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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN GARCIA BELMONTE,

Defendant and Appellant.

F059761

(Super. Ct. No. F09903119)

OPINION

APPEAL from a judgment of the Superior Court of Fresno County. Robert H. Oliver, Judge.

Scott Concklin, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Stephen G. Herndon and Darren K. Indermill, Deputy Attorneys General, for Plaintiff and Respondent.

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On February 21, 2009, farm workers found Juan Garcia's decomposing body alongside three .22 caliber shell casings in a field near Kerman. A pathologist opined that multiple .22 caliber gunshot wounds to the head three days to two weeks earlier were the cause of death. Months later, after the domestic violence arrest of her cohabitant

Eduardo Garcia Belmonte, Sr., Neomi Vasquez told authorities she had seen Belmonte's sons, 21-year-old Juan Garcia Belmonte and 16-year-old Eduardo Garcia Belmonte, Jr., kidnap Garcia a couple of weeks before his body was found and had heard both sons talk about Garcia's fate afterward.¹

A jury found Juan guilty of first degree special circumstance murder during commission of a kidnapping and guilty of kidnapping and found arming-of-a-principal-with-a-firearm allegations true in both counts.² The court sentenced him to life without the possibility of parole plus one year in prison. On appeal, he challenges the denials of his motion to suppress evidence, his motion to dismiss the case, and his motion to strike the special circumstance. He raises four special-circumstance instructional issues. He contests the sufficiency of the evidence of the special circumstance, the adequacy of an aiding and abetting instruction, the assistance of counsel, the constitutionality of his sentence, and his probation revocation fine. We order the probation revocation fine stricken from the judgment but in all other respects affirm the judgment.

BACKGROUND

On August 12, 2009, an information charged Juan with the murder (count 1; Pen. Code, § 187, subd. (a))³ and the kidnapping (count 2; § 207, subd. (a)) of Garcia. In count 1, the information alleged the special circumstances of an intentional killing by means of lying in wait (§ 190.2, subd. (a)(15)) and the commission of the murder while engaged in a kidnapping (§ 190.2, subd. (a)(17)(B)). In both counts, the information alleged the arming of a principal with a firearm, to wit, a rifle. (§ 12022, subd. (a)(1).)

¹ For brevity and clarity, later references to the father are to “Belmonte” and to the sons as “Juan” and “Eduardo.” The discussion sets out additional facts, issue by issue, as relevant. (*Post*, parts 1-12.)

² Though tried and convicted with Juan, Eduardo appeals separately. (*People v. Eduardo Garcia Belmonte, Jr.* (F059759).)

³ Later statutory references are to the Penal Code.

On December 17, 2009, the court granted Juan’s motion to set aside the lying-in-wait special circumstance allegation. (§§ 190.2, subd. (a)(15), 995.) On February 1, 2010, a jury found him guilty as charged, found true the murder-during-kidnapping special circumstance allegation, and found true the arming allegations in both counts, after which, on the prosecutor’s motion, the court dismissed the arming allegation in the kidnapping count. On March 4, 2010, the court imposed a sentence of life without the possibility of parole, imposed a consecutive sentence of one year on the arming enhancement to the murder count, and imposed and stayed the three-year middle term on the kidnapping count. (§§ 208, subd. (a), 654, 12022, subd. (a)(1).)

DISCUSSION

1. Motion to Suppress

On the grounds that his *Miranda*⁴ admonition was inadequate, that there was no showing he understood his *Miranda* rights, and that detectives did not inform him of his consular rights, Juan argues that the denial of his motion to suppress his statements was error. The Attorney General argues that there was no error and that error, if any, was harmless. We agree with the Attorney General that there was no error.

Juan filed a motion to suppress statements he made during a custodial interrogation by two detectives, the prosecutor filed an opposition, and the court held a hearing. One of the detectives testified. Both Juan and the detective were born in Mexico and fluent in Spanish. Juan spoke little English, so the recorded interrogation was entirely in Spanish. The detective testified that the interrogation transcript contained the English translation of the rights he read to him from the department-issued card in evidence. He testified that he read Juan his rights “in a calm manner” and that nothing in his interaction with the detectives or in his body language suggested he misunderstood anything:

⁴ *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*).

“[Detective:] You have the right to remain silent. Anything you say may be Anything you say may be used against you in court. You have the right to have an attorney prior to and during any questioning. If you cannot afford an attorney, one will be appointed for you, free of charge, before questioning. Do you understand?”

“[Juan:] Uh, huh (affirmative).

“[Other detective:] Did you say ‘yes’?”

“[Detective:] Say ‘yes’

“[Other detective:] Do you understand yes or no?”

“[Detective:] ... or ‘no’?”

“[Juan:] Well, yes.”

As to Juan’s consular rights, the detective testified that a sign at the jail informs foreign nationals of their consular rights and that he thought Mexico was not one of the countries whose foreign nationals he was required by statute to advise of their consular rights. (Cf. § 834c.) The court admitted a letter from the Mexican Consulate attaching Article 36 of the Vienna Convention on Consular Relations, April 24, 1963, 21 U.S.T. 77, T.I.A.S. No. 6820 (Article 36), which “addresses communication between an individual and his consular officers when the individual is detained by authorities in a foreign country.” (*Sanchez-Llamas v. Oregon* (2006) 548 U.S. 331, 337.) The United States Supreme Court held that there is no suppression remedy for an Article 36 violation but noted that a defendant “can raise an Article 36 claim as part of a broader challenge to the voluntariness of his statements to police.” (*Id.* at p. 350.)

