in company with [his two companions], and stood with them . . . watching the [victim] approach them. [The defendant] was standing immediately adjacent to [his companion] when the latter launched his vicious attack and made no effort . . . to restrain the latter during any part of the ensuing proceedings. . . . [The defendant] gave active aid, encouragement and assistance to [his companion] by taking such an affirmative part as to keep other people back who might have ‘buted in’ and have thus prevented the tragedy. By so doing, he acted with full knowledge that an assault and battery was in progress, the reasonable and natural consequences of which might be . . . the death of, either or both of the combatants.” (*Id.* at pp. 153-154.)

Next, defendant asserts that, as a matter of law, battery cannot serve as the target offense for a murder under the natural and probable consequences theory. We disagree.

Defendant asserts that *People v. Prettyman* (1996) 14 Cal.4th 248 (*Prettyman*) stands for the proposition that one cannot be guilty of first degree murder by aiding and abetting a battery. The Supreme Court rejected an identical contention as applied to simple assault in *People v. Gonzales and Soliz* (2011) 52 Cal.4th 254 (*Gonzales and Solis*), as follows, “*Prettyman* addressed a conflict in the case law concerning whether a trial court was required to identify and define the target offense for the jury or need only describe the target offense generally as some criminal or nefarious conduct intended by the defendant. [Citation.] . . . [¶] . . . [T]he decision does not directly address what crimes can or cannot provide liability for murder under the [natural and probable

consequences] doctrine. . . . In describing the target crime [in *Prettyman*] as a form of aggravated assault, we did not hold that *only* aggravated assault can provide a predicate 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 must be considered trivial for these purposes. [¶] . . . In *People v. Gonzales* (2001) 87 Cal.App.4th 1, the defendant was convicted of murder under the natural and probable consequences doctrine. [Citation.] . . . [Citation.] The trial court identified the target crime as ‘assault’ but did not instruct on the elements of the crime. [Citation.] On appeal, the defendant argued the trial court had a sua sponte duty to instruct that a finding of guilt based on the natural and probable consequences doctrine must depend on his knowing that the shooter . . . was armed. [Citation.] In effect, the defendant contended [that] his liability for murder under the natural and probable consequences doctrine had to be based on his intent to aid and abet *an assault with a deadly weapon*. The Court of Appeal rejected the contention, concluding [that] ‘the standard instruction[, which allowed defendant to be convicted of murder if it was a] natural and probable consequence of the assault’ [citation] [was sufficient]. We likewise reject [the defendant’s] contention here that, as a matter of law, simple assault cannot serve as the target offense for murder liability under the natural and probable consequences doctrine.” (*Id.* at pp. 299-300, some italics added.) The Supreme Court then said, in a footnote, “See also *People v. Medina* (2009) 46 Cal.4th 913 [(*Medina*)] . . . where neither the majority nor the dissent questioned that simple assault

could serve as the target offense.” (*People v. Gonzales and Solis, supra*, 52 Cal.4th at p. 300, fn. 13.)¹⁰

Although not mentioned in *Gonzales and Solis*, in *Prettyman*, the California Supreme Court noted, “. . . [D]ecisions involving application of the ‘natural and probable consequences’ doctrine in aiding and abetting situations . . . most commonly involved situations in which a defendant assisted or encouraged a confederate to commit an assault . . . with potentially deadly force, and the confederate not only assaulted but also murdered the victim.” (*Prettyman, supra*, 14 Cal.4th at p. 262.) In two of the cases cited by *Prettyman*, i.e., *People v. Cayer* (1951) 102 Cal.App.2d 643, 651, and *LeGrant, supra*, 76 Cal.App.2d 148, 154, (discussed above) two appellate courts permitted the use of misdemeanor “assault and battery” as the target offenses for murder and manslaughter, respectively.

In *People v. Canizales* (2011) 197 Cal.App.4th 832 (*Canizales*), the appellate court rejected the defendant’s contention that one cannot be convicted of murder as a natural and probable consequence of the commission of a misdemeanor (in that case, street racing), thusly, “[A] target misdemeanor may support a conviction for a non-target murder under the [natural and probable consequences] theory.’ (See *People v. King* (1938) 30 Cal.App.2d 185, 200 . . . [plan for misdemeanor simple assault resulted in death when one conspirator used a deadly weapon]; *People v. Lucas* (1997) 55

¹⁰ In *People v. Montano* (1979) 96 Cal.App.3d 221, 223, 226 (*Montano*), battery was the target offense, which the defendant aided and abetted, and its natural and probable consequence was attempted first degree murder.

