**PEOPLE v. ROBBINS**

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*THE PEOPLE, Plaintiff and Respondent, v. AKIL ROBBINS, Defendant and Appellant.*

Court of Appeals of California, Second District, Division Three.

Filed December 13, 2010.

***Attorney(s) appearing for the Case***

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**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

KLEIN, P. J.

Defendant and appellant, Akil Robbins, appeals the judgment entered following his conviction, by jury trial, for first degree murder and felony evasion of a peace officer, with gang and firearm use enhancements (Pen. Code, §§ 187, 186.22, subd. (b), 12022.53; Veh. Code, § 2800.2).[1](https://www.leagle.com/decision/incaco20101213025#fid1) He was sentenced to state prison for a term of 50 years to life.

The judgment is affirmed as modified.

**BACKGROUND**

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) [6 Cal.4th 1199](https://www.leagle.com/cite/6%20Cal.4th%201199), 1206), the evidence established the following.

**1. *Prosecution evidence.***

On October 2, 2006, Angel Gonzalez was standing at a busy intersection when he heard gunshots. He saw Christopher Mathis standing next to the open front passenger door of a red Chevrolet Cobalt. Mathis was pointing a gun in a downward angle at the victim, who was subsequently identified as Ernest Crayton. Mathis fired one last time and got back into the car, which sped away. Gonzalez identified defendant Robbins as the Cobalt's driver. Crayton died from six gunshot wounds.

Los Angeles Police Officer Jesus Carrillo, responding to a radio broadcast about the shooting, saw a red Cobalt traveling at high speed. Carrillo activated his siren and red light and gave chase. He pursued the Cobalt until it stopped suddenly and its two occupants fled on foot. Carrillo could see their faces clearly as they ran. He identified the driver as Robbins and the passenger as Mathis.

Mathis was subsequently found hiding in a garage, and Robbins was found hiding in some bushes. Although there was no gunshot residue on Mathis's hands, there was residue on Robbins's left hand. The murder weapon was discovered in the Cobalt, underneath the driver's seat.

Winsla Hightower had rented the Cobalt on the day of the murder and loaned it to her friend Myeisha Brown. Brown testified[2](https://www.leagle.com/decision/incaco20101213025#fid2) she knew Robbins from the neighborhood. Robbins asked Brown if he could borrow the Cobalt for 20 minutes to visit his girlfriend. Brown agreed and Robbins drove off. He did not return the car.

Christopher Thompson, a member of the Rolling 40s gang, told police he saw Mathis get out of the Cobalt and shoot Crayton. Crayton had flashed a Rolling 40s gang sign at someone moments before Mathis shot him. Thompson said he could not identify the driver of the Cobalt. At trial, Thompson denied belonging to the Rolling 40s gang and testified he did not remember anything about the shooting.

Robbins and Mathis were members of the 76 East Coast Crips. According to the prosecution gang expert, this gang and the Rolling 40s were rivals. The gang expert testified the shooting occurred in Rolling 40s territory and that it had been committed for the benefit of Robbins's gang.

**2. *Defense evidence.***

Kimi Scudder, a gang intervention specialist, testified the Rolling 40s and the 76 East Coast Crips were allies, not rivals. Thus, the shooting would not have benefitted Robbins's gang.

**CONTENTIONS**

1. The trial court misinstructed the jury on Robbins's liability as an aider and abettor.

2. The trial court failed to award Robbins the correct amount of presentence custody credit.

**DISCUSSION**

**1. *Trial court did not misinstruct the jury on aiding and abetting.***

Robbins contends the trial court erred by incorrectly telling the jury it could not convict him of a lesser degree of murder than the actual killer. This claim is meritless.

**a. *Legal principles.***

"Because aiders and abettors may be criminally liable for acts not their own, cases have described their liability as `vicarious.' [Citation.] This description is accurate as far as it goes. But, as we explain, the aider and abettor's guilt for the intended crime is not entirely vicarious. Rather, that guilt is based on a combination of the direct perpetrator's acts and the aider and abettor's *own* acts and *own* mental state." (*People v. McCoy* (2001) [25 Cal.4th 1111](https://www.leagle.com/cite/25%20Cal.4th%201111), 1117.) "Aider and abettor liability is . . . vicarious only in the sense that the aider and abettor is liable for another's actions as well as that person's own actions. When a person `chooses to become a part of the criminal activity of another, she says in essence, "your acts are my acts . . . ."' [Citation.] But that person's *own* acts are also her acts for which she is also liable. Moreover, that person's mental state is her own; she is liable for her mens rea, not the other person's." (*Id.* at p. 1118.)

And as we held in *People v. Nero* (2010) [181 Cal.App.4th 504](https://www.leagle.com/cite/181%20Cal.App.4th%20504): "In . . . [*McCoy*] . . . our California Supreme Court held that an aider and abettor may be found guilty of *greater* homicide-related offenses than those the actual perpetrator committed. Extending that holding, we conclude that an aider and abettor may be found guilty of *lesser* homicide-related offenses than those the actual perpetrator committed." (*Id.* at p. 507.)

**b. *The initial jury instructions.***

In this case, Robbins and Mathis were tried together and both of them were charged with murder. As part of the aiding and abetting instructions, which were based on CALJIC Nos. 3.00 and 3.10, the jury was told: "Persons who are involved in committing a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation, is equally guilty. Principals include (1), those who directly and actively commit the act constituting the crime, or (2), those who aid and abet the commission of the crime. [¶] A