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

THE PEOPLE,

Plaintiff and Respondent,

v.

BOBBY CHIU,

Defendant and Appellant.

C063913

(Super. Ct. No. 03F08566)

Following a reversal by this court of the first degree murder conviction of defendant Bobby Chiu and attached gang enhancements, the People retried defendant. Defendant was not the shooter, so the People's theory of liability was that either he aided and abetted the murder or he perpetrated the offenses of disturbing the peace or assault, the natural and probable consequence of which was murder. Based on one of these theories, the jury found defendant guilty of first degree murder. It also found true a gang enhancement.

Defendant appeals, raising contentions relating to juror misconduct, closing the courtroom, prosecutorial misconduct, insufficient evidence, and instructional error, among others. We agree with two: some of the jury instructions were wrong

because they did not allow the jury to consider whether defendant might have been guilty of only second degree murder under the natural and probable consequence doctrine, even if the shooter committed first degree murder; and collateral estoppel prevented defendant's retrial on the gang enhancement. We therefore strike the gang enhancement and conditionally reverse defendant's first degree murder conviction. We remand for a retrial on first degree murder only unless the People accept a reduction of the conviction to second degree murder. Because defendant will have to be either retried or resentenced, we do not reach defendant's sentencing arguments relating to cruel and unusual punishment and the imposition of jail and booking fees.

FACTUAL AND PROCEDURAL BACKGROUND

A

The Prosecution's Case

In September 2003, McClatchy High School acquaintances Sarn Saeteurn and Mackison Sihabouth argued over instant messaging about two girls. Saeteurn challenged Sihabouth to an after school fight the next day in front of Famous Pizza, which was owned by Sihabouth's parents. Next door to Famous Pizza was an internet cafe named E-Channel. Saeteurn told Sihabouth he was going to bring his "homies" with him and would shoot Sihabouth's father if his father tried to break up the fight. Saeteurn's threats made Sihabouth "[h]ella raged," and he called Simon Nim, whom he knew from E-Channel. Nim was a member of the Hop

Sing gang, as were defendant, Tony Hoong, and Rickie Che.¹

Sihabouth also knew defendant and Hoong from E-Channel.

Defendant and Che were friends.

The next day, American Legion High School student Toang Tran learned about the fight from defendant, who was a classmate. Defendant asked Tran if he "'want[ed to] see someone get shot,'" said there was going to be a fight over a girl, and defendant's "friend" would shoot if his "friend feels pressured."

Sihabouth showed up for the fight in front of Famous Pizza and saw a crowd of Nortenos and Asians. He decided to leave because he thought he was "going to get caught for this fight." Saeteurn failed to show up because he learned that Hop Sing members were going to be there and believed they "'are crazy and they try to kill people.'" "

Also waiting in front of Famous Pizza that day was McClatchy High School student Teresa Nguyen, looking for her boyfriend, Antonio Gonzales, who was a student at American Legion. When Nguyen found Gonzales, she greeted him with a hug

¹ The prosecution's gang expert testified about the Hop Sing gang. They were "off the charts" in terms of criminal sophistication as compared to African American gangs and Hispanic gangs and even other Asian gangs. They "are not stupid enough to wear colors and brag about who they are. People know who they are." The other gangs were "about stupid machismo. Respect, disrespect. You look at me the wrong way, I'll kill you." The Hop Sing gang was all "about making money anyway they can" and used violence "in a very calculated and cold hearted way."

and a kiss. Defendant then said something to Nguyen, as though he was mocking her. Nguyen asked if he was mocking her, and defendant started snickering. Nguyen told him, "'Shut up.'" Defendant and Gonzales then "start[ed] exchanging [fighting] words." Defendant called Gonzales a "bitch" and "call[ed] [him] out."

Gonzales and defendant walked toward each other. Gonzales's friend, Roberto Treadway, told Gonzales, "'I got your back.'" On defendant's side were Che and Hoong. Che punched Treadway. Defendant swung at Gonzales, and Gonzales swung back. Defendant then "body slammed" Gonzales on Gonzales's back and started hitting him. Another one of Gonzales's friends, Lareina Montes, unsuccessfully tried to grab Gonzales to stop the fighting. Gonzales's cousin, Angelina Hernandez, hit defendant with her fists, which allowed Gonzales to get back up and resume fighting defendant. Then Roberto Reyes joined in the fight. Reyes punched defendant once, causing him to bleed. Treadway's cousin, Joshua Bartholomew, hit defendant hard on the head. During the fighting, defendant said, "'Grab the gun.'" Che got a gun from the trunk of a car. As Bartholomew and Treadway "t[oo]k off running," Hoong pulled out a knife and stabbed Treadway in the arm. Che pointed the gun at Gonzales's face and said, "'Run now, bitch, run.'" Gonzales "t[oo]k [Che] up on that invitation." Che then pointed the gun at Treadway's head but hesitated. Defendant and Hoong yelled "[s]hoot him," "[s]hoot him." Che shot Treadway dead. Che, defendant, and Hoong fled together in a car.

B

The Defense

Defendant testified on his own behalf. On the day Treadway was killed, defendant had heard, as did "[t]he whole school," "[t]here was going to be a fight between two kids . . . fighting over a girl." He did not know or think Che had a gun. He mocked Nguyen in an attempt to "pickup on her." A fight began between him and Gonzales over Nguyen. While defendant was fighting Gonzales, defendant "continually felt punches into the back of [his] head." Those punches "never stopped." He "felt [his] body going weak." He also received a blow to his face and was bleeding from his nose. Nobody was helping him. He never called for anybody to get a gun. Gonzales ran away when Che pulled out a gun. Pulling the gun out was not something defendant expected or wanted Che to do.

DISCUSSION

I

*There Was No Error In The Court's Investigation
And Rulings Regarding Juror Misconduct*

Defendant contends the trial court denied him due process by: (1) improperly investigating a possible claim of juror misconduct; (2) removing a holdout juror; and (3) allowing deliberations to resume with a new juror instead of declaring a mistrial. We find no error in the court's investigation and rulings on juror misconduct.