Cal.App.4th 721, 732-733 (*Lucas*) . . . [misdemeanor brandishing a gun].) ‘The natural and probable consequences doctrine . . . allows an aider and abettor to be convicted of murder, without malice, even when the target offense is not an inherently dangerous felony.’ (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322, (*Culuko*), [Fourth Dist, Div. 2].)^[11] [¶] We believe that the[se] cases . . . set forth the more logical position. 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 [of a reasonable person] 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 [the defendants] acted.* [Citation.]^[12] 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

¹¹ In *Culuko*, we went on to say, “[W]here two or more defendants have committed an unlawful act in which a death has resulted, and the state has proven that one of the defendants actually harbored the malice necessary for a murder conviction (either express or implied), it may be appropriate to rely on the natural and probable consequence doctrine to hold the other defendant liable.” (*Culuko*, p. 322.)

¹² Another example of this occurred in *People v. Luparello* (1986) 187 Cal.App.3d 410, 443, in which Division One of this court looked, not to the elements of the asserted target offense, i.e., aggravated assault, but to the circumstances of the commission of the target offense in determining if the first degree murder, of which defendant was convicted as an aider and abettor of the aggravated assault, was a natural and probable consequence.

not mandate it. Here, given the facts and circumstances of the speed contest . . . the likelihood that someone would be killed was reasonably foreseeable.” (*Canizales*, pp. 854-855, italics added.) We completely agree with the reasoning in *Canizales* and adopt it as our own.

Defendant also asserts that there are no cases, outside the gang context, where a first degree murder has been a natural and probable consequence of a misdemeanor battery and assault. In the gang context, first degree murder has been viewed as a natural and probable consequence of an assault where the defendant knew the perpetrator was capable of using deadly force and an inference could be made that he shared the perpetrator’s intent to assault the victim with a deadly weapon. (*Gonzales and Solis, supra*, 52 Cal.4th at p. 296.) In *Medina*, gang expert testimony and the fact that two of the three gang members who attacked the victim knew a gun was available at the scene created a reasonable inference that the fatal shooting of the victim by one of the three was reasonably foreseeable by the other two after the victim was able to hold his own during a retaliatory beating administered by them. (*Medina, supra*, 46 Cal.4th at pp. 922-923.) What these cases teach is not that first degree murder is a natural and probable consequence only in gang cases. Rather, they teach that if evidence or reasonable inferences drawn from the evidence show that a first degree murder is a natural and

probable consequence of aiding and abetting a particular crime, given *all the attendant circumstances* (*id.* at p. 927), a first degree murder conviction will be upheld.¹³

In *Durham, supra*, 70 Cal.2d 171, 185, the California Supreme Court upheld the first degree murder conviction of a defendant who aided and abetted “forcible resistance of arrest” (*id.* at p. 181) on the grounds that he and the shooter “had been engaged in a joint expedition which involved the commission of robberies . . . and which included . . . the forcible resistance to arrest; that [the defendant] was fully aware . . . that [the shooter] had exhibited his pistol in the commission of [the] robberies and had actually fired it at one who had sought to apprehend them in the act of escaping; . . . that [defendant] knew that [the shooter] was armed when they [were stopped by the victim police officer].” (*Durham*, p. 185.)

In *People v. Wheaton* (1923) 64 Cal.App. 58, 66-68 [cited with approval in *Durham*], the appellate court upheld the first degree murder conviction of the defendant where five men set out to commit burglaries, all were armed except the defendant and one of defendant’s companions killed a police officer who was attempting to apprehend them.

¹³ Having rejected defendant’s contention that battery cannot serve as the target offense, under the natural and probable consequences theory, for first degree murder, and that there was sufficient evidence to support the verdict of first degree murder under this theory, we necessarily reject her contention that the trial court erred in instructing the jury that it could base its conviction on that theory.