To “get some idea of the totality of the circumstances,” to “observe both the demeanor [and] the manner in which the interview took place,” and to observe the body language of the participants, the court, before ruling on the motion, reviewed a transcript of the English-language translation of the Spanish-language interrogation and the audio and video recording of the interrogation. Even though “each part of the admonition was not followed with the opportunity, based on the transcript, for Juan to respond,” the court

noted “specific language by the interrogating officer before the beginning of the *Miranda* admonition and at the conclusion as to his understanding ... in the affirmative.” By the totality of the circumstances standard, the court found the admonition “appropriate,” in light of Juan’s “age, experience, education, background, and intelligence,” and denied the motion.

Juan raises several challenges to the court’s ruling. First, the detective said “we’ve already spoken to your brother, *he’s in trouble.*” (Italics added.) That, Juan asserts, conveyed to him “the notion that detectives were investigating his little brother rather than seeking information to be used against [him].” Second, the detective did not say that “anything you say *can and will* be used against you in court.” (Italics added.) That, Juan states, failed to impress on him that the detectives were his adversaries. Third, the detective did not ask him “if he understood each right individually” but “waited until the end of the entire advisement.” That, Juan says, noting that “both detectives talked over each other in their follow-up questioning,” failed to establish that he understood his *Miranda* rights. Fourth, the detectives did not ask him about whether he had been arrested before, been given a *Miranda* warning before, or had any experience with the criminal justice system in this country before. That, Juan claims, makes the assumption “not fair” that he, as “a foreign national” who “does not speak English and who has been in this country for only a few years,” understood his *Miranda* rights. Fifth, the detectives did not advise him of his consular rights. That, Juan claims, left him, “a foreign national who entered the country illegally,” with “no idea what to expect from American law enforcement authorities.”

Miranda holds a defendant “may waive effectuation” of the rights against self-incrimination that the admonition conveys if “the waiver is made voluntarily, knowingly and intelligently.” (*Miranda, supra*, 384 U.S. at p. 444.) “The inquiry has two distinct dimensions.” (*Moran v. Burbine* (1986) 475 U.S. 412, 421 (*Burbine*), citing *Edwards v. Arizona* (1981) 451 U.S. 477, 482 (*Edwards*); see also *Brewer v. Williams* (1977) 430

U.S. 387, 404.) “First, the relinquishment of the right must have been voluntary in the sense that it was the product of a free and deliberate choice rather than intimidation, coercion, or deception. Second, the waiver must have been made with a full awareness of both the nature of the right being abandoned and the consequences of the decision to abandon it. Only if the ‘totality of the circumstances surrounding the interrogation’ reveal [*sic*] both an uncoerced choice and the requisite level of comprehension may a court properly conclude that the *Miranda* rights have been waived.” (*Burbine, supra*, at p. 421, citing, e.g., *Fare v. Michael C.* (1971) 442 U.S. 707, 725.)

On appellate review of a *Miranda* ruling, the rule of law is settled that we accept the court’s resolution of disputed facts and inferences as well as the court’s evaluations of credibility, if supported by substantial evidence, and that we determine independently from facts not in dispute and from facts properly found true whether the challenged statements were illegally obtained. (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.) Here, the record shows not only a choice without coercion but also the requisite level of comprehension. (Cf. *Burbine, supra*, 475 U.S. at p. 421.) “The question is not one of form, but rather whether the defendant in fact knowingly and voluntarily waived the rights delineated in the *Miranda* case.” (*North Carolina v. Butler* (1979) 441 U.S. 369, 373.) By a totality of the circumstances, our analysis of the record persuades us that, contrary to Juan’s argument, he “knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel.” (*Miranda, supra*, 384 U.S. at p. 475; cf. *People v. Davis* (2009) 46 Cal.4th 539, 586 [reviewing court’s duty is to “independently decide whether the challenged statements were obtained in violation of *Miranda*”].)

2. *Motion to Dismiss*

Juan argues that the denial of his *Mejia*⁵ motion to dismiss on the ground of Belmonte's deportation violated his federal constitutional rights to compulsory process and due process by depriving him of the favorable testimony of a material witness.⁶ The Attorney General argues that there was no error. We agree with the Attorney General.

Attached to Juan's motion was a declaration in which defense counsel related a telephone conversation he had with Belmonte, who was in Mexico. Belmonte said that he saw Altamirano get into a fight and that he saw Garcia "placed in the car and taken away." He denied seeing anything else, hearing anyone say anything about a plan to do anything to anyone, telling Vasquez to go inside, and telling her "not to say anything about what happened that night or what she may have heard." Belmonte said he "cannot and will not" return to the United States "because he would have to come back without proper documentation."

The prosecutor filed an opposition arguing there was "no plausible showing" that Belmonte was a material witness, was not available due to governmental action, or would provide favorable evidence that would not be simply cumulative to Vasquez's testimony. The opposition noted that on the day of his deportation investigators were aware only of a "domestic violence situation," that Juan was not arrested until the following day, that Belmonte did not "witness the abduction" about which Vasquez was to testify, and that Belmonte refused to return to Fresno "for his own reasons."

At the hearing on the motion, Glenn Falls, the lead sheriff's office investigator, testified about his conversation with Vasquez on April 27, 2009, two days after Belmonte

⁵ *People v. Mejia* (1976) 57 Cal.App.3d 574.

⁶ Juan's motion and the court's ruling addressed Geronimo Altamirano and Jesus Cuin, both of whom likewise were deported, but on appeal he challenges, and we address, solely the court's ruling as to Belmonte.

went to jail on the domestic violence complaint.⁷ Vasquez told Falls that she witnessed Garcia's kidnapping, that Belmonte told her to go inside the house, that he knew what was going to happen, and that he was present during a later conversation about the crime, but that he did not participate. Falls testified that Belmonte remained in custody at the county jail until May 26, 2009, but no one ever interviewed him about the Garcia case.⁸ Falls testified that on the next day, May 27, 2009, he found out Eduardo was in custody at the county jail on an immigration detainer, asked detectives to interview him, monitored the interview, and on the basis of information from the interview had other officers arrest Juan later that day.