During deliberations, the jury sent the court a note stating, "We are stuck on Murder I or II due to personal views.

What do we do?" Two hours and 13 minutes later, the jury sent the court another note stating, "We are at a stale mate [sic]." The court interpreted the notes as follows: They "can be read to read due to personal views, we are at a stalemate. And one reasonable interpretation of that is that there is personal view or opinion outside of the evidence and law which is affecting one or more opinions. [¶] The other is that they just have different personal views. But given the whole here, there is at least a reasonable possibility of juror misconduct." Over defense objection, the court questioned the foreperson. The juror answered "Yes" when the court asked whether "personal views" meant "one or more jurors have reached different opinions based on something personal to them other than the law or the evidence." The foreperson explained in response to further questioning from the court that Juror No. 1 "had a conflict between the morality of . . . what we were doing and the law that had to be applied."

The court then questioned some of the other jurors and then questioned Juror No. 1. Thereafter, the court denied the defense's motion for a mistrial that had been based on the manner in which the court conducted the investigation of juror misconduct and granted the People's motion to remove Juror No. 1.

Defendant's first contention is the court was "unwarranted" in inquiring about possible juror misconduct because there was no "cogent evidence" of juror misconduct, citing *People v. Cleveland* (2001) 25 Cal.4th 466. In *Cleveland*, the California

Supreme Court quoted from *People v. Johnson* (1992) 3 Cal.4th 1183 at page 1255, that absent “‘considerably more cogent evidence of coercion,’” the trial court in *Johnson* “properly declined to inquire into whether some jurors were coercing the dissenting juror.” (*Cleveland*, at p. 479.) *Cleveland* prefaced that comment with the relevant inquiry for our purposes on appeal: “‘The decision whether to investigate the possibility of juror bias, incompetence, or misconduct--like the ultimate decision to retain or discharge a juror--rests within the sound discretion of the trial court. [Citation.] . . . [¶] As our cases make clear, a hearing is required only where the court possesses information which, if proven to be true, would constitute ‘good cause’ to doubt a juror’s ability to perform his duties and would justify his removal from the case. [Citation.]’” (*Cleveland*, at p. 478.)

Here, the court did not abuse its discretion in investigating the possibility of juror misconduct. In deciding to conduct its investigation, the court noted that “given the whole here, there is at least a reasonable possibility of juror misconduct.” The “whole here” included the following three salient facts. One, defense counsel had recently given a closing argument that the court described as containing “a definite strain of asking for sympathy not just because of [defendant’s] age, but for the comparative fault . . . by the defendant versus the other participant in this crime.” It was because of this inappropriate argument the court gave a special instruction that told the jurors they were to disregard

arguments by counsel “[i]f either counsel suggested in any way that you may consider penalty or punishment . . . or sympathy for or against the defendant.” Two, the day before the jury sent the court the note regarding “personal views,” the court had received a note from one of the jurors (who turned out to be Juror No. 1) that the juror was “feel[ing] like [she was] going to throw up” and asked if “someone [could] stand in for [her].” When the court sent a note to Juror No. 1 asking whether she felt well enough to continue with deliberations that afternoon, she responded in writing, “NO!” This note and the juror’s vehement response she could not continue with deliberations suggested the possibility something was wrong. And three, the “personal views” note made it plausible there was a juror who was injecting his or her personal views in the case that were not based on the facts or law that would justify the removal of that juror from the case. Given these facts, the court did not abuse its discretion in investigating the possibility of juror misconduct.

Defendant’s second contention is the court abused its discretion in removing Juror No. 1 because it was not established to a demonstrable reality she was unable to withstand pressure from other jurors and unable to follow the law of aiding and abetting. “We review for abuse of discretion the trial court’s determination to discharge a juror and order an alternate to serve. [Citation.] If there is any substantial evidence supporting the trial court’s ruling, we will uphold it. [Citation.] . . . [H]owever, . . . a juror’s inability to

perform as a juror “‘must appear in the record as a demonstrable reality.’” [Citation.]’” (*People v. Cleveland, supra*, 25 Cal.4th at p. 474.) Here, there was no abuse of discretion. The juror’s inability to perform as a juror was based on substantial evidence in the form of her responses and the trial court’s factual findings regarding her demeanor.

There was substantial evidence Juror No. 1 could not withstand pressure from the other jurors. Juror No. 1 admitted she felt she was “being pressured into changing how [she] fe[lt].” She said she was “going to wind up changing [her] vote” “just because of the people [who] [she] was dealing with in the jury” and her “vote w[ould not] be truthful in the long run.” When the court asked her, “This is what I hear you telling me. Saying, Judge, there is just pressure in the jury process and I’m getting pressure. And to be truthful with you, I got to tell you, I think I may change my vote in a way that is not truthful just in response to that pressure; is that what you are telling me?” Juror No. 1 responded, “Unfortunately, yes.” In relying on these responses to remove Juror No. 1, the court stated that before Juror No. 1 responded, “Unfortunately, yes,” the juror “pause[d]” and “actually looked down again with tears in her eyes.” The court continued that it had “never made a stronger demeanor finding than [it was] making at this time that [the court] believed her opinion as articulated at that time and in those words represented her true position This is a juror [who] the Court believes will move in response to just

numerical breakdown and change her vote as she so forthrightly and in such a moving way admitted."