In *People v. Harper* (1945) 25 Cal.2d 862, the California Supreme Court upheld the first degree murder conviction of the defendant who aided and abetted a robbery and escape, where the codefendant returned to the scene of the robbery and killed the victim.

Convictions for attempted premeditated and deliberate murder have been upheld where the defendant aided and abetted attempted robberies (*People v. Hart* (2009) 176 Cal.App.4th 662) and a battery (*People v. Montano* (1979) 96 Cal.App.3d 221).

As in *Durham* and *Wheaton*, there were sufficient attendant circumstances here, as discussed above, to justify the jury's implied finding that the first degree murder of the victim was a natural and probable consequence of defendant's aiding and abetting the codefendant's battery of the victim.

2. Jury Instructions

a. Voluntary Manslaughter

1. Unintentional, Nonmalicious Killing During an Inherently Dangerous Felony

Defendant contends that the trial court had a sua sponte duty to instruct the jury on voluntary manslaughter¹⁴ based on the theory that the killing of the victim was unintentional and without malice, during the course of an inherently dangerous felony (assault by means of force likely to produce great bodily injury). In support, he relies on *People v. Garcia* (2008) 162 Cal.App.4th 18 (*Garcia*), while acknowledging that the conclusion reached in *Garcia* is now an issue pending before the California Supreme

¹⁴ The jury was instructed on this offense on the theory that the victim had been killed as a result of imperfect self defense.

Court in another case.¹⁵ We will assume, for purposes of this argument only, that *Garcia* is correct and the California Supreme Court will eventually hold that an unintentional killing, without malice, during the course of an inherently dangerous felony constitutes voluntary manslaughter.

“An instruction on a lesser included offense must be given *only if there is substantial evidence* from which a jury could reasonably conclude that the defendant committed the lesser, uncharged offense but not the greater, charged offense. [Citation.] ‘[E]very lesser included offense, or theory thereof, *which is supported by the evidence* must be presented to the jury.’ [Citation.]” (*People v. Thomas* (2012) 53 Cal.4th 771, 813, some italics added.)

Notably missing from defendant’s argument here is *any* citation to the record concerning the lack of implied malice, i.e., that defendant¹⁶ did not subjectively appreciate that hers or the codefendant’s conduct (depending on whether one believed that the defendant participated in the beating of the victim or not) endangered the victim’s life. (See *Garcia, supra*, 162 Cal.App.4th at p. 32.) Because defendant did not testify and made *no* statements about her thought process during the beating of the victim, there was no evidence that she did not subjectively appreciate that hers or the codefendant’s conduct endangered the victim’s life. Nor was there any basis for the jury to make a reasonable inference that she did not subjectively appreciate that her conduct or that of

¹⁵ That case is *People v. Bryant* (S196365, review granted 11/16/2011).

¹⁶ Defendant makes clear in her reply brief that it is hers, and not the codefendant’s subjective appreciation that is at issue.

the codefendant endangered the victim's life. Therefore, there was *no* evidentiary basis for the giving of an instruction on voluntary manslaughter under this theory.

2. *Sudden Quarrel/Heat of Passion*

As stated before, the codefendant testified that after he and defendant heard the smacking noise coming from the bedroom into which the witness and the victim had gone, the codefendant and defendant entered the room to see the other two yelling at each other. The codefendant jokingly asked the victim if he had "struck out" with the witness. The codefendant told defendant that the witness had told him that the victim "tried to . . . take the pussy." The codefendant went on to testify that the victim then made a derogatory remark about both women and suggested that he and the codefendant go elsewhere for sexual favors. The victim and the witness cussed each other out. The victim repeated his suggestion, including the colorful language, to the codefendant, adding that the cabin was the codefendant's (not the defendant's) home. The codefendant told the victim to watch his mouth around the defendant and suggested that they all stop. The victim twice repeated his derogatory remark about the women, which resulted in defendant reaching over the codefendant and slapping the victim in the face. The victim took a step back and the codefendant feared that the victim was going to harm the defendant and the codefendant had to use force to stop the victim, so he pushed the victim across the room and ordered him out. The victim approached the codefendant and defendant on what the codefendant believed was his way out the door, but, instead, he began hitting the codefendant. The codefendant struck back and knocked the victim down. The victim got back up and the two women left the room, closing the door behind

