Filed 12/13/16 P. v. Rhee CA2/8

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE,

Plaintiff and Respondent,

v.

RONALD RHEE,

Defendant and Appellant.

B263988

(Los Angeles County Super. Ct. No. BA317399)

APPEAL from a judgment of the Superior Court of Los Angeles County. Douglas Sortino, Judge. Affirmed.

Joseph F. Walsh, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A. Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Brian Soo Chin was fatally stabbed at about 2:00 a.m. on July 15, 2006. It happened during a brawl in a parking lot a few blocks away from the bar where he and his friends had been involved in a brief bar fight shortly before the parking lot altercation. Defendant and appellant Ronald Rhee (defendant), Justin Sung Hong and Sang Min (David) Kim, among others, were identified as participants in the parking lot incident.[1] The day after the killing, defendant flew to South Korea on a one-way ticket. In 2008, while defendant was still in Korea, Justin Hong and David Kim were jointly tried for Brian's murder (the Hong/Kim trial). The jury found both men guilty of first degree murder and found true a gang enhancement. We affirmed Kim's and Hong's convictions in 2010 (*People v. Kim* (B211454, June 2010) 2010 WL 2510729; *People v. Hong* (B213632, May 2010) 2010 WL 2091763).

Defendant was extradited from Korea in May 2010, and, in July 2011, he was charged by information with Brian's murder. In February 2015, a jury convicted defendant of first-degree murder.[2] On appeal from that conviction, defendant contends:

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[1] Because several of the people involved have the same last name, we refer to them by their first names.

[2] Defendant was charged with deliberate and premeditated murder; use of a deadly weapon and gang enhancements were

(1) multiple evidentiary rulings were prejudicially erroneous; (2) there were multiple instructional errors; and (3) there was insufficient evidence of premeditation and deliberation. We affirm.

FACTS

A. People's Case

Viewed in accordance with the usual rules of appeal (*People v. Zamudio* (2008) 43 Cal.4th 327, 357) the evidence established that in July 2006, defendant was a member of the criminal street gang known as "Koreatown Gangstas" or "KTG." Justin Hong, David Kim, Arnold Kim and Chris Shin were also affiliated with KTG to a greater or lesser extent. Stella Yoo, who had friends in KTG, was also present.[3]

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also alleged. A jury found defendant guilty of first degree murder but found both enhancements not true. Defendant filed a new trial motion based on some of the contentions he now makes on appeal: (1) it was error to instruct that defendant could be convicted of first degree murder under the natural and probable consequences theory of aiding and abetting and (2) it was error to not instruct on voluntary manslaughter as a lesser included offense; and (3) it was error to admit into evidence letters defendant wrote to Hong. After it denied the new trial motion, the trial court sentenced defendant to 25 years to life in prison. Defendant timely appealed.

[3] Because of similarities in last names, from time to time, we use witnesses' first name.

On July 14, 2006, murder victim Brian Chin and his friends Hogan Shin, Mike Kim, Jun Kim, Dieter Schleicher and Daniel Lee (collectively "Brian's group") had dinner together at Bohemia, a restaurant located on the corner of Sixth and Kenmore in Los Angeles. From Bohemia, Brian's group walked the few blocks to Blink, a bar located on the second floor of a shopping center on the corner of Alexandria and Wilshire. Also at Blink that night was defendant, Justin, David, Chris, Arnold, Sam Choi and Stella. Brian's group sat at a table in the patio, next to the table where Stella and some of the others were sitting. By 1:00 a.m., everyone at both tables was inebriated. Because he believed David had shoved his chair several times, Jun punched David in the face, bloodying his nose. The bar manager separated Brian's group from the other group before matters escalated into a full-fledged brawl and escorted one of the younger men (probably Arnold Kim) out of the bar. Arnold then retrieved a crowbar from his car and headed back to Blink.

Brian's group left Blink shortly after Jun's altercation with David. As they walked toward the escalator leading down to Alexandria Street, Arnold Kim was coming up the escalator with the crowbar. Mike and Brian tackled Arnold to the ground and took the crowbar away. Meanwhile, Dieter and Hogan held back other people who had been in Blink and who were now gathered at the top of the escalator. When Chris Shin tried to assist

Arnold, Hogan shoved Chris against a glass window and held him there. Eventually, the bar manager came outside and held back the others so that Brian's group could leave. As Brian's group went down the escalator, people gathered at the balcony, spit at them and exchanged obscenities.