There was also substantial evidence Juror No. 1 was unable to follow the law. The court asked her if she could "apply th[e] law in reaching [her] verdict in this case as [she] s[aw] fit based on the evidence, or is . . . the law is so different from [her] personal beliefs in this area that [she] c[ould]n't do that." She responded, "I don't feel that I would be able to. It's taken a lot. It has taken its toll on me at least. I have only been here in tears, that's not good. I am just not, ah, I just don't feel that it's right in this situation here." The court then asked, "Are you saying, hey, Judge, I want you to know there is a reasonable likelihood or a probability . . . I am going to have to ignore some of this law because morally I don't like it. I don't think it is right?" Juror No. 1 responded, "If I am going to be honest, I would say yes." The trial court found this "moment" to be "crucial" because prior to that, Juror No. 1's answers "had been somewhat equivocal." The trial court explained the "moment" was "so arresting" that defense counsel asked to approach and although the court "did not do that," there was a "dominant inference, and it was communicated to this juror . . . that [defense counsel] wanted her to stay on as a juror" and after that "there was a startling . . . change in the pattern of her answers. After that the responses were bland, straightforward, consistent with the voir dire questions that she answered in her questionnaire" Based on this state of the record and

the demeanor findings it had made, the court stated "there is a demonstrated reality . . . she is unable to follow the law, not in the sense that there is not evidence there, but as probed that there was just a moral, fundamental objection to the law itself."

Finally, we reject defendant's third contention that even if Juror No. 1 was properly removed, the court should have granted the defense's mistrial motion "[b]ecause deliberations had progressed to . . . the point of stalemate, too far to begin anew" However, it is well settled "such substitution is permissible when good cause has been shown and the jury has been instructed to begin deliberations anew." (*People v. Collins* (1976) 17 Cal.3d 687, 691.) Here, the jury was instructed, "you must set aside and disregard all past deliberations and begin your deliberations all over again. Each of you must disregard the earlier deliberations and decide this case as if those earlier deliberations had not taken place."

II

*The Court Did Not Violate Defendant's Sixth
Amendment Right In Excluding Certain People
From The Courtroom For A Short Amount Of Time*

After the court had finished delivering its oral ruling on the mistrial motion and had started delivering its oral ruling on the motion to remove Juror No. 1, the court asked a man in the audience to step out of the courtroom as follows: "Sir, would you step out of the courtroom, please." Defense counsel "object[ed] to closing the courtroom." The court overruled the

objection as follows: "These are other OX² people on another calendar who are here to be voir dired. They are not here to observe this trial. They are here on another calendar that the Court hears [¶] We'll accommodate them out there, plug [them] into their individual attorneys, they go off down the hallway to do their examination, and at the morning break, if there's problems, I hear them. But they are unrelated to this case. They are not here for this case." The court then went on to deliver its oral ruling removing Juror No. 1, which spanned 13 pages of reporter's transcript. On appeal, defendant claims the court violated his Sixth Amendment right to a public trial. We disagree.

"Every person charged with a criminal offense has a constitutional right to a public trial, that is, a trial which is open to the general public at all times. (See U.S. Const., amends. VI, XIV; Cal. Const., art. I, § 15; see also Pen. Code, § 686, subd. 1.)" (*People v. Woodward* (1992) 4 Cal.4th 376, 382.) Here, at least one person was excluded from the court's oral pronouncement of its ruling removing Juror No. 1 and a reasonable inference from the record is others were as well.³

² The "OX" calendar is a debtor's examination, also known as an order of examination. It is when the judge swears in the debtor and the counsel for creditor asks questions, usually outside the presence of the judge, about the assets of the debtor.

³ It is a reasonable inference others were excluded as well because the court stated (before asking the one person to leave)

The issue is whether this exclusion was "de minimis" and therefore did not violate the Sixth Amendment. (*Woodward*, at pp. 385-386 [where the court closure "did not exclude preexisting spectators, did not include any of the evidentiary phase of the trial and lasted only one and one-half hours," the closure was "de minimis"].) We hold it was. The court did not clear the courtroom of all spectators. Rather, the trial court asked one person in the courtroom to leave who was there on another matter, and its comments suggested that others who might have wanted to enter for courtroom for business unrelated to the present trial would be asked to take care of that business in the hallway. These comments came while the court was delivering its ruling on a motion instead of during the evidentiary phase of the trial. Under these facts, there was no Sixth Amendment violation.

III

*Defendant Has Forfeited His Contention That
His Due Process Rights Were Violated By A
Prosecution "Interlaced With Racial And Ethnic
Prejudice"; Defense Counsel Was Not
Ineffective For Failing To Object*

Defendant contends the "prosecution was interlaced with racial and ethnic prejudice, [so his] conviction must be reversed for violation of due process." He claims the

it "need[ed] to close this door and keep people out for a while."

prosecutor resorted to “[r]acial and ethnic stereotyping” to “portray the brawl as an assault by ‘criminally sophisticated’ Chinese gangsters taking advantage of clueless Nortenos.” We find the issue forfeited and counsel not deficient for failing to object.

Defendant takes issue with the prosecutor’s opening statement, the prosecutor’s gang expert testimony, and the prosecutor’s closing argument, claiming they were all based on racial stereotyping. But defendant never objected on these grounds in the trial court, which forfeits the issue on appeal. (*People v. Earp* (1999) 20 Cal.4th 826, 893.) While defendant claims the issue was preserved in a motion for new trial, it was not. The issue raised there was the “insufficiency and unconstitutionality of the ‘criminal street gang’ special allegation.”

And we do not find defense counsel ineffective for failing to object, as defendant now claims on appeal. Defense counsel had a valid tactical reason for not objecting. Specifically, defense counsel used the “cultural stereotyp[ing]” as he referred to it to argue that the People were relying on “bogus” stereotypes to make the jury believe defendant was guilty. Thus, defense counsel tried to use to his advantage what he now claims on appeal should lead us to reverse his conviction. This we will not do.

Finally, we reject defendant’s suggestion we reach this argument raised for the first time on appeal “because a criminal prosecution based on racial prejudice is intolerable.” We are

not persuaded by this general claim absent a cogent reason as to why this principle should apply here.

IV

There Was Sufficient Evidence To Support A Murder Conviction Under The Natural And Probable Consequences Doctrine

Defendant contends there was insufficient evidence to support a murder conviction under the natural and probable consequences doctrine because “[a]bsent a gang motivation for the fight, the breach of peace (a juvenile misdemeanor) was too trivial to support a murder conviction” under that doctrine. He claims the incident here “began as a trivial after-school fight between high school boys, rather than a dangerous gang-related confrontation.” In support of this argument he cites *People v. Medina* (2009) 46 Cal.4th 913. As we explain, we disagree with defendant’s characterization of the facts and find *Medina* actually supports a conclusion of sufficient evidence here.