them. The codefendant asked the victim what was going on. The victim rushed at the codefendant with his fists swinging and the codefendant “dropped” the victim. The victim rushed the codefendant again and grabbed on to the latter’s waist, pinning his arms to his side. Both stumbled into the bedroom wall. The victim tried to wrestle the codefendant, which the codefendant described as the victim “wrestling with his self [*sic*]” due to the differences in their weights. The codefendant testified that this effort by the victim “wasn’t really doing nothing” until the victim tried to throw the codefendant along with himself through the window, but a blanket hung over it kept both inside the room.¹⁷ At that point, the codefendant believed he was fighting for his life. The codefendant freed his arms, although the victim continued to hold onto his waist, and the codefendant began “wailing on [the victim’s] backside” with all his strength with his fists, “fighting for [his] life.” The victim loosened his grip on the codefendant’s waist and the codefendant tried to push him back, but the victim came forward towards the codefendant. The codefendant grabbed the victim’s shoulders, and while holding on to him, kneed him several times in the chest, and possibly in the face, using both knees and all the force he could muster. As the codefendant began kneeing the victim, the latter let go of the codefendant. The codefendant repeated that he was “fighting for his life” and “trying to get [the victim] off [him]” while he was kneeing the victim. The victim rose up and put his arms up. Fearing that the victim was coming at him again, the codefendant “defended [him]self” and “was fighting for his life” by “open[ing] fire on

¹⁷ The codefendant later testified that he did not know if the victim was trying to throw him through the window.

[the victim's] chest" and the latter fell back, hitting the ground. The codefendant stepped over the victim's feet, left the room and slammed the door. The women asked the codefendant what had happened and he replied that he "had to fight with [the victim]." When asked at trial if he noticed that the victim was having trouble breathing during their confrontation, the codefendant testified that he was "trying to defend [him]self" and observed the victim only to the extent that he noticed when the latter was coming at him.

Defendant contends that the trial court erred in rejecting her request that the jury be instructed on voluntary manslaughter on the theory that the victim was killed as a result of provocation.¹⁸ When discussing the request, the trial court said that the

¹⁸ The standard instruction on provocation reducing murder to manslaughter is as follows, "A killing that would otherwise be murder is reduced to voluntary manslaughter if the defendant killed someone because of a sudden quarrel or in the heat of passion. [¶] The defendant killed someone because of a sudden quarrel or in the heat of passion if: [¶] 1. The defendant was provoked; [¶] 2. As a result of the provocation, the defendant acted rashly and under the influence of intense emotion that obscured (his/her) reasoning or judgment; [¶] AND [¶] 3. The provocation would have caused a person of average disposition to act rashly and without due deliberation, that is, from passion rather than from judgment. [¶] Heat of passion does not require anger, rage, or any specific emotion. It can be any violent or intense emotion that causes a person to act without due deliberation and reflection. [¶] In order for heat of passion to reduce a murder to voluntary manslaughter, the defendant must have acted under the direct and immediate influence of provocation as I have defined it. While no specific type of provocation is required, slight or remote provocation is not sufficient. Sufficient provocation may occur over a short or long period of time. [¶] It is not enough that the defendant simply was provoked. The defendant is not allowed to set up (his/her) own standard of conduct. You must decide whether the defendant was provoked and whether the provocation was sufficient. In deciding whether the provocation was sufficient, consider whether a person of average disposition, in the same situation and knowing the same facts, would have reacted from passion rather than from judgment. [¶] [If enough time passed between the provocation and the killing for a person of average disposition to 'cool off' and regain his or her clear reasoning and judgment, then the killing is not reduced to voluntary manslaughter on this basis.] [¶] The People have the burden of proving beyond a

[footnote continued on next page]

codefendant had said only that he beat the victim because he feared for his life and the court asked counsel for the codefendant, who had also made the request, what evidence there was that the codefendant had been provoked by the victim. Counsel for the codefendant responded that the codefendant testified that it was not until the victim tried to put him through the window that he began to fear for his life and the violence the victim engaged in *before* the window incident constituted sufficient provocation.

However, according to the codefendant's own testimony, that was not why he inflicted the fatal blows. Additionally, in the pre-window sorties between the victim and the codefendant, the latter got the better of the victim each time, successfully knocking him down twice. Even the victim holding on to the codefendant's waist and attempting to wrestle him was described dismissively by the codefendant as the victim trying to "wrestle with hi[m]self" due to the differences in their weights. This does not constitute provocation.