As they were walking away from the escalator, Hogan, who was part of Brian's group, looked back and saw they were being followed by several men who had been in Blink. Hogan saw David Kim take "a swing" at a security guard at the bottom of the escalator. As Brian's group walked north on Alexandria to Daniel's car in the Crown Plaza Building parking lot, they realized 4 or 5 of the young men who had been in Blink were not far behind them. By the time Brian's group reached the parking lot, they were being followed by about 10 men. While Daniel and Dieter of Brian's group ran to get help from a security guard, those 10 men attacked Hogan, Jun and Brian. Jun saw two men holding cans of mace and one holding a knife; when the person with the knife lunged at Jun, he backed away. Hogan was "maced," which impaired his vision. Jun saw Brian surrounded by people kicking and punching him, and heard someone yell "shank him." Brian was stabbed at least 12 times, including five independently fatal wounds. None of Brian's friends could identify the person who stabbed Brian. David Kim's blood was on a shoe police found in the parking lot.

The murder occurred in the early morning hours of July 15, 2006. That same day, defendant purchased a one-way ticket to South Korea on a flight leaving Los Angeles at 12:30 a.m. on July 16, 2006; he was on that flight. In February 2010, the South Korean police began investigating defendant for using a forged college diploma to obtain a teaching job. In connection with that investigation, the officer in charge checked the Interpol Database and discovered that defendant was wanted for murder in the United States. Defendant was arrested by the Seoul police and was extradited to the United States in May 2010, almost four years after the murder.

Recordings from surveillance cameras at Blink and the Chapman Plaza parking lot were introduced into evidence at defendant's 2015 jury trial. Defendant's companions at Blink that night, Chris Shin, Arnold Kim and Stella Yoo, all testified. They claimed to remember little of what happened that night, but their statements to the police and prior testimony, including in the Hong/Kim trial, were introduced. Chris testified that he was at Blink that night, sitting at a table with Justin Hong, David Kim and Stella Yoo. Defendant was not initially with them, but joined them off and on throughout the evening. Chris saw Jun punch David. Chris was tackled at the top of the escalator. **Chris** followed the people from Blink who were following Brian's group to the Chapman Plaza parking lot because he thought his

friends Justin and David might be there. By the time Chris arrived at the parking lot, the fight was almost over. He saw a man lying on the ground, bleeding profusely (Brian). While Chris and Justin were at the police station, police secretly recorded a conversation between them; Chris said he remembered seeing one person hitting Brian, but he did not name the person. But in the Hong/Kim trial, identified defendant as that person. In defendant's trial, Chris testified that Justin Hong and David Kim (who had already been convicted of the murder) were the only people he saw hitting Brian.

Stella told the police she saw defendant in the group of people running to the Chapman Plaza parking lot that night. Stella thought the people she saw were associated with her boyfriend's gang or some other gang.

Arnold Kim testified that he retrieved a crowbar from his car for protection after he saw one of his friends being assaulted (apparently referring to Jun punching David). But when he was coming up the escalator on his way back to the bar, he was grabbed and the crowbar was taken away. Defendant helped Arnold up. Arnold followed a large group of people, including defendant, to the Chapman Plaza parking lot. Arnold saw a lot of people, including defendant, fighting in the parking lot; a few people were rubbing their eyes. Arnold saw defendant punch Brian. Eventually, it seemed like everyone was kicking or hitting

Brian. There was blood on the ground where Brian was laying. When Brian was on the ground, Arnold kicked him because Brian had tried to hurt him. After kicking Brian, Arnold ran away. Arnold testified that the police pressured him into saying Justin and David were there and that defendant killed Brian.

B. The Defense Case

Defendant testified that he went to Blink that night to meet Justin Hong, David Kim, Chris Shin, Arnold Kim and Stella Yoo. When he arrived sometime between 9:30 and 10:00 p.m., the bar was packed with between 50 and 70 people. Defendant got drunk quickly and went to the bathroom to vomit. When he returned to the bar, it was "pretty much empty." At the table where he had been sitting, some of the chairs were overturned. A waitress told defendant his friends were outside fighting. When defendant walked out of the bar, it was chaos; it seemed as though everyone who had been in the bar was there; David Kim had a bloody nose and was being held against a rail by an older man (Hogan); and Arnold Kim was being pinned on the ground by a couple of older men (Brian and Mike). Defendant was still so intoxicated that he could not process what he was seeing. After Hogan released David and started to walk away, Justin asked Hogan where he was from to which Hogan responded, "I'm from Hell." Hogan, Brian and Mike went down the escalator while Blink staff held back the other people.