In *Medina*, the California Supreme Court upheld the jury’s verdict of first degree murder for two aiders and abettors based on the natural and probable consequences doctrine, finding that the nontarget crimes of murder and attempted murder were a reasonably foreseeable consequence of simple assault, the target offense they had aided and abetted. (*People v. Medina, supra*, 46 Cal.4th at pp. 919-920, 928.) The case involved a verbal challenge by the defendants (members of a street gang) that resulted in a fistfight between the defendants and the victim (a member of another street gang). (*Id.* at p. 916.) “After the fistfight ended, one of the defendants shot and killed the

victim as he was driving away from the scene of the fight with his friend.” (*Ibid.*) The jury had found the gunman guilty of murder and attempted murder of the friend, as the actual perpetrator, and two nonshooting defendants in the fistfight guilty of those offenses as aiders and abettors. (*Ibid.*) The appellate court, however, reversed the nonshooting defendants’ convictions, holding there was insufficient evidence that the nontarget offenses of murder and attempted murder were a natural and probable consequence of the target offense of simple assault, which the nonshooting defendants had aided and abetted. (*Ibid.*) Our Supreme Court reversed the judgment of the appellate court relating to the nonshooting defendants “[b]ecause a rational trier of fact could have concluded that the shooting death of the victim was a reasonably foreseeable consequence of the assault.” (*Ibid.*)

Defendant focuses on *Medina* because our Supreme Court relied in some part on the fact the shooting there was gang-related to find sufficient evidence. (*People v. Medina, supra*, 46 Cal.4th at p. 922.) The problem with defendant’s reliance on *Medina* is that *Medina*’s teaching is not that gang evidence is necessary to prove sufficient evidence of murder on a natural and probable consequences theory when the target offense is essentially a fistfight. Rather, “[t]he issue is ‘whether, under all of the circumstances presented, a reasonable person in the defendant’s position would have *or should have known* that the [shooting] was a reasonably foreseeable consequence of the act aided and abetted by the defendant.’” (*Medina*, at p. 927.)

Here, as there, it was. Defendant spread word of a confrontation by telling Tran there was going to be a fight over a girl. Defendant knew Che brought a gun to the fight. This was established by the fact defendant asked Tran earlier that day if he "'want[ed to] see someone get shot,'" said there was going to be a fight over a girl, and defendant's "friend" would shoot if the "friend feels pressured." Defendant ensured a fight would take place when the original one failed to materialize. This was established by the fact defendant mocked Nguyen when she hugged and kissed her boyfriend Gonzales and then provoked Gonzales by "exchanging words" with him and calling him a "bitch." Gonzales described defendant's behavior as using "fighting words" and "calling [him] out." When, predictably, a fight ensued, defendant ensured Che would use the gun by telling Che to "'[g]rab the gun'" and then telling him to "'shoot,'" even when Che hesitated. It was then Che shot Treadway dead.

Under these facts, there was sufficient evidence to support defendant's murder conviction under the theory murder was a natural and probable consequence of defendant's behavior of disturbing the peace.

V

*The Court's Instructions On Natural And
Probable Consequences Were Prejudicially Erroneous*

Defendant contends the court prejudicially erred in failing to instruct the jury that to find him guilty of first degree murder on a natural and probable consequences theory, it had to

find that first degree murder (as opposed to simply murder) was a natural and probable consequence of the target offense. Although he failed to object to this error, he claims we can reach it because it affected his substantial rights (Pen. Code, § 1259) because the instructions incorrectly stated the law. We agree with defendant there was prejudicial instructional error and because of that, the claim can be raised for the first time on appeal. (See *People v. Cabral* (2004) 121 Cal.App.4th 748, 750 [allowing instructional error to be raised for the first time on appeal under those circumstances].)

As is relevant here, the jury was instructed on the natural and probable consequence theory as follows.

"Before you may decide whether the defendant is guilty of *murder* under a theory of natural and probable consequences, you must decide whether he is guilty of the crime of assault or disturbing the peace. To prove the defendant is guilty of murder, the People must prove that:

"1. The defendant is guilty of assault or disturbing the peace.

"2. During the commission of assault or disturbing the peace, a co-participant in that assault or disturbing the peace committed the crime of murder.

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the *murder* was a natural and probable consequence of the commission of the assault or disturbing the peace.

"[¶] [¶]

"The People are alleging that the defendant originally intended to aid and abet either the crime of assault or the crime of disturbing the peace. The defendant is guilty of assault or disturbing the peace if you find that the defendant aided and abetted one of those crimes, and that the *murder* was the natural and probable result of one of those crimes" (CALCRIM No. 403, italics added.)

"If you decide that the defendant is guilty of murder as an aider and abettor, you must decide whether it's murder of the first degree or second degree.

"The *perpetrator* is guilty of first-degree murder if the People have proved that he acted willfully, deliberately, and with premeditation. The *perpetrator* acted willfully if he intended to kill. The *perpetrator* acted deliberately if he carefully weighed the considerations for and against his choice, and knowing the consequences, decided to kill. The *perpetrator* acted with premeditation if he decided to kill before committing the act that caused death." (CALCRIM No. 521, italics added.)

Lacking from these instructions was the requirement the jury find that first degree murder was the natural and probable consequence of either target offense. This was error. (See *People v. Woods* (1992) 8 Cal.App.4th 1570, 1586-1587; *People v. Hart* (2009) 176 Cal.App.4th 662, 673.)