Defendant here points to the abusive things the victim said to the codefendant about the women and his initial attempts to hit the codefendant. However, according to the codefendant, he asked the victim what was going on after the victim had made his remarks about the women and the victim hit the codefendant the first time. This suggests that the codefendant was not particularly phased by the victim's remarks or conduct. As

[footnote continued from previous page]

reasonable doubt that the defendant did not kill as the result of a sudden quarrel or in the heat of passion. If the People have not met this burden, you must find the defendant not guilty of murder." (Judicial Council of California Criminal Jury Instructions, CALCRIM No. 570.)

we have already stated, the fact that the codefendant was able to knock the victim down, the victim subsequently rushed him and he referred to the victim's efforts to wrestle him after grabbing on to his waist so dismissively ("wrestling with hi[m]self") also suggests that the codefendant was not incensed by the victim's statements or actions. Moreover, they did not result, according to the testimony of the codefendant, in the codefendant administering the fatal blows—the codefendant's fear that he would be harmed or killed by the victim did.

Defendant's assertion that the jury could have rejected some portions of the codefendant's testimony, i.e., his claim of self-defense, and accepted others, is irrelevant to this issue because the codefendant made no express or implied claim that he administered the fatal blows because the victim provoked him.

Defendant asserts that because this occurred between friends during a New Years Eve party suggested that the fatal assault was due to a sudden quarrel and not pre-planned. However, the jury obviously believed it was premeditated and deliberate. Moreover, these circumstances fall far short of even suggesting that the codefendant administered the fatal blows because he was provoked by the victim.

Next, defendant asserts that because the codefendant fatally beat the victim due to the latter's sexual advance on defendant, the requested instruction should have been given. While the sexual advance on defendant was the motive for the killing, it still did not establish that the codefendant was acting under the influence of a strong emotion produced by this event when he fatally beat the victim. In fact, according to the codefendant, he made two conciliatory remarks to the victim long after he was told about

the sexual advance (the codefendant suggested that all four stop the verbal argument and later asked the victim what was going on), suggesting that he was not “acting rashly and under the influence of intense emotion” at the time he beat the victim to death.

Finally, even if this instruction had been given, it would not have benefitted the defendant. The jury was instructed that “[p]rovocation may reduce a murder from first degree to second degree. The weight and significance of the provocation, if any, are for you to decide. If you conclude that a defendant committed murder, but was provoked, consider the provocation in deciding whether the crime was first or second degree murder.” The fact that the jury found the codefendant guilty of first degree murder indicates its rejection of the notion that the codefendant had been provoked.

b. *Involuntary Manslaughter*

Without objection from the defense, the following modified version of the standard instruction on involuntary manslaughter was given, “[The n]ext section deals with the lesser-included offense of involuntary manslaughter. When a person committed an unlawful killing but does not intend to kill and does not act with conscious disregard for human life, then the crime is involuntary m[urder]. The difference between other homicide offenses and involuntary m[urder] depends on whether the person was aware of the risk to life that his or her actions created and consciously disregarded that risk. ¶¶ An unlawful killing caused by a willful act done with full knowledge and awareness that the person is endangering the life of another and done in conscious disregard of that risk is voluntary manslaughter or murder. An unlawful killing resulting from a willful act committed without intent to kill and without conscious disregard of the risk to human life

is involuntary m[urder]. A defendant committed involuntary manslaughter if; [¶] (1) The defendant committed [a] crime that posed a high risk of death or great bodily injury because of the way it was committed. And; [¶] (2) the defendant's acts unlawfully caused the death of another person. [¶] The crime of battery is a crime that poses a high risk of death or great bodily injury. [¶] Great bodily injury means significant or substantial physical injury. It is an injury that is greater than minor or moderate harm. In order to prove murder or voluntary manslaughter, the People have the burden of proving beyond a reasonable doubt that the defendant acted with [the] intent to kill or with conscious disregard for human life. If the People have not met either of these burdens, you must find the defendant not guilty of murder and not guilty of voluntary manslaughter.”