As agreed by the defense, the court deferred a ruling on the motion until after Vasquez testified. From December 2008 to the time of the domestic violence incident, she testified, she, Belmonte, and Juan lived in one shack, and Eduardo lived in a nearby shack, in the part of Fresno known as Tent City. Sometimes Altamirano and Cuin stayed with them. Garcia lived nearby. On April 25, 2009, she and Belmonte got into an argument. He choked her and tried to kill her. He went to jail. She went to a domestic violence shelter. Afraid that he was going to kill her because she knew about Garcia's fate, she told a homicide detective what she knew.

Vasquez testified that some other people told her Garcia set Juan up to be robbed of drugs and money. Stabbed during the robbery, Juan was upset when he got out of the hospital.⁹ He said that after he found out for sure what happened "they" – referring to himself, Eduardo, Altamirano, and Cuin – "were going to get back at [Garcia] for what had happened." He did not say how. Within a day or two or three after his release from

⁷ After several court appearances, as the court later noted, the domestic violence charges against Belmonte were dismissed on May 20, 2009.

⁸ The parties later stipulated that Belmonte was deported on May 26, 2009.

⁹ The parties stipulated that the date of Juan's hospital emergency room treatment was February 4, 2009.

the hospital, Vasquez saw Juan, Eduardo, Altamirano, and Cuin drag Garcia toward Juan's car, argue and fight with him, and try to put him into the trunk. Garcia was struggling, "yelling at them not to do anything to him," and insisting "he didn't have anything to do with what was going on." They did not get him into the trunk but did put him into the back seat. He sounded afraid. She told them to leave him alone. Belmonte pushed her into the shack and told her to get inside, stay inside, not to get involved, and not to say anything. She never saw Garcia again.

Later, Vasquez testified, as she, Juan, Eduardo, Belmonte, Cuin, and Altamirano sat around the fire drinking, she heard Juan talk "about they had beaten up [Garcia]" and "shot him in the head" with "the .22 that they had there" and that "he was glad that they got everything over with." He did not say who had shot him. She heard Eduardo say "he had hit him a couple of times" and "he was glad to get it done and over with." She heard Cuin say basically the same thing. She heard Altamirano talk about how he had hit him and how Garcia deserved what they had done to him. Belmonte, Juan, and Eduardo sat her down later and told her "if I ever said anything that I would end up the same way."

The test, the court observed, is whether the testimony of a deported witness is "material and favorable to the defense and not merely cumulative." The court noted that Belmonte's testimony "may have contradicted or impeached" Vasquez's testimony but did "not rise to the level of material and favorable, given the entire context of this case that would warrant the sanction of dismissal." The court commented that "as to threats or not threats to [Vasquez], [Belmonte]'s testimony would be certainly self serving to the effect that he did not, indeed, threaten her." On that rationale, the court denied the motion.

The parties agree that, without more, the "prompt deportation of illegal-alien witnesses" is "not sufficient to establish a violation of the Compulsory Process Clause of the Sixth Amendment or the Due Process Clause of the Fifth Amendment. A violation of these provisions requires some showing that the evidence lost would be both material and

favorable to the defense.” (*United States v. Valenzuela-Bernal* (1982) 458 U.S. 858, 872-873.) The parties disagree on whether Belmonte’s testimony would have been, to quote the court’s rationale, “material and favorable to the defense and not merely cumulative.” As the high court notes, “Sanctions may be imposed on the Government for deporting witnesses only if the criminal defendant makes a plausible showing that the testimony of the deported witnesses would have been material and favorable to his defense, in ways not merely cumulative to the testimony of available witnesses.” (*Id.* at p. 873.) Even if we were to assume, *arguendo*, that Belmonte’s testimony would have been material and favorable, “sanctions will be warranted for deportation of alien witnesses only if there is a reasonable likelihood that the testimony could have affected the judgment of the trier of fact.” (*Id.* at pp. 873-874.)

By that test, the record persuades us the court’s ruling was correct. Belmonte had multiple biases to discredit any testimony he might have given. Both of his sons were on trial for murder. He was jailed for domestic violence against Vasquez. Had he testified inconsistently with her incriminating testimony, those biases would have diminished any credibility he might otherwise have had. The defense vigorously impeached Vasquez for the inconsistencies in her testimony and for the effects of her alcohol and drug abuse on her ability to perceive the events to which she testified, but even so the jury found her to be a credible witness. On that record, there was no reasonable likelihood that Belmonte’s testimony could have affected the judgment of the trier of fact.

3. CALCRIM No. 400

Juan argues that instructing the jury that an aider and abettor is *equally* guilty of the perpetrator’s crime was error. The Attorney General argues that Juan forfeited his right to appellate review, that there was no error, and that error, if any, was harmless. We agree with the Attorney General that error, if any, was harmless.

First, the court instructed on general principles of aiding and abetting (CALCRIM No. 400 (Revised June 2007)): “A person may be guilty of a crime in two ways. One, he

may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator who directly committed the crime. A person is *equally* guilty of the crime, whether he committed it personally or aided and abetted the perpetrator who committed it. Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.” (Italics added.)¹⁰

Second, the court instructed on the requisite proof of intent for aiding and abetting (CALCRIM No. 401):¹¹ “To prove the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: [¶] One, the perpetrator committed the crime. [¶] Two, the defendant knew that the perpetrator intended to commit the crime. [¶] Three, before or during the commission of the crime the defendant intended to aid and abet the perpetrator in committing the crime. [¶] And, four, the defendant’s words or conduct did, in fact, aid and abet the perpetrators in the commission of the crime. [¶] Someone aids and abets a crime if he knows of the perpetrators unlawful purpose; he specifically intends to and does, in fact, aid, facilitate, promote, encourage, or instigate the commission of that crime. [¶] If all of these requirements are proved, the defendant does not have to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] 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 an aider and abettor. [¶] The person who aids and abets a crime is not guilty of that crime if he withdraws before the crime is committed. To withdraw, a person must do two things: [¶]

¹⁰ The italicized word at the heart of Juan’s argument no longer appears in the instruction. (See CALCRIM No. 400 (Revised April 2010).)