Defendant never went to the Chapman Plaza parking lot that night. He left the area outside Blink with two girls, got into his car and followed the crowd because he thought there was going to be another fight and wanted to watch. But when murder victim Brian confronted defendant, through the open driver's side window of defendant's car, defendant became frightened and drove away.

Defendant went to Korea on July 16, 2006 for the purpose of reconnecting with his biological father. It was the decision of defendant's mother that he go to Korea, not defendant's. Had defendant known he was the subject of an outstanding arrest warrant, he would not have left the country. Defendant's mother testified she had bought the airplane ticket for defendant a month before the murder. She later said the purchase was one week before the murder.

DISCUSSION

A. Sufficiency of the Evidence of Premeditation

Defendant contends there was insufficient evidence of premeditation and deliberation to support the first degree murder conviction. He argues there was no evidence of prior planning, motive or a manner of killing suggesting a preconceived design. We disagree.

The standard of review on a challenge to the sufficiency of the evidence is well known. The appellate court reviews " 'the

whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.]' [Citation.]" (*People v. Sandoval* (2015) 62 Cal.4th 394, 423 (*Sandoval*), citing *Zamudio, supra.*)

In *Sandoval*, our Supreme Court recently explained that " ' "deliberation" refers to careful weighing of considerations in forming a course of action; "premeditation" means thought over in advance. [Citations.] "The process of premeditation and deliberation does not require any extended period of time. 'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly.' " ' [Citation.]" (*Sandoval*, *supra*, 62 Cal.4th at p. 424.) First degree murder verdicts are typically sustained where there is evidence of planning, motive, and manner of killing, extremely strong evidence of planning or evidence of motive in conjunction

with evidence of either planning or manner of killing. (*Ibid*., citing *People v. Anderson* (1968) 70 Cal.2d 15, 26-27.) These so-called "*Anderson* factors" are "descriptive and neither normative nor exhaustive, and that reviewing courts need not accord them any particular weight.' [Citation.]" (*Sandoval,* at p. 424.)

In *People v. Chiu* (2014) 59 Cal.4th 155, our Supreme Court explained that there "are two distinct forms of culpability for aiders and abettors. 'First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also "for any other offense that was a 'natural and probable consequence' of the crime aided and abetted." ' [Citation.]" (*Id*. at p. 158.) An aider and abettor may *not* be convicted of first degree premeditated murder under the natural and probable consequences doctrine. Rather, someone other than the direct perpetrator may be guilty of first degree murder only on direct aiding and abetting principles. (*Id.* at pp. 158-161, italics added.) As applied in this case, defendant could be convicted of first degree murder only as to a direct perpetrator or based on evidence he intended to aid and abet a first degree murder.

Here, Chris Shin's testimony in the Hong/Kim trial that defendant was the person he saw stabbing Brian was substantial evidence that defendant was in fact that person, notwithstanding

conflicting evidence that other people stabbed defendant. There was sufficient evidence of motive and manner of killing from which a reasonable trier of fact could infer defendant did so with deliberation and premeditation. That defendant was motivated by revenge can be inferred from the evidence that he, Arnold Kim, David Kim and Chris Shin were affiliated with the KTG gang. Defendant became aware that Brian's group got the best of his associates in a fist fight - - Jun punched David Kim in the nose, Brian and Mike tackled Arnold Kim to the ground and took away his crowbar, and Hogan shoved Chris Shin into a glass wall to prevent him from helping Arnold. There was expert testimony that a gang member would have perceived such acts as showing disrespect to his gang for which there had to be payback. That defendant had deliberately in advance considered a knife attack as a means of redress for perceived insults to the gang is shown by the letters defendant wrote to Hong. The evidence that Brian was stabbed 14 times including multiple fatal wounds is evidence of a manner of killing from which deliberation and premeditation can be inferred.

The jury's findings that defendant did not personally use a knife does not undermine the jury's verdict of guilt, for two reasons. First, Penal Code section 954 provides: "An acquittal of one or more counts shall not be deemed an acquittal of any other count." The rule applies equally to an enhancement finding that

appears inconsistent with the verdict on a substantive offense. (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405.) A "jury's 'not true' finding on the personal firearm use enhancements may be logically inconsistent with a finding that defendant was the direct perpetrator of the [attempted murder, robbery and assault with a firearm] but, by statute, the inconsistency is not grounds for reversal because substantial evidence supported the verdict." (*Id*. at p. 407.)