Woods involved a murder charge based on aiding and abetting liability and the natural and probable consequences doctrine. (*People v. Woods, supra*, 8 Cal.App.4th. at p. 1579.) When the jury asked the trial court whether a defendant could be found

guilty of aiding and abetting second degree murder if the perpetrator of the murder was guilty of first degree murder, the trial court answered, "No." (*Ibid.*) On appeal, this court agreed with the defendant that the trial court had misinstructed the jury. (*Woods*, at p. 1580.) We explained as follows:

"While the perpetrator is liable for *all* of his or her criminal acts, the aider and abettor is liable vicariously only for those crimes committed by the perpetrator which were reasonably foreseeable under the circumstances. Accordingly, an aider and abettor may be found guilty of crimes committed by the perpetrator which are less serious than the gravest offense the perpetrator commits, i.e., *the aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator's criminal acts were reasonably foreseeable under the circumstances and which were not.*" (*Id.* at pp. 1586-1587.)

More recently, this court followed *Woods* in a case much like the one before us. That case involved a charge of attempted murder based on aiding and abetting liability and the natural and probable consequences doctrine. (*People v. Hart*, *supra*, 176 Cal.App.4th at p. 668.) Like the jury instructions on natural and probable consequences here that referred only to "murder," "[t]he instructions on natural and probable consequences [in *Hart*] referred to 'attempted murder' without noting that, in order to convict [the defendant] of attempted *premeditated* murder under the natural and probable consequences doctrine, the jury would have to find that attempted

premeditated murder was a natural and probable consequence of the attempted robbery." (*Hart*, at p. 665.) We concluded "that the trial court has a duty, *sua sponte*, to instruct the jury in a case such as this one that it must determine whether premeditation and deliberation, as it relates to attempted murder, was a natural and probable consequence of the target crime. Having failed to do so here, the trial court erred." (*Id.* at p. 673.) We further concluded that the error was reversible "unless it can be shown that the jury properly resolved the question under the instructions, as given." (*Ibid.*)

Applying *Woods* and *Hart* here, the instructions were deficient because they failed to inform the jury it needed to decide whether first degree murder, rather than just "murder," was a natural and probable consequence of the target offense. The absence of such an instruction means that if the jury used the natural and probable consequences theory to return the first degree murder conviction, the jury necessarily convicted defendant of first degree murder simply because that was the degree of murder the jury found the perpetrator committed, and the jury never determined whether a reasonable person in defendant's position would have known that premeditated murder (i.e., first degree murder) was likely to happen (if nothing unusual intervened) as a consequence of either target offense. Because this possibility exists, we must reverse defendant's first degree murder conviction. When a trial court instructs a jury on two theories of guilt, one of which was legally correct

and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was actually based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1126-1129.) There is no such basis here, as it is impossible for us to determine from the instructions given, the verdict returned, or other circumstances of the case on which theory the jury based its first degree murder conviction.

We turn then to the remedy. As in *Woods*, because "the court's instructional error affected only the degree of the crime of which [defendant] was convicted," we "may reduce the conviction to [the] lesser degree [of the offense] and affirm the judgment as modified, thereby obviating the necessity for a retrial," but at the same time we must "give the prosecutor the option of retrying the greater offense, or accepting [the] reduction to the lesser offense.'" (*People v. Woods, supra*, 8 Cal.App.4th at p. 1596; see also *People v. Hart, supra*, 176 Cal.App.4th at pp. 674-675.) Accordingly, that is what we will do.

VI

CALCRIM No. 400 And Its "Equally Guilty" Language

Defendant contends the trial court erred by instructing the jury that a perpetrator and an aider are "equally guilty" of the crime. This instruction is from CALCRIM No. 400, which as given here stated in part, "A person is equally guilty of the crime whether he or she committed it personally, or aided or abetted the perpetrator who committed it."

Recently, we have explained the applicable law as follows:

"Generally, a person who is found to have aided another person to commit a crime is 'equally guilty' of that crime. (§ 31; see 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Introduction to Crimes, § 77, pp. 122-123.)

"However, in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1114-1122 . . . [an aider might be found guilty of first degree murder, even if shooter is found guilty of manslaughter on unreasonable self-defense theory]; *People v. Woods* [*supra*] 8 Cal.App.4th [at pp.] 1577-1578 . . . [aider might be guilty of lesser crime than perpetrator, where ultimate crime was not reasonably foreseeable consequence of act aided, but a lesser crime committed by perpetrator during the ultimate crime was a reasonably foreseeable consequence of the act aided].)

"Because the instruction as given was generally accurate, but potentially incomplete in certain cases, it was incumbent on [the defendant] to request a modification if [he thought it was misleading on the facts of this case. H[is] failure to do so forfeits the claim of error. (*People v. Lang* (1989) 49 Cal.3d 991, 1024 . . . [party may not claim 'an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language']; see *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163-1165 . . . (*Samaniego*) [challenge to CALCRIM No. 400 forfeited for failure to seek modification]; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518 . . .

(Nero) [construing CALJIC No. 3.00, also using the 'equally guilty' language, and finding it misleading 'even in unexceptional circumstances'].)" (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118-1119, fn. omitted.)

Because there was no objection to this instruction, on appeal defendant claims his counsel was prejudicially deficient in failing to object. The prejudice here would have been that the jury was constrained to find defendant guilty of the same degree of murder as the perpetrator.⁴ Because we are reversing defendant's first degree murder conviction for either a reduction to second degree murder or retrial, we need not consider whether counsel was ineffective for failing to object.

VII

Collateral Estoppel Barred Retrial Of The Gang Enhancement

In defendant's first appeal, we reversed for insufficient evidence a gang-related firearm use enhancement attached to defendant's first degree murder conviction. Defendant contends that this court's reversal of the gang-related firearm use enhancement in his first appeal collaterally estopped retrial of the gang enhancement here. We agree both that he can raise this issue for the first time on appeal and that collateral estoppel barred the retrial of the gang enhancement. (See *People v.*

⁴ Defendant contends there was evidence of voluntary manslaughter as well based on heat of passion and that this was an option the jury could have found him guilty of as well. As we will explain in part VIII of the Discussion, we reject the argument there was evidence of voluntary manslaughter based on heat of passion.