¹¹ The text of CALCRIM No. 401 is the same now as then.

One, he must notify everyone else he – he knows is involved in the commission of the crime that he is no longer participating. The notification must be made early enough to prevent the commission of the crime. [¶] And, two, he must do everything reasonably within his power to prevent the crime from being committed. He does not actually have to prevent the crime. [¶] The People have the burden of proving beyond a reasonable doubt that the defendant did not withdraw. If the People have not met this burden, you must not – you may not find the defendant guilty under an aiding and abetting theory.

The rule of law is settled that “[a]ll 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.) Accordingly, an aider and abettor ‘shares the guilt of the actual perpetrator.’” (*People v. Mendoza* (1998) 18 Cal.4th 1114, 1122, quoting *People v. Prettyman* (1996) 14 Cal.4th 248, 259.) Since “aiders and abettors may be criminally liable for acts not their own, cases have described their liability as ‘vicarious.’ (E.g., *People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.) This description is accurate as far as it goes.” (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*)).) But, as our Supreme Court emphasizes, “the aider and abettor’s guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator’s acts and the aider and abettor’s *own* acts and *own* mental state.” (*Ibid.*, italics in original.)

Accordingly, “in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator.” (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118 (*Lopez*), citing *McCoy*, *supra*, 25 Cal.4th at pp. 1114-1122 [aider and abettor might be found guilty of first degree murder even if shooter is found guilty of manslaughter on an unreasonable self-defense theory]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578 [aider and abettor might be found guilty of lesser crime than the perpetrator where lesser crime that perpetrator committed was reasonably foreseeable consequence of act aided even though ultimate crime that the perpetrator committed was not]; see also

People v. Nero (2010) 181 Cal.App.4th 504, 507 (*Nero*); *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165 (*Samaniego*).

In reliance on *Nero* and *Samaniego*, Juan argues that the inclusion of the word “equally” in CALCRIM No. 400 prejudiced him “because there was substantial evidence to support a theory that [he] was not the actual killer who had a different state of mind than the actual killer.” He summarizes his theory at trial as, first, that he “was not guilty of felony murder” since Altamirano “was the actual killer who killed according to his own ulterior motive which was outside the common scheme of the kidnapping plan” and, second, that he was not guilty of malice aforethought murder since his “participation in the killing was with a mitigated state of mind, which was the result of rekindled heat of passion.” His argument fails to persuade us.

In his interview with the detectives, Juan admitted that he knew Altamirano had the .22 caliber rifle with him, that he told Altamirano that “if you’re going to do the job, then you’re going to do it,” and that Altamirano said, “Yes, little brother, I’m going to do it.” Juan admitted that he told Altamirano “to do the job quickly,” that Juan “started beating” Garcia as soon as Cuin got him out of the car, and that when Altamirano got the rifle Juan grabbed Garcia by the hands and pushed him to the ground to keep him from moving, taking off, or getting the rifle. But Garcia got loose, Juan said, and started to struggle with Altamirano for the rifle, and Altamirano shot him in the forehead. Juan admitted that he said, when Garcia died, “That’s it,” and that he felt “something like excited” because he “had never done a job” before.

During the interview, Juan told detectives that Altamirano, with the rifle in his hand, said shortly before the shooting, “I’m going to fuck him up.” Juan speculated about “something going on from before about a woman” but acknowledged he had no idea “what kind of problem” he might have had “regarding a girl *or I don’t know what.*” (Italics added.) Guessing, too, Juan’s attorney argued to the jury that the killing “was an independent act by [Altamirano] *for whatever his gripe was.*” (Italics added.)

A court has a duty to instruct on a defense “only if substantial evidence supports the defense.” (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1054 (*Shelmire*), citing, e.g., *People v. Panah* (2005) 35 Cal.4th 395, 484.) “Substantial evidence is ‘evidence which is reasonable, credible, and of solid value.’” (*Shelmire, supra*, at p. 1055, citing, e.g., *People v. Johnson* (1980) 26 Cal.3d 557, 578, limited on another ground in *People v. Sutton* (2010) 48 Cal.4th 533, 538.) “On review, we determine independently whether substantial evidence to support a defense existed.” (*Shelmire, supra*, at p. 1055.) Our independent review of the record persuades us that there was no substantial evidence that Altamirano committed the killing for an ulterior motive outside the scope of the kidnapping plan.

As to Juan’s argument that he acted in “rekindled heat of passion,” Vasquez testified that after leaving the hospital Juan said that “they would take care of [Garcia]” and get back at him for setting Juan up to be robbed and stabbed. She testified that as Juan, Eduardo, Altamirano, and Cuin were arguing and fighting with Garcia, dragging him toward Juan’s car, and trying to stuff him into the trunk, she heard Juan say that “[t]hey were just going to scare him.” After the killing, when a detective asked him if he got his revenge, he said that since his revenge “was just to beat him up” and “teach him with [his] own hands,” not to kill him, he did not get his revenge “just the way [he] wanted.” However, she testified that after the killing he talked about how they had beaten him up and shot him in the head with the .22 and how he was glad they got everything over with. Juan admitted to the detectives that he told Altamirano to do the job quickly, started to beat Garcia as soon as Cuin got him out of the car, grabbed Garcia’s hands and pushed him to the ground just before Altamirano shot him, and felt excited after the killing, as he had never done a job before.