Second, even though the "not true" finding seemed to be factually inconsistent with guilt, there was no factual inconsistency between the "not true" finding and defendant's conviction based on aiding and abetting which would have been premeditated on someone else in defendant's group using the knife.

B. Evidentiary Rulings

1. <u>The letter defendant wrote to Justin Hong</u>

Defendant contends it was prejudicial error to admit into evidence a letter defendant wrote to Justin Hong in late 2005, in which defendant expressed admiration for Justin having stabbed three people. Defendant maintains the letter was inadmissible under Evidence Code sections 1101, subdivision (a) and 352. In admitting the evidence, the trial court admonished the jury that it could consider the letter only on the issues of defendant's intent to kill, intent to aid and abet murder, intent to assist, further or

promote criminal conduct by gang members, motive, and his relationship with **Justin**. Defendant argues allowing the letter "to be presented to the jury as evidence that [defendant] had a future intent to stab Brian Chin is to 'manufacture' words that do not appear in the letter. All the letter shows is that [defendant] approved of Justin Hong's act of stabbing three people. As such, it was evidence of [defendant's] bad character." We find no error.

With statutory exceptions, all relevant evidence is admissible. (Evid. Code, §§ 350, 351.) Evidence is relevant if it has "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.) One statutory exception to the admissibility of relevant evidence is Evidence Code section 1101, subdivision (a), which makes evidence of a person's character inadmissible to prove that person's conduct on a specified occasion. (Evid. Code, § 1101, subd. (a).) But nothing in Evidence Code section 1101, subdivision (a) "prohibits the admission of evidence that a person committed a crime, civil wrong, or other act when relevant to prove some fact (such as motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident) . . . other than his or her disposition to commit such an act." (Evid. Code, § 1101, subd. (b).)

But even relevant evidence, including evidence admissible under Evidence Code section 1101, subdivision (b), may be

excluded if “its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury.” (Evid. Code, § 352.) We will not disturb a trial court’s exercise of its discretion under Evidence Code section 352 absent a showing that such discretion was exercised “ ‘. . . in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice. [Citations.]’ ” (*People* v. *Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

In *People v. Lang* (1989) 49 Cal.3d 991, our Supreme Court held it was not error to admit evidence that the defendant was observed carrying a handgun on five or six prior occasions and when asked why he carried the gun about one month before the murder, he “pointed the weapon at [the person asking] and replied, ‘I’ll waste any mother fucker that screws with me.’ ” (*Id.* at p. 1014.) The court explained that the evidence was probative of the defendant’s state of mind. “The jury could reasonably interpret defendant’s statement (“I’ll waste any mother fucker that screws with me.”) to mean he had a preexisting intent to kill anyone who interfered with him or thwarted his desires or plans or, in other words, to kill on slight provocation under circumstances where he had no right of self-defense. [The

witness's] testimony thus provided circumstantial evidence that the killing . . . was intentional." (*Id.* at pp. 1015-1016.)[4]

Here, defendant wrote the challenged writings in late 2005, while defendant was in Marine Corps training camp. In letters dated December 3, 4 and 12, defendant expresses regret over the death of "Trigger," a mutual friend, talks about not liking training camp and missing his friends at home. The letters use language commonly associated with criminal street gangs. In the letter dated December 25, defendant writes, "When I read you stuck 3 [illegible] I was fuckin motivated you know what I'm sayin!!! Fuck yea! Puttin my ops to good use eh?! Shit . . . . That was fuck yea!! Who were they?! Some weak Chinks? What happened? How that shit go down? Was all the homies there? Sounds fuckin exciting!!" Defendant did not object to the letters being admitted as evidence of defendant's gang membership, but requested that the reference to the stabbing be deleted.

We find no abuse of discretion in the trial court's conclusion that the December 25 letter was relevant to the disputed issues of intent to kill, intent to aid and abet, the gang enhancement as well as probative of defendant's relationship with Justin. Under *Lang*, *supra*, it is not that the December 25 letter directly shows

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4 *Lang* was disapproved on another ground in *People v. Diaz* (2015) 60 Cal.4th 1176, 1190 [no sua sponte duty to give cautionary instruction on out-of-court admissions].)

defendant had the intent to kill Brian Chin on some future date; it is that the letter shows defendant's ongoing state of mind – a desire to emulate his friend by killing someone who was disrespectful of his gang, just as his fellow gang member had done. This state of mind was circumstantial evidence of intent to kill.