Saunders (1993) 5 Cal.4th 580, 592-593 [double jeopardy clause issues can be raised for first time on appeal]; *Brown v. Superior Court* (2010) 187 Cal.App.4th 1511, 1524 [double jeopardy has an issue preclusion component to it].)

In his first appeal, this court held "there [wa]s insufficient evidence to prove . . . [defendant's] participation in a murder benefitting or committed in association with a gang with a specific intent to promote, further, or assist criminal gang activity." This was an element of both the gang enhancement and the gang-related firearm use enhancement. We then addressed the effect of double jeopardy on the People's ability to retry defendant on the gang enhancement and the gang-related firearm use enhancement. We found the People could retry defendant on the gang enhancement because "[t]he punishment on the gang enhancement . . . is . . . one that merely increases the minimum prison term to 15 years for an indeterminate life sentence on an underlying crime." In contrast, we found the People could not retry defendant for the gang-related firearm use enhancement "because this enhancement by contrast increased the punishment on [defendant's] underlying crime beyond the statutory maximum."

Our reasoning implicated one aspect of the double jeopardy clause, which is the one that "protect[s] against successive prosecutions for the same offense after acquittal or conviction." (*Brown v. Superior Court, supra*, 187 Cal.App.4th at p. 1524, italics added.) Our analysis determined that, for the purposes of double jeopardy, the gang-related firearm use

enhancement functioned as an offense barring retrial of that "offense," whereas the gang enhancement functioned as an enhancement thereby allowing retrial of that "enhancement."

We were neither presented with nor considered the other aspect of the double jeopardy clause, the collateral estoppel or issue preclusion component, namely, whether our conclusion "there [wa]s insufficient evidence to prove . . . [defendant's] participation in a murder benefitting or committed in association with a gang with a specific intent to promote, further, or assist criminal gang activity" barred relitigation of that same element in the gang enhancement.⁵ We turn there next.

"'Collateral estoppel' . . . stands for an extremely important principle in our adversary system of justice. It means simply that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. Although first developed in civil litigation, collateral estoppel has been an established rule of federal criminal law [for] more than 50 years" (*Ashe v. Swenson* (1970) 397 U.S. 436, 443 [25 L.Ed.2d 469, 475].) *Ashe* was recently cited in *Yeager v. United States* (2009) 557 U.S. ____ [174 L.Ed.2d 78]. In the defendant's first trial in *Yeager*, the jury acquitted him of fraud but deadlocked on charges of insider

⁵ For this reason, the doctrine of law of the case does not apply.

trading. (*Id.* at p. ____ [174 L.Ed.2d at p. 85].) The Supreme Court held that, to the extent the fraud acquittals necessarily decided that the defendant was not in possession of any insider information, the issue-preclusion component of the double jeopardy clause barred a retrial on the insider trading charges.⁶ (*Id.* at p. ____ [174 L.Ed.2d at pp. 87-91].)

The same rationale applies here. In defendant's first appeal, we held "there [wa]s insufficient evidence to prove . . . [defendant's] participation in a murder benefitting or committed in association with a gang with a specific intent to promote, further, or assist criminal gang activity."⁷ This holding was the equivalent of an acquittal on the "offense" of the gang-related firearm enhancement. The issue-preclusion component of the double jeopardy clause therefore precluded a retrial on the gang enhancement because the element we found lacking in the "offense" of the gang-related firearm enhancement was identical to one of the elements in the gang enhancement. We therefore strike the true finding on the gang enhancement and

⁶ Based on the United States Supreme Court's application of collateral estoppel to a retrial in the same proceeding in *Yeager*, we reject the People's argument that "collateral estoppel . . . has not been applied to retrial after reversal."

⁷ Given that we expressly found insufficient evidence of this element, we reject the People's characterization of our holding as a "disagreement with the jury's resolution of conflicting evidence." The evidence on the gang enhancement was not "conflicting" -- it was lacking.

do not consider defendant's other argument that there was insufficient evidence of the gang enhancement.⁸

This leaves one final point. Defendant contends he is entitled to a full reversal of his conviction because the gang evidence "poisoned the well in a manner that violated [his] right to due process." In support, he cites *People v. Albarran* (2007) 149 Cal.App.4th 214. In *Albarran*, defendant and his companion fired multiple shots at a house where a birthday party was in progress. (*Id.* at pp. 217-218.) After conviction, defendant moved for a new trial; he argued there was insufficient evidence to support the gang enhancements and without these enhancements, the gang evidence was irrelevant and overly prejudicial. The trial court granted a new trial only as to the gang enhancements. (*Albarran*, at p. 222.) The appellate court found the gang evidence was irrelevant and so prejudicial as to deny defendant a fair trial. (*Id.* at p. 217.)

Albarran is distinguishable. In *Albarran*, the gang evidence was extremely inflammatory. It included defendant's gang tattoo referencing the Mexican Mafia and graffiti which contained a threat to kill the police. (*People v. Albarran*, *supra*, 149 Cal.App.4th at p. 220.) Here, the gang evidence was not comparable. There was no evidence connecting defendant to

⁸ The People acknowledge that "to the extent this Court intended its finding of insufficient evidence to be the functional equivalent of acquittal, respondent acknowledges the allegation is precluded from retrial" and "[c]onsequently the gang allegation should be stricken."

other murderous activities of the Hop Sing gang. Indeed, the People's own evidence relating to the Hop Sing gang tended to beg the question whether this really was a gang-related shooting in the first place. According to the gang expert, Hop Sing members "don't engage in conflicts out in the open where there [are] a lot of witnesses . . . [a]nd they try to keep their criminal activity within their own set, and they don't try to display it out in the open." "[T]hey were much less likely to engage in pointless violence than the Nortenos and Surenos." Given the state of the gang evidence, we do not find its introduction prejudiced defendant's trial.