The independent or de novo standard of review is applicable in assessing not only whether instructions correctly state the law but also whether instructions direct a finding adverse to a defendant by removing an issue from the jury’s consideration. (*People v.*

Posey (2004) 32 Cal.4th 193, 218 (*Posey*.) “Here the question is whether there is a ‘reasonable likelihood’ that the jury understood the charge as the defendant asserts.” (*People v. Kelly* (1992) 1 Cal.4th 495, 525 (*Kelly*), citing *Estelle v. McGuire* (1991) 502 U.S. 62, 72 (*McGuire*).) Our duty is to review the instruction Juan challenges not “‘in artificial isolation’” but “‘in the context of the instructions as a whole and the trial record.’” (*Ibid.*)

Instructed that voluntary manslaughter due to heat of passion is a lesser included offense of murder and that heat of passion “may not be solely based upon revenge,” the jury found Juan guilty of murder. Jurors are presumed capable of understanding and correlating instructions and are presumed to have followed those instructions. (*People v. Sanchez* (2001) 26 Cal.4th 834, 852 (*Sanchez*); *Lopez, supra*, 198 Cal.App.4th at p. 1119.) Harmless error is the applicable standard of review. (*Chapman v. California* (1967) 386 U.S. 18, 24 (*Chapman*); *Nero, supra*, 181 Cal.App.4th at pp. 518-519; *Samaniego, supra*, 172 Cal.App.4th at p. 1165.) Our independent review of the record persuades us that error, if any, in instructing the jury that an aider and abettor is *equally* guilty of the perpetrator’s crime was harmless beyond a reasonable doubt.¹² (*Shelmire, supra*, 130 Cal.App.4th at p. 1055.)

4. Special Circumstance: Sufficiency of the Evidence

Juan argues that imposition of the felony murder special circumstance was error due to an insufficiency of the evidence of an independent felonious purpose. The Attorney General argues that there was no error. We agree with the Attorney General.

Juan’s argument focuses on the prosecution’s allegation of the felony murder special circumstance of commission of a murder while engaged in a kidnapping (§ 190.2, subd. (a)(17)(B)) rather than the felony murder special circumstance of commission of a

¹² In the interest of judicial economy, we addressed Juan’s prejudice argument without addressing his error argument or the Attorney General’s forfeiture argument.

murder with intent to kill while engaged in a kidnapping (§ 190.2, subd. (a)(17)(M)). As to the latter, but not the former, special circumstance, if there is intent to kill, then proof of the elements of robbery proves the special circumstance even if the sole purpose of the kidnapping was to commit the murder.¹³ The charging decision here, he argues, invokes the independent felonious purpose rule, which “requires that the murder be committed ‘in order to advance [the] independent felonious purpose’ of robbery” and which states that “the special circumstance is not established when the felony is merely incidental to the murder.” (*People v. Burney* (2009) 47 Cal.4th 203, 253, citing *People v. Green* (1980) 27 Cal.3d 1, 61 (*Green*).)¹⁴ On the faulty premise that “the kidnapping was committed for no purpose other than to commit murder, or at least to commit an act of violence against the victim with express or implied malice aforethought,” he argues that there is an insufficiency of the evidence of the special circumstance.

First, the record contains substantial evidence that Juan kidnapped Garcia to beat him up but not to kill him. After he left the hospital, Juan said that they were going to get back at Garcia for what had happened and that they were just going to scare him. In his interview with the detectives, he said his revenge was just to beat him up and teach him with his own hands, not to kill him, so he did not get his revenge just the way he wanted.

¹³ “The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 190.4 to be true: [¶] ... [¶] (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: [¶] ... [¶] (B) Kidnapping in violation of Section 207, 209, or 209.5. [¶] ... [¶] (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), *if there is specific intent to kill*, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder.” (§ 190.2, subds. (a)(17)(B), (a)(17)(M), italics added.)

¹⁴ *Green* was disapproved on another ground by *People v. Hall* (1986) 41 Cal.3d 826, 834, fn. 3.

(See, e.g., *People v. Raley* (1992) 2 Cal.4th 870, 902-903 (*Raley*) [sufficient evidence of independent felonious purpose where defendant might not have decided victim's fate at time of kidnapping but might have formed intent to kill after asportation]; *People v. Clark* (1990) 50 Cal.3d 583, 608 [even though *Green* held that felony murder special circumstance inapplicable where defendant intends to commit murder and incidentally commits another felony while doing so, *Green* rule inapplicable where defendant has independent purpose, not simply incidental to intended murder, for commission of another felony].)

Second, the record contains substantial evidence that Juan had concurrent intent not only to kidnap Garcia but also to kill him. After driving Garcia away from Tent City, Juan parked his car out in the country, told Altamirano to do the job quickly, and began to beat Garcia. He grabbed Garcia's hands and pushed him to the ground just before Altamirano shot him in the forehead. Back at Tent City, Juan said that they had beaten him up and shot him in the head and that he was glad they got everything over with. "That defendant may have had concurrent intent, that is, consisting of both an intent to kill and an intent to commit an independent felony, does not invalidate the felony-murder special circumstance." (*People v. Barnett* (1998) 17 Cal.4th 1044, 1159, citing *Raley*, *supra*, 2 Cal.4th at p. 903.) As the Attorney General notes, Juan's "interpretation of the *Green* rule is not consistent with the concept of concurrent intent."

5. Special Circumstance: Motion to Strike

Juan argues that the order denying his motion to strike the special circumstance was error due to an insufficiency of the evidence of an independent felonious purpose. The Attorney General argues that Juan forfeited his right to appellate review, that there was no error, and that error, if any, was harmless. Having rejected Juan's challenge to imposition of the special circumstance due to an insufficiency of the evidence of an independent felonious purpose (*ante*, part 4), we reject out of hand, on the same rationale,

his analogous challenge to the order denying his motion to strike the special circumstance due to an insufficiency of the evidence of an independent felonious purpose.