Defendant faults this instruction in three regards. First, he asserts that it did not contain the definition of battery. However, that definition was given in conjunction with the instruction on aiding and abetting. If defendant wanted this definition repeated when the instruction on involuntary manslaughter was given, he should have requested it. The jury had the means before it to determine whether a battery was committed.

Next, defendant asserts that the instruction was faulty in that it provided that “[t]he crime of battery is a crime that poses a high risk of death or great bodily injury.” He correctly points out that battery does not require the infliction of bodily harm or even pain. (*County of Santa Clara v. Willis* (1986) 179 Cal.App.3d 1240, 1251, fn. 6.) However, the instruction also provided, as an element of involuntary manslaughter, that “defendant committed [a] crime that posed a high risk of death or great bodily injury

because of the way it was committed” and that battery was such a crime. We are confident that the jury interpreted this requirement to mean that because of the manner in which the battery here was committed on the victim, it posed a high risk of death or great bodily injury. Defendant cites neither legal precedent declaring this to be improper, nor does he assert that there was no evidence to support it. His reliance on *People v. Cox* (2000) 23 Cal.4th 665, 676 (*Cox*), is misplaced. Therein, the trial court instructed the jury that misdemeanor battery was an inherently dangerous offense in the abstract, which is miles apart from the instruction here.

Finally, defendant asserts that the instruction was defective because it failed to require a finding of criminal negligence. In support, he cites *People v. Butler* (2010) 187 Cal.App.4th 998, 1012-1014 (*Butler*). *Butler* and the authorities it relies on, i.e., *Cox*, *supra*, 23 Cal.4th 665, 674-676, and *People v. Wells* (1996) 12 Cal.4th 979, 988, make clear that the criminal negligence required for involuntary manslaughter is “commit[ting] a misdemeanor in a manner dangerous to life[.]” (*Butler*, at p. 1008.) The same modified version of the standard instruction on involuntary manslaughter given here was given in *Butler*. (*Id.* at p. 1013, fn. 9.)¹⁹ Division One of this court rejected the defendant’s

¹⁹ In fairness to the trial court here and in *Butler*, the standard instruction on involuntary manslaughter, CALCRIM No. 580, states the requirements for that offense in the disjunctive, i.e., “The defendant . . . committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed[*or*] committed a lawful act, but acted with criminal negligence” (CALCRIM No. 580, italics added.) This would lead any careful jurist to believe that if the act causing the death was a misdemeanor and not a lawful act, the second part of the instruction, i.e., that referenced criminal negligence, should not be given. That was certainly the case in *Butler*. (*Butler*, *supra*, 187 Cal.App.4th at p. 1013, fn. 9.)

contention that the trial court’s failure, sua sponte, to include in the instruction given principles of criminal negligence²⁰ was not error, saying, “. . . [T]he trial court adequately advised the jury of the criminal negligence mens rea applicable to involuntary manslaughter by instructing the jury that the predicate crimes underlying the involuntary manslaughter allegation must have been committed in a manner that posed a high risk of death or great bodily injury. [¶] . . . [¶] . . . As stated in *People v. Rodriguez, supra*, 186 Cal.App.2d at page 440, ‘an act is criminally negligent when a man of ordinary prudence would foresee that the act would cause a high degree of risk or great bodily harm.’ This is essentially the same standard provided to the jury by the trial court; i.e., defendant committed involuntary manslaughter if the ‘defendant committed a crime that posed a high risk of death or great bodily injury because of the way in which it was committed.’ [¶] We note the jury instruction did not reference the objective standard applicable to involuntary manslaughter; i.e., whether a reasonable person would have known that the act created a high risk of death or great bodily injury. However, there is nothing to suggest that the failure to provide the jury with this information harmed defendant. The jury was merely told that the crime must be committed in a manner that posed a high risk of death or great bodily harm; the jury was not told that defendant need

²⁰ Those principals are stated as follows, “A person acts with criminal negligence when: [¶] 1. He or she acts in a reckless way that creates a high risk of death or great bodily injury; [¶] AND [¶] 2. A reasonable person would have known that acting in that way would create such a risk. [¶] In other words, a person acts with criminal negligence when the way he or she acts is so different from the way an ordinarily careful person would act in the same situation that his or her act amounts to disregard for human life or indifference to the consequences of that act” (*Butler, supra*, 187 Cal.App.4th at p. 1013, fn. 9.)