2. Admissibility of the airline reservation evidence

Defendant contends the Homeland Security special agent's testimony that Homeland Security records showed defendant's reservations for the flight to Korea were made the day after the killing was inadmissible hearsay. He argues the prosecution did not establish the evidence was admissible under the business records exception (Evid. Code, § 1271) because the Homeland Security agent could not testify as to how airline employees obtained the data and entered it into the Homeland Security data bases. We find no error.

Subject to statutory exceptions, evidence of an out of court statement offered to prove the truth of the matter stated is inadmissible hearsay. (Evid. Code, § 1200.) Exceptions "commonly involve considerations of necessity, or at least efficiency, i.e., in the absence of the exception there might be no practical substitute for the proffered evidence, which would therefore be withheld from the trier of fact despite its posited trustworthiness. [Citation.]" (*People v. Franzen* (2012)

210 Cal.App.4th 1193, 1208.) "When evidence is offered under one of the hearsay exceptions, the trial court must determine as preliminary facts, both that the out-of-court declarant made the statement as represented, and that the statement meets certain standards of trustworthiness." (*People v. Cudjo* (1993) 6 Cal.4th 585, 608.)

At issue here is the business records exception described in Evidence Code section 1271: "Evidence of a writing made as a record of an act, condition, or event is not made inadmissible by the hearsay rule when offered to prove the act, condition, or event if: [¶] (a) The writing was made in the regular course of a business; (b) The writing was made at or near the time of the act, condition, or event; (c) The custodian or other qualified witness testifies to its identity and the mode of its preparation; and (d) The sources of information and method and time of preparation were such as to indicate its trustworthiness." (Evid. Code, § 1271.) "Writing" includes magnetic tape (i.e. computer records). (*Aguimatang v. California State Lottery* (1991) 234 Cal.App.3d 769, 798.)

To be admissible under Evidence Code section 1271, there must be proof that the person who wrote the information (i.e. input it into the data system) had knowledge of the facts from personal observation, but that person need not testify. The "rule permits any ' "qualified witness" ' to establish to the conditions of

admissibility. [Citations.] The witness need not have been present at every transaction to establish the business records exception; he or she need only be familiar with the procedures followed." (*Jazayeri v. Mao* (2009) 174 Cal.App.4th 301, 322.)

Here, during the People's case in chief, Homeland Security Special Agent Thomas May testified without objection that in August 2006, acting on a request from Detective Alan Solomon (the lead detective), May determined that a one-way ticket to Korea for a flight on July 16, 2006, was purchased for defendant on July 15, 2006 (the day after the murder), to be paid for in cash at the airport. Defendant flew to Korea on that flight. But defendant's mother testified that she made the reservation through a travel agent one month or one week before Brian was killed and paid for it with a credit card on the day of the flight. In rebuttal, the prosecutor sought to introduce May's testimony reiterating that Homeland Security records disclosed the reservation was made the day after the murder. The trial court sustained defendant's hearsay objection but gave the prosecutor an opportunity to lay a foundation for a hearsay exception. May then testified he had access to the relevant federal data bases, had training in their use and that the information in the data bases came from ticketing reservations and flight manifests. May explained that, pursuant to Homeland Security requirements, a traveler who wants to purchase a ticket on an

international flight must provide a passport to the airline ticketing agent; the ticketing agent enters the relevant information, including passport and date of purchase, into the airline's data base, the information is sent to a clearinghouse in Kentucky and downloaded into the federal data base; all of this is done electronically. Over defendant's objection that there was no testimony from employees of the airline or the clearinghouse, the trial court found May had laid a sufficient foundation for application of the business records exception to the federal data bases at issue. We find no error.