6. CALCRIM No. 731

Juan argues that omission of sua sponte instruction with CALCRIM No. 731 (“Special Circumstances: Murder in Commission of Felony – Kidnapping With Intent to Kill”) was error due to the absence of evidence of intent to kill. The Attorney General argues that there was no error and that error, if any, was harmless. Having determined the record contains substantial evidence that Juan had concurrent intent not only to kidnap Garcia but also to kill him (*ante*, part 4), we reject out of hand, on the same rationale, his analogous challenge to omission of sua sponte instruction with CALCRIM No. 731.

7. CALCRIM No. 730: Independent Felonious Purpose

Juan argues that instruction with CALCRIM No. 730 (“Special Circumstances: Murder in Commission of Felony”) was error due to inadequate language on independent felonious purpose. The Attorney General argues that Juan forfeited his right to appellate review and that there was no error. We agree with the Attorney General that there was no error.

The crux of Juan’s argument is that our Supreme Court “sometimes articulates the [*Green*] rule as requiring an independent purpose for the *commission of murder* and other times articulates the rule as requiring an independent purpose for the *commission of the underlying felony*. This means,” he infers, “that *both* articulations must be met.” (Italics in original.) We disagree. “As [our Supreme Court] ha[s] summarized the [*Green*] rule, ‘to prove a felony-murder special-circumstance allegation, the prosecution must show that the defendant had an independent purpose for the commission of the felony, that is, the commission of the felony was not merely *incidental* to an intended murder.’” (*People v. Horning* (2004) 34 Cal.4th 871, 907 (*Horning*), quoting *People v. Mendoza* (2000) 24 Cal.4th 130, 182, italics added.) Here, paraphrasing the *Green* rule, the court instructed

that “in order for this special circumstance to be true, the People must prove that the defendant intended to commit kidnapping independent of the killing. If you find that the defendant only intended to commit murder and the commission of kidnapping was merely part of or *incidental* to the commission of that murder, then the special circumstance has not been proved.” (CALCRIM No. 730, italics added.)

“By focusing on the intent of a non-killer to kidnap,” Juan argues, “the jury is not required to determine the critical question, which is whether that [*sic*] the murder was committed in order to *advance* an independent felonious purpose.” (Italics added.) Our Supreme Court has rejected the argument “that the court erred in not also telling the jury the murder had to be committed in order to carry out or *advance* the robbery or burglary,” noted that “*Green* established one requirement, not two,” and emphasized that there is “nothing magical” about *Green*’s verbiage. (*Horning, supra*, 34 Cal.4th at pp. 907-908, italics added.) “Several ways exist to explain the requirement,” the court emphasized. (*Id.* at p. 908, fn. omitted.) Even though *Horning* was not an aiding and abetting case, our Supreme Court’s observations about the law are equally germane here.

In addition to giving CALCRIM No. 730, the court instructed not only on the general principles of aiding and abetting (CALCRIM No. 400 (Revised June 2007)) and on the requisite proof of intent for aiding and abetting (CALCRIM No. 401) but also on first degree felony murder where a person other than the aider and abettor committed the fatal act (CALCRIM No. 540B) and on the requirement that an aider and abettor who is not the actual killer acted either with intent to kill or with reckless indifference to human life (CALCRIM No. 703). Bearing in mind that there is nothing magical about *Green*’s verbiage, our duty, by the independent standard of review, is to assess whether there is a reasonable likelihood that the jury understood the charge as Juan asserts. (*Posey, supra*, 32 Cal.4th at p. 218; *Kelly, supra*, 1 Cal.4th at p. 525, citing *McGuire, supra*, 502 U.S. at p. 72.) Our independent review of the record persuades us that the court did not err by

instructing the jury with CALCRIM No. 730. (See, e.g., *Sanchez, supra*, 26 Cal.4th at p. 852; *Lopez, supra*, 198 Cal.App.4th at p. 1119.)¹⁵

8. CALCRIM No. 370

Juan argues that instruction with CALCRIM No. 370 (“Motive”) eliminated the prosecution’s burden of proof of an independent felonious purpose. The Attorney General argues that Juan forfeited his right to appellate review, that there was no error, and that error, if any, was harmless. We agree with the Attorney General that there was no error.

The crux of Juan’s argument is that “the *Green* ‘independent purpose’ rule requires the jury to determine the killer’s purpose for committing the murder and the killer’s purpose for committing the kidnapping. Because the ‘purpose’ for a crime is a form of ‘motive,’ it was error to instruct the jury that the People are not required to prove motive.” On motive, the court instructed the jury, “The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict, you may, however, consider whether the defendant had a motive. Having a motive may be a factor tending to show the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty.” (CALCRIM No. 370.)

For his CALCRIM No. 370 argument, Juan builds on his CALCRIM No. 730 argument, which claims error due to inadequate language on an independent felonious purpose, but we have already rejected that argument. (*Ante*, part 7.) Additionally, his CALCRIM No. 370 argument depends on the specious premise that instructing that the prosecution was “not required to prove motive” somehow “affirmatively eliminated the ‘independent purpose’ requirement,” which was entirely absent from the instruction. His premise incorrectly conflates the two words as well. Motive is defined as “[s]omething,

¹⁵ In the interest of judicial economy, we addressed Juan’s error argument without addressing the Attorney General’s forfeiture argument.

esp. willful desire, that leads one to act.” (Black’s Law Dict. (9th ed. 2009).) Witkin congruently characterizes motive as “the emotional urge that induces a particular act.” (1 Witkin, Cal. Crim. Law (3d ed. 2000) Elements, § 4, p. 202.) Purpose, on the other hand, is “[a]n objective, goal, or end.” (Black’s Law Dict. (9th ed. 2009).)