VIII

The Court Properly Did Not Instruct On Certain Lesser Included Crimes

Defendant contends the court erred in not instructing on all lesser included offenses supported by the evidence. The court instructed on voluntary manslaughter on the theory Che killed in the heat of passion or on the theory Che killed or defendant aided and abetted the killing because "he acted in imperfect self-defense or imperfect defense of another." Defendant claims the court should also have instructed on three other lesser included offenses: (1) voluntary manslaughter based on defendant's own heat of passion; (2) voluntary manslaughter based on aiding and abetting an assault with a deadly weapon without malice; and (3) involuntary manslaughter based on aiding and abetting the brandishing of a firearm. There was insufficient evidence to instruct on these offenses.

A

*There Was Insufficient Evidence To Instruct On Voluntary
Manslaughter Based On Defendant's Own Heat Of Passion*

Defendant contends the jury should have been instructed on voluntary manslaughter based on his own heat of passion. Specifically, he argues that "if [he] called out for a gun during the brawl and/or yelled for [Che] to shoot, which was the People's theory of direct aiding and abetting, there was substantial evidence to support a theory that [defendant] may have acted based on a sudden quarrel or heat of passion and provocation." Defendant's theory focuses on his version of facts wherein, as defendant describes on appeal, he was receiving "non-stop blows to the head [that] were painful and that he was on the verge of losing consciousness."

If the jury believed this version of events, at least as applied to defendant's act of calling out for the gun, he was not guilty of any crime because he was being beaten almost until unconsciousness, and it would have been reasonable to call out for the gun in self-defense.

As applied to defendant's act of yelling at Che to shoot Treadway, if the jury believed this, defendant's action would not reduce his culpability to voluntary manslaughter. Defendant cites *People v. Leavitt* (1984) 156 Cal.App.3d 500, for the proposition the transferred intent doctrine applies to voluntary manslaughter. (*Id.* at p. 507.) However, as that case teaches, there is no substantial evidence to support a theory of transferred intent as to the homicide victim where the victim's

death "could not have been the inadvertent result of [the] defendant's attempt to defend himself from [another person.]" (*Id.* at p. 508.) Here, there was no evidence defendant's order to shoot (when the gun was directed at Treadway) was the inadvertent result of his attempt to defend himself from the beatings inflicted by another group.

B

*There Was Insufficient Evidence To Instruct On
Voluntary Manslaughter Based On Aiding And Abetting
An Assault With A Deadly Weapon*

Defendant has two theories for why the court should have instructed on voluntary manslaughter based on aiding and abetting an assault with a deadly weapon. One, he contends he "could have been convicted of voluntary manslaughter on a theory that by calling for a gun, [he] only intended for [Che] to commit assault with a deadly weapon, without intending for [Che] to kill anyone, or to shoot with conscious disregard for human life." Two, if he yelled at Che to shoot, "that does not necessarily mean that he urged [Che] to kill anyone, or to shoot at anyone. It would have been a call for [Che] to shoot to wound, or to shoot in the air to scare adversaries away."

As to the first theory, as we have explained, if the jury believed defendant called for the gun in self-defense while being beaten almost to unconsciousness, defendant would not be guilty of a crime.

As to the second theory, defendant fails to mention that when defendant urged Che to shoot Treadway, Che was already

pointing the gun at Treadway's head. Therefore, it was unreasonable that defendant's order for Che to shoot would simply be to wound Treadway or scare their adversaries away.

C

*There Was Insufficient Evidence To Instruct On
Involuntary Manslaughter Based On Defendant
Aiding And Abetting Brandishing A Firearm*

Defendant contends the court should have instructed on involuntary manslaughter based on him aiding and abetting Che's brandishing the firearm. He believes this theory had evidentiary support because the jury could have believed defendant called out for a gun during the fight as a cry for help while still not believing defendant was the one who called for Che to shoot (given conflicting evidence about who directed Che to shoot).

Again, as we have said, if the evidence was as defendant portrays on appeal, then defendant would not have been guilty of any crime because defendant would be acting in self-defense.

IX

*The Instruction On Natural And Probable
Consequences Did Not Allow The Jury To Find
Defendant Guilty Of Murder By Finding Che
Aided And Abetted Defendant, Rather
Than The Other Way Around*

Defendant contends "[t]he instruction[] on the natural and probable consequence theory [CALCRIM No. 403] was erroneous in that [it] allowed the jury to apply the doctrine upon finding

that [he] was 'guilty' of committing a target offense himself, without requiring a finding that his 'guilt' was based on *aiding and abetting* a confederate in the commission of the target offense." He claims "the jury could have found [him] guilty of murder based on a theory that Rickie Che aided and abetted [him] in committing the target offense, without a finding that [he] aided and abetted Rickie Che." "In other words, the jury could find that [Che] was aiding and abetting [defendant] rather than the other way around."

This argument need not detain us long. CALCRIM No. 403 mentioned twice defendant must be the aider and abettor under the natural and probable consequences doctrine. Specifically, the instruction stated: "The People are alleging that the defendant originally intended to aid and abet either the crime of assault or the crime of disturbing the peace. The defendant is guilty of assault or disturbing the peace if you find that the defendant aided and abetted one of those crimes, and that the murder was the natural and probable result." It is not reasonable the jury would have ignored the language we have just quoted and, as defendant argues, concluded defendant was guilty of murder simply because of what came before in that instruction.⁹

⁹ What became before in the instruction was as follows: "Before you may decide whether the defendant is guilty of murder under a theory of natural and probable consequences, you must decide whether he is guilty of the crime of assault or disturbing the peace. To prove the defendant is guilty of murder, the People must prove that:

*The Court Did Not Err In Giving The
Mutual Combat Instruction (CALCRIM No. 3471)*

Defendant contends the court erred in giving the pattern mutual combat instruction (CALCRIM No. 3471) because the instruction "interfered with [his] right to defend himself against the attack of others."¹⁰ He acknowledges he was engaged

"1. The defendant is guilty of assault or disturbing the peace.

"2. During the commission of assault or disturbing the peace, a co-participant in that assault or disturbing the peace committed the crime of murder.

"3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault or disturbing the peace.