The evidence was sufficient to establish that May was familiar with Homeland Security requirements that information about international travelers, including the dates their tickets are purchased, must be communicated to Homeland Security, and the procedure by which airlines comply with those requirements. This was sufficient to show that airlines officials had an obligation to accurately input reservation and flight information in the databases to which Homeland Security had access. As such, his testimony was both trustworthy and fell within the business records exception to the hearsay rule.[5]

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[5] Inasmuch as we find no error, defendant's ineffective assistance of counsel claim, based on trial counsel's failure to object to May's testimony during the prosecutor's case-in-chief

C. Instructional Errors

In determining whether there has been instructional error, we consider the instructions as a whole and assume that the jurors are "intelligent persons and capable of understanding and correlating" the jury instructions they are given. (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) We interpret the instructions, if possible, so as to support the judgment. (*Ibid.*)

1. <u>Accomplice instructions as to Arnold Kim and Chris Shin</u>

Defendant contends the trial court erred in failing to instruct (1) that Arnold Kim was an accomplice as a matter of law and (2) that the jury must decide whether Chris Shin was an accomplice. Both Kim and Shin were part of the group that attacked Brian. We reject defendant's argument.

D. The Governing Legal Principals

The trial court has a sua sponte duty to instruct on the well settled principals relating to accomplice testimony. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) These principals include that a "conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense . . . ." (Pen. Code, § 1111.) The evidence required to corroborate an

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necessarily fails. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1170.)

accomplice may be slight. The defendant's own conduct implying consciousness of guilt constitutes sufficient corroboration. (*People v. Avila* (2006) 38 Cal.4th 491, 563.)

The statute defines "accomplice" as "one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111.) This definition " 'encompasses all principals to the crime [citation], including aiders and abettors and coconspirators.' [Citation.]" (*People v. Mohamed* (2016) 247 Cal.App.4th 152, 161; see Pen. Code, § 31 [principal in a crime is one who either directly commits the offense, or one who aids and abets in its commission].)

A defendant may be held criminally liable both for the crime "he or she intended to aid and abet (the target crime), and also for any other crime that is the 'natural and probable consequence' of the target crime." (*People v. Prettyman* (1996) 14 Cal.4th 248, 261.) When the target crime is assault, the defendant may be guilty of an unintended second degree murder (but not first degree murder) if that murder is a natural and probable consequence of the intended assault. (*Chiu, supra*, 59 Cal.4th at p. 161.) "Whether a person is an accomplice is a question of fact for the jury unless the facts and the inferences to be drawn therefrom are undisputed. [Citation.]" (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 103.)

E. Application to Arnold Kim

Here, there was evidence that after the altercation in Blink, Arnold retrieved a crowbar from his car (ostensibly for the purpose of protecting himself and his friends), but in a scuffle at the top of the escalator he was dispossessed of the crowbar by Mike and Brian; there was no evidence that Arnold ever reacquired the crowbar. Arnold admitted he was in the Chapman Plaza parking lot and watched Brian being hit and kicked by others before he rushed in and kicked Brian once – either while Brian was falling to the ground or after he was on the ground – and then ran away. There was no evidence that Arnold knew defendant or anyone else was armed with a knife, or that Brian was being stabbed. From this evidence, a reasonable trier of fact could conclude that Arnold was criminally liable for second degree murder under an aiding and abetting theory with the target crime of assault. But that was not the only reasonable inference from the evidence. A reasonable trier of fact could conclude that a fatal stabbing was not a natural and probable consequence of a fist fight, or that Arnold's participation in the parking structure fight came only after Brian had been stabbed.

On this record, the trial court appropriately gave CALCRIM No. 334, instructing the jury that it must decided whether Arnold was an accomplice, and if it concluded he was an accomplice, that his testimony alone was not sufficient upon

which to base a conviction, but required corroboration. The court properly refused to instruct that Arnold was an accomplice as a matter of law.

F. Application to Chris Shin

Unlike Arnold, there was no evidence from which a reasonable trier of fact could conclude that Chris was a principal in Brian's murder – either as a direct perpetrator or an aider and abettor. There was evidence that Chris and defendant were members of the same gang; Chris was the person Hogan shoved against the glass wall at the top of the escalator outside of Blink; Hogan did so to prevent Chris from helping Arnold while Brian and Mike were taking away Arnold's crowbar; and Chris was in the crowd that followed Brian's group to the Chapman Plaza parking lot. But there was no evidence that Chris participated in the assault in the parking lot.

Even assuming Chris could be deemed an accomplice because, as a fellow gang member he was providing back up in the parking lot, his testimony was sufficiently corroborated by other evidence including defendant's own conduct implying consciousness of guilt by flight. Thus any error in failing to instruct on Chris being an accomplice was harmless.

2. Instructions on aiding and abetting liability for murder

Defendant contends the trial court erred in failing to "clearly instruct the jury that [defendant] could not be convicted of first degree murder under a natural and probable consequences theory of aiding and abetting." We find no error.