Our duty, by the independent standard of review, is to assess whether there is a reasonable likelihood that the jury understood the instruction as Juan asserts. (*Posey, supra*, 32 Cal.4th at p. 218; *Kelly, supra*, 1 Cal.4th at p. 525, citing *McGuire, supra*, 502 U.S. at p. 72 .) Our independent review of the record persuades us that the court did not err by instructing the jury with CALCRIM No. 370. (See, e.g., *Sanchez, supra*, 26 Cal.4th at p. 852; *Lopez, supra*, 198 Cal.App.4th at p. 1119.)¹⁶

9. CALCRIM No. 730: Logical Nexus

Juan argues that instruction with CALCRIM No. 730 (“Special Circumstances: Murder in Commission of Felony”) was error due to inadequate language on the logical nexus between the felony and the act resulting in death. The Attorney General argues that Juan forfeited his right to appellate review and that there was no error. We agree with the Attorney General that there was no error.

The legal basis of Juan’s argument is the holding in *People v. Cavitt* (2004) 33 Cal.4th 187 (*Cavitt*) that “the felony-murder rule requires both a *causal* relationship and a *temporal* relationship between the underlying felony and the act resulting in death. The causal relationship is established by proof of a logical nexus, beyond mere coincidence of time and place, between the homicidal act and the underlying felony the nonkiller committed or attempted to commit. The temporal relationship is established by proof the felony and the homicidal act were part of one continuous transaction.” (*Id.* at p. 193, italics in original.) The court carefully delineated the boundaries of the rule, however,

¹⁶ In the interest of judicial economy, we addressed Juan’s error argument without addressing the Attorney General’s forfeiture argument.

not only by rejecting the defense argument “that a nonkiller’s liability for the felony murder committed by a cofelon depends on proof of a very specific causal relationship between the homicidal act and the underlying felony – namely, that the killer intended thereby to advance or facilitate the felony” but also by emphasizing that “the felony-murder rule is intended to eliminate the need to plumb the parties’ peculiar intent with respect to a killing committed during the perpetration of the felony.” (*Id.* at pp. 197-198.)

Noting the boundaries of the *Cavitt* rule, we turn to the record. Juan candidly predicates his argument on his assumption of “substantial evidence to support a theory that [Altamirano] was the killer who harbored his own intent to kill, according to his own ulterior motives, independent of the common plan to commit kidnapping, and that [Juan] participated in the kidnapping without knowing of [Altamirano]’s secret intent to kill.” Having rejected Juan’s challenge to CALCRIM No. 400 after our independent review of the record persuaded us that there was no substantial evidence that Altamirano committed the killing for an ulterior motive outside the scope of the kidnapping plan (*ante*, part 3), we reject out of hand, on the same rationale, his analogous challenge to CALCRIM No. 730.¹⁷

10. Assistance of Counsel

Juan argues that his attorney’s performance as to instruction with CALCRIM Nos. 370, 400, and 730 and omission of sua sponte instruction with CALCRIM No. 731 constituted ineffective assistance of counsel. The Attorney General argues that Juan fails to show ineffective assistance of counsel. We agree with the Attorney General.

To establish ineffective assistance of counsel, the defendant must prove that counsel’s performance fell below an objective standard of reasonableness and that the deficient performance prejudiced the defense, which requires a showing of a reasonable

¹⁷ In the interest of judicial economy, we addressed Juan’s error argument without addressing the Attorney General’s forfeiture argument.

probability that but for counsel's unprofessional errors the result of the proceeding would have been different. (*Williams v. Taylor* (2000) 529 U.S. 362, 363, citing *Strickland v. Washington* (1984) 466 U.S. 668, 688, 699 (*Strickland*)). "Surmounting *Strickland*'s high bar is never an easy task." (*Padilla v. Kentucky* (2010) 559 U.S. ___, ___ [176 L.Ed.2d 284, 301; 130 S.Ct. 1473, 1485].) "Judicial scrutiny of counsel's performance must be highly deferential." (*Ibid.*, citing *Strickland, supra*, at p. 669.)

A reviewing court can adjudicate an ineffective assistance claim solely on the issue of prejudice without evaluating counsel's performance. (*Strickland, supra*, 466 U.S. at p. 697.) We do so here. Having rejected Juan's claims of error as to instruction with CALCRIM Nos. 370, 400, and 730 and the omission of sua sponte instruction with CALCRIM No. 731 (*ante*, parts 3 & 6-8), we conclude that, since the absence of error precludes a showing of a reasonable probability that the result of the proceeding would have been different, the requisite showing of prejudice is lacking. (*Strickland, supra*, 466 U.S. at p. 694.)

11. Life Without the Possibility of Parole

Juan argues that his sentence of life without the possibility of parole for first degree special circumstance murder is cruel and unusual punishment that violates the federal constitution and cruel or unusual punishment that violates the state constitution. The Attorney General argues the contrary. We agree with the Attorney General.

For his federal constitutional challenge, Juan relies primarily on *Graham v. Florida* (2010) 560 U.S. ___ [176 L.Ed.2d 825; 130 S.Ct. 2011] (*Graham*) and *Solem v. Helm* (1983) 463 U.S. 277 (*Solem*). Observing that the "age of 18 is the point where society draws the line for many purposes between childhood and adulthood," *Graham* held "that for a juvenile offender who did not commit homicide the Eighth Amendment forbids the sentence of life without parole." (*Graham, supra*, at p. ___ [176 L.Ed.2d at p. 845; 130 S.Ct. at p. 2030].) Juan is not a juvenile offender. He was 21 years old at the time of Garcia's kidnapping and murder. *Graham* is inapposite.