not be subjectively aware of the high risk as long as a reasonable person would be aware. Absent direction on the standard to apply, the jurors would likely have looked at the circumstances to determine whether in their view there was a high risk. Because the jurors' unanimous conclusion on this point reflects the viewpoint of 12 persons drawn from the community at large, this approach could equate with the objective (reasonable person) standard. In any event, even if the jury improperly applied a subjective standard when evaluating mens rea (i.e., whether the circumstances showed defendant was aware of the risk), this would have inured to defendant's benefit as the jury would have had to agree unanimously on a fact not required for an involuntary manslaughter conviction. [¶]

. . . [¶] Although instruction on criminal negligence in the language of CALCRIM No. 580 would have further expanded on the concept of a gross lack of due caution, the additional information on this subject was not necessary for the jury's understanding of the case. The criminal negligence portion of CALCRIM No. 580 sets forth the requirements that the defendant acted with more than 'ordinary carelessness, inattention, or mistake in judgment,' and that the defendant's conduct was 'so different from the way an ordinarily careful person would act' that the conduct 'amounts to disregard for human life or indifference to the consequences of that act.' [Citation.] These concepts were sufficiently conveyed to the jury through the instruction stating that the crime must be committed in a manner that poses a high risk of death or great bodily injury. Reasonable jurors would have understood that commission of a crime in a manner that posed a high risk of death or great bodily injury constitutes conduct that is more than mere carelessness or inattention and reflects a disregard or indifference to life and human

safety. [¶] The jury was also instructed that the predicate offenses had to be committed wilfully or knowingly, thus ensuring the jury understood that accidental conduct could not support an involuntary manslaughter verdict. Reasonable jurors would have recognized that purposeful or knowing conduct committed in a manner posing a high risk of death or great bodily harm is more than mere carelessness or mistaken judgment.” (*Id.* at pp. 1012, 1014-1015, fn. omitted.)

We note that defendant makes no attempt to argue that the conclusion reached in *Butler* was incorrect—he simply cites it as reason for us to reverse the conviction in this case. Clearly, it is not.

Finally, the People assert that the jury’s verdict of first degree murder meant that it necessarily rejected the notion that the killing was without the intent to kill. Defendant’s response is that given defendant’s “relative lack of involvement in the killing” the jury may have been willing to exercise leniency had they been given instructions on criminal negligence. We think not. As Division One in *Butler* concluded, the concepts that would have been covered in an instruction on criminal negligence were covered by the instruction provided.

3. *Cumulative Error*

Having concluded that no error occurred in any of the matters addressed by defendant, we necessarily reject her contention that the cumulative weight of these errors requires reversal of her conviction.

4. *Restitution*

At a joint sentencing hearing, the trial court sentenced “each defendant” to prison for 25 years to life, awarded credit for time served and said, “As to each defendant the Court orders restitution in the amount of \$7,500 to the Victim’s Compensation Fund, and an additional \$488.32 to [the victim’s family].” The court went on to impose fees and fines, again, “[a]s to each defendant.” Defendant here contends that her liability should be joint and severable with the codefendant’s, asserting that “the record as a whole makes it abundantly clear that the trial court intended for the . . . restitution to be paid jointly and severally” In *People v. Blackburn* (1999) 72 Cal.App.4th 1520, this court held that it was “glaringly obvious” the trial court there ordered that the direct restitution be joint and severable where it ordered the defendant to pay direct restitution in the full amount in August of 1997 and ordered his codefendant to do the same in January, 1998. (*Id.* at p. 1535.) We noted that with this interpretation of the trial court’s award, “there is no double recovery; nor is [one defendant] entitled to have [the other defendant’s] restitution obligation credited against his.” (*Ibid.*) Therefore, we will direct the trial court to have the minutes of the sentencing hearing and abstract reflect that defendant’s restitution obligation is joint and severable with the codefendant’s.

DISPOSITION

The trial court is directed to amend the abstract of judgment and minutes of the sentencing hearing to show that the direct restitution order for defendant is joint and severable with the codefendant's. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

RAMIREZ
P. J.

We concur:

RICHLI
J.

CODRINGTON
J.