As previously discussed, "an aider and abettor may *not* be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu, supra*, 59 Cal.4th at pp. 158-159, italics added.) In other words, to be criminally liable for aiding and abetting a first degree murder, the defendant must have intended to aid and abet first degree murder, not some other target crime. However, criminal liability for *second degree* murder may be based on the natural and probable consequences doctrine.

The jury instructions given in this case were consistent with *Chiu*. The jury was instructed that defendant was charged with murder and that there are two types of murders: first degree murder and second degree murder. (CALCRIM Nos. 500, 521.) It was further instructed:

"If you find that the defendant personally committed murder of the alleged victim, it is murder of the first degree if you

also find that the defendant acted willfully, deliberately, and with premeditation. Otherwise, it is murder of the second degree.

"If you find that a coparticipant murdered the alleged victim and that the defendant aided and abetted that coparticipant in the crime of murder, it is murder of the first degree if you also find that the defendant acted willfully, deliberately and with premeditation. Otherwise, it is murder of the second degree.

"If you find that a coparticipant murdered the alleged victim, that the defendant aided and abetted that coparticipant in the crime of assault by force likely to produce great bodily injury, and that murder is a natural and probable consequence of assault by force likely to produce great bodily injury, *it is murder of the second degree regardless of the defendant's state of mind*." (CALCRIM No. 521, italics added.)

The jury was also instructed on the natural and probable consequence doctrine. (CALCRIM No. 403.)

Consistent with *Chiu*, the trial court properly instructed the jury that, if defendant was not the actual perpetrator, defendant's liability for first degree murder could only be based on direct aiding and abetting principles. He could be liable for second degree murder under the natural and probable consequences theory of aiding and abetting, with the target crime being assault by force likely to produce great bodily injury. Read

as a whole, the instructions were correct, and there was no possibility that defendant was convicted of first degree murder on a natural and probable consequences theory.[6]

3. Failure to instruct on voluntary manslaughter as a lesser included offense of murder

Defendant contends he was denied due process as the result of the trial court not instructing on voluntary manslaughter as a lesser included offense of murder. He argues there was sufficient evidence of adequate provocation to warrant the instruction, and no evidence of any "cooling off period." Both Kim and Shin were in the group that attacked Brian. We reject defendant's arguments.

The standard of review for a challenge to the trial court's failure to instruct on a lesser included offense is de novo. We view the evidence in the light most favorable to the defendant. (*People v. Millbrook* (2014) 222 Cal.App.4th 1122, 1137 (*Millbrook*).) Because defendant contends the instructions were deficient under the federal law, we apply the test articulated in

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[6] Although the opening brief is not clear on this point, to the extent defendant argues on appeal that his trial counsel was ineffective for not objecting to the natural and probable jury instruction, we disagree for the reason that the instruction was legally correct. Hence no objection was required. (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1170.)

Chapman v. California (1967) 386 U.S. 18, 24, to any harmless error analysis. (*People v. Thomas* (2013) 218 Cal.App.4th 630, 633.)

"Trial courts have the duty under California law 'to instruct fully on all lesser necessarily included offenses supported by the evidence.' [Citation.] '[I]n a murder prosecution,' a court's duty to instruct sua sponte 'includes the obligation to instruct on every supportable theory of the lesser included offense of voluntary manslaughter, not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied.' [Citations.]" (*Millbrook, supra,* 222 Cal.App.4th at p. 1137.) " '[S]ubstantial evidence to support instructions on a lesser included offense may exist even in the face of inconsistencies presented by the defense itself' [citation] and 'even when as a matter of trial tactics a defendant . . . fails to request the instruction.' [Citations.] In particular, even if the defendant testifies to a state of mind inconsistent with the theory of a lesser included offense, substantial evidence may still support an instruction on that offense. [Citation.]" (*Ibid.*)

Voluntary manslaughter is a lesser included offense of murder. (*People v. Carasi* (2008) 44 Cal.4th 1263, 1306.) It is the absence of malice that reduces an intentional killing from murder to voluntary manslaughter. Malice is negated when the killing occurs "upon a sudden quarrel or heat of passion." (Pen. Code,