"[¶]. . . . [¶]"

However, as we have just explained, what came after was as follows:

"The People are alleging that the *defendant originally intended to aid and abet* either the crime of assault or the crime of disturbing the peace. The defendant is guilty of assault or disturbing the peace if you find that *the defendant aided and abetted* one of those crimes, and that the murder was the natural and probable result of one of those crimes."
(CALCRIM No. 403, italics added.)

¹⁰ As given here, CALCRIM No. 3471 states, "A person who engages in mutual combat or . . . who is the initial aggressor has a right to self-defense only if:

"1. He actually and in good faith tries [to] stop fighting;

in mutual combat with Gonzales, but contends he should have still retained the right of self-defense against others who attacked him while engaged in mutual combat with Gonzales. He then states, "the instruction simply states that a person who is engaged in mutual combat does not have the full right of self[-]defense, without saying that the limitation applies only to a claim of self-defense against the opponent in mutual combat, and does not apply to others who join the fight, contrary to the agreement."

Defendant's argument does not persuade us. The facts as defendant describes them in his opening brief on this argument were that "[a]t least three [people] other[than Gonzales] took free shots at [defendant]'s head, delivering more than ten blows, to the point that [defendant] nearly lost consciousness." If the jury had found these to be the facts and if it read the

"2. He indicates by word or by conduct to his opponent in a way that a reasonable person would understand that he wants to stop fighting, and that he has stopped fighting;

"3. He gives his opponent a chance to stop fighting.

"If a person meets these requirements, he then has a right to self-defense if the opponent continues to fight.

"A fight is mutual combat when it began or continued by mutual consent or agreement. That agreement may be expressly stated or implied, and must occur before the claim to self-defense arose.

"If you decide that the person started the fight using nondeadly force, and the opponent responded with such sudden and deadly force that the person could not withdraw from the fight, then the person has a right to defend himself with deadly force, and was not required to try to stop the fight."

instruction as defendant suggests, the jury still could have found defendant had the right to self-defense. This is because CALCRIM No. 3471 itself stated, ““If you decide that the person started the fight using nondeadly force, and the opponent responded with such sudden and deadly force that the person could not withdraw from the fight, then the person has a right to defend himself with deadly force, and was not required to try to stop the fight.” Surely, hitting defendant more than 10 times in the head to the brink of unconsciousness would qualify under this instruction as deadly force that allowed defendant to defend himself. And, the jury was instructed that if “defendant, in aiding and abetting the killing, acted in complete self-defense or defense of another, his action was lawful, and you must find him not guilty of any crime.”

XI

*The Court Did Not Err In Giving CALCRIM No. 373
And Special Instruction No. 1 Regarding Not
Considering Why Others Had Not Been Prosecuted*

Defendant contends the court erred in instructing with CALCRIM No. 373¹¹ and special instruction No. 1¹² that he claims

¹¹ CALCRIM No. 373 stated there may have been other people involved in the commission of the crime charged against defendant and the jury should not speculate whether those people have been or will be prosecuted. The instruction did not apply to Nim.

¹² Special instruction No. 1 stated: “If either counsel suggested in any way that you may consider penalty or punishment, or whether Rickie Che or any other person has been

prohibited the jury from considering whether Gonzales, Hernandez, Bartholomew, Nguyen, and Montes could have been prosecuted for murder based on the natural and probable consequences doctrine. His theory is this: when Gonzales and Treadway "squared off" to fight defendant and Che, then Gonzales, Hernandez, Bartholomew, Nguyen, and Montes "knew or should have known that any fighting would not remain one-on-one, but would draw others in, and could quickly escalate into a riot. They knew or should have known that this sort of melee could result in serious injury or death." He claims these witnesses therefore had a motive to testify favorably to the prosecution.

The premise of defendant's argument is wrong. None of these witnesses could have been prosecuted for murder based on the natural and probable consequences doctrine. A reasonable person in the position of Gonzales, Hernandez, Bartholomew, Nguyen, or Montes would not "have known that the [shooting] was a reasonably foreseeable consequence of the act [they] aided and abetted." (*People v. Medina, supra*, 46 Cal.4th at p. 927.) They were unaware Che brought a gun to the fight or that he would shoot if pressured. In other words, they had no way of knowing this fight could turn deadly. While defendant makes much of the fact the jury was instructed knowledge of the gun

or will be prosecuted, or sympathy for or against the defendant, you must disregard those arguments. You must not discuss those matters or permit them to enter into your deliberations in any way."

was not a "prerequisite" for finding defendant guilty on a natural and probable consequences theory, it also was instructed that knowledge of that fact may be considered in determining whether the homicide was foreseeable.

Defendant also cites *People v. Sanchez* (2001) 26 Cal.4th 834, for the proposition, "all participants in a deadly brawl are potentially liable for a resulting death." *Sanchez* does not sweep so broadly. Rather, that case stands for the proposition that where armed rival gang members engage in a gun battle that kills an innocent bystander, both can be liable for murder even though it is unclear who fired the fatal shot. (*Id.* at pp. 838-839.) This is not the situation we have here.

XII

The Court Properly Did Not Give Accomplice Instructions As To Gonzales, Nguyen, Bartholomew, Hernandez, and Montes

Using the same rationale as his last argument, defendant contends the court erred in failing sua sponte to instruct that Gonzales, Nguyen, Bartholomew, Hernandez, and Montes were accomplices as a matter of law. For the same reasons we rejected that argument, we reject this one too.

DISPOSITION

The gang enhancement is stricken. Defendant's conviction of first degree murder is reversed unless the People accept a reduction of the conviction to second degree murder. If, after the filing of the remittitur in the trial court, the People do not bring defendant to retrial solely on the premeditation and deliberation element within the time set forth in Penal Code

section 1382, subdivision (a)(2) -- 60 days unless waived by the defendant -- the trial court shall proceed as if the remittitur constituted a modification of the judgment to reflect a conviction of second degree murder and shall resentence defendant accordingly.

We concur: ROBIE, J.

BLEASE, Acting P. J.

NICHOLSON, J.