Holding “that a criminal sentence must be proportionate to the crime for which the defendant has been convicted,” *Solem* held that a sentence of life without the possibility of parole for defendant’s seventh nonviolent felony (the crime of passing a worthless check) was cruel and unusual punishment. (*Solem, supra*, 463 U.S. at p. 290.) The high court observed that “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.” (*Id.* at p. 292.)

On the scope of appellate review, *Solem* noted, “Reviewing courts, of course, should grant substantial deference to the broad authority that legislatures necessarily possess in determining the types and limits of punishments for crimes, as well as to the discretion that trial courts possess in sentencing convicted criminals.” (*Solem, supra*, 463 U.S. at p. 290, fn. omitted.) Elaborating, the high court added, “In view of the substantial deference that must be accorded legislatures and sentencing courts, a reviewing court rarely will be required to engage in extended analysis to determine that a sentence is not constitutionally disproportionate.” (*Id.* at p. 290, fn. 16.)

The vitality of the holding in *Solem* is doubtful. In the Third Circuit’s words, *Harmelin v. Michigan* (1991) 501 U.S. 957 (*Harmelin*) “attacked” *Solem*’s reading of the Eighth Amendment, characterized *Solem* as ““simply wrong” on the ground that ““the Eighth Amendment contains no proportionality guarantee,”” and affirmed a sentence of life without the possibility of parole for a first-time offender convicted of possession of about 672 grams of cocaine. (*United States v. Frazier* (3d Cir. 1992) 981 F.2d 92, 95, quoting *Harmelin, supra*, at p. 965 (plurality opinion); see *id.* at pp. 1008-1009.) The plurality opinion in *Harmelin* characterized *Solem* as “scarcely the expression of clear and well accepted constitutional law” and cited approvingly two high court cases that had “explicitly rejected” *Solem*’s “three-factor” test. (*Id.* at p. 965.) Concurring, Justice

Kennedy wrote, “The Eighth Amendment does not require strict proportionality between crime and sentence. Rather, it forbids only extreme sentences that are ‘grossly disproportionate’ to the crime.” (*Id.* at p. 1001.)

In a later application of the gross disproportionality principle, the United States Supreme Court held that a grand theft sentence of 25 years to life for an offender with a robbery prior and three residential burglary strike priors “is not grossly disproportionate and therefore does not violate the Eighth Amendment’s prohibition on cruel and unusual punishments.” (*Ewing v. California* (2003) 538 U.S. 11, 30 (plurality opinion).) By parity of reasoning, we hold that Juan’s sentence of life without the possibility of parole for deliberately plotting and executing a revenge attack on Garcia, actively participating in his beating and kidnapping, and assisting in his violent death by gunfire is not grossly disproportionate and does not violate the Eighth Amendment.

For his state constitutional challenge, Juan relies primarily on *People v. Dillon* (1983) 34 Cal.3d 441 (*Dillon*),¹⁸ in which a 17-year-old defendant, armed with a .22 caliber semiautomatic rifle, set out with several other youths, some armed with shotguns, to steal marijuana that two brothers were growing illegally on a secluded farm. (*Id.* at p. 451.) He heard shotgun blasts he thought were his friends “‘being blown away,’” even though the sounds were accidental discharges by another youth, and when one of the brothers, armed with a shotgun, drew near, he shot and killed him. (*Id.* at pp. 482-483.) Noting how defendant’s state of mind evolved “from youthful bravado, to uneasiness, to fear for his life, to panic,” our Supreme Court modified the judgment by reducing the degree of the crime to second degree and held that his first degree murder sentence violated the constitutional prohibition against cruel or unusual punishment (Cal. Const., art. I, § 17). (*Dillon, supra*, at pp. 482, 489.) “[A]ll statutory penalties,” the court held,

¹⁸ *Dillon* was disapproved on another ground by *People v. Chun* (2009) 45 Cal.4th 1172, 1185-1186.

are “subject ... to the rule that a punishment is impermissible if it is grossly disproportionate to the offense as defined or as committed, and/or to the individual culpability of the offender.” (*Id.* at pp. 450.)

Juan argues that he is “comparable to *Dillon* in terms of both nature of the offense and nature of the offender.” We disagree. “The shooting in [*Dillon*] was a response to a suddenly developing situation that defendant perceived as putting his life in immediate danger. To be sure, he largely brought the situation on himself, and with hindsight his response might appear unreasonable; but there is ample evidence that because of his immaturity he neither foresaw the risk he was creating nor was able to extricate himself without panicking when that risk seemed to eventuate.” (*Dillon, supra*, 34 Cal.3d at p. 488.) Here, on the other hand, Juan plotted revenge against Garcia over a period of days. Then he beat him, kidnapped him, and drove him to a remote area, where he again beat him and assisted in his violent death by gunfire. On those facts, his sentence of life without the possibility of parole is not grossly disproportionate and does not violate the cruel or unusual punishment clause of the California Constitution.

12. Parole Revocation Fine

Juan argues, the Attorney General agrees, and we concur that, due to imposition and stay of Juan’s sentence on the kidnapping, his sentence includes no period of parole. Accordingly, imposition and stay of a section 1202.45 parole revocation fine was error, so we order the fine stricken and the judgment modified. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380, citing *People v. Oganesyanyan* (1999) 70 Cal.App.4th 1178, 1184-1185.)

DISPOSITION

The judgment is modified by striking the section 1202.45 parole revocation fine. The clerk of the superior court is directed to so amend the abstract of judgment and to send a certified copy to the Department of Corrections and Rehabilitation. Juan has no right to be present at those proceedings. (See *People v. Virgil* (2011) 51 Cal.4th 1210, 1234-1235.) As modified, the judgment is affirmed.

Gomes, Acting P.J.

WE CONCUR:

Poochigian, J.

Detjen, J.