§ 192, subd. (a).) "Such heat of passion exists only where 'the killer's reason was actually obscured as the result of a strong passion aroused by a "provocation" sufficient to cause an " 'ordinary [person] of average disposition . . . to act rashly or without due deliberation and reflection, and from this passion rather than from judgment.' " ' [Citation.] To satisfy this test, the victim must taunt the defendant or otherwise initiate the provocation. [Citations.]" (*Carasai,* at p. 1306.) To "reduce murder to manslaughter, provocation must be such as would 'render an ordinary person of average disposition "liable to act rashly or without due deliberation and reflection, and from this passion rather than from judgment" ' [Citation.]" (*People v. Trinh* (2014) 59 Cal.4th 216, 232.) Whether the circumstances were sufficient to arouse the passions of an ordinarily reasonable person is generally a question for the trier of fact, but "where the provocation is so slight or so severe that reasonable jurors could not differ on the issue of adequacy, then the court may resolve the question. [Citations.]" (*People v. Fenenbock* (1996) 46 Cal.App.4th 1688, 1704.)

Even assuming a provocative act sufficient to arouse the passions of an ordinarily reasonable person, a killing is not voluntary manslaughter "if sufficient time has elapsed between the provocation and the fatal blow for passion to subside and reason to return." (*People v. Moye* (2009) 47 Cal.4th 537, 550.) In

Moye, *supra*, the court found no legally sufficient evidence of provocation where the alleged provocation (a fight between the defendant, the victim and their friends) occurred the night before the killing. (*Id.* at p. 550.) In *People v. Souza* (2012) 54 Cal.4th 90, several hours elapsed between when the defendant learned that his mother had been forcibly removed from a house party earlier in the evening and when the defendant, his brother and a third man went to that party and opened fire on the party goers, killing three and wounding two others. "Even assuming defendant and his brother reasonably believed that a group of persons had assaulted their mother, . . . the amount of time that had elapsed between the allegedly provocative act and the crimes made defendant's actions consistent with planned revenge and such a desire for revenge cannot objectively satisfy the provocation requirement. [Citations.]" (*Id.* at p. 117.)

In this case, the jury was given CALCRIM Nos. 520, 521 and 522, which explain the distinction between first and second degree murder, and how "provocation" may reduce murder from first to second degree. Trial court and counsel engaged in the following colloquy regarding instructions on lesser included offenses:

> THE COURT: First things first, I did not include any lessers. I didn't know whether anybody was going to be requesting them. I don't see any that I left out

given the record as I have it. [Defense counsel], is the defense requesting any lessers?

[DEFENSE COUNSEL]: No.

THE COURT: At this point you are declining to request a voluntary manslaughter?

[DEFENSE COUNSEL]: That is correct.

THE COURT: All right. [W]ell, let me just make a finding here. I anticipated there might be a request for voluntary manslaughter. Based on my review of the record I don't think it would be appropriate because I think given the facts as testified to in this case, even drawing reasonable inference in the defense's favor, I do not see that voluntary manslaughter would apply given the fact that it appears to me that there more than sufficient cooling off period as a matter of law based upon the fact that whatever the altercation at Blink, the victim's group had voluntarily left the location, was walking away and then there was a decision by the alleged – the group that the defendant is alleged to be a part of follow them for a matter of a couple of blocks, long city blocks. [¶] And in my opinion as a matter of law, whatever the nature of the provocation, there was a

sufficient cooling off period to make voluntary manslaughter not a valid instruction even if requested by the defense. [¶] Do you want to add anything to that record [prosecutor]?

[THE PROSECUTOR]: Only that when the defendant testified his testimony was that he was not present and that the victim did nothing to provoke him which I think taking into consideration with Your Honor's comments would make voluntary manslaughter inapplicable.

THE COURT: I agree as well. The defense appears to be – I was not there, I was not involved. Not I was there and involved but my involvement was somehow mitigated. [¶] Let me just ask you this, [defense counsel]. Is it a tactical decision on your part as well to not ask for a voluntary at this point given what appears to be the focus of the defense?

[DEFENSE COUNSEL]: Yes.

THE COURT: And you've done that after looking at all of the discovery in this case as well as your own investigation and you've made a tactical decision not to request it; is that correct?

[DEFENSE COUNSEL]: Yes."

We agree with the trial court that there was insufficient evidence of provocation to warrant instructions on voluntary manslaughter. Nothing Brian did provoked defendant's conduct. Even if defendant was provoked by Brian at Blink, there was a sufficient cooling off period once Brian's group left the nightclub and walked to the parking lot.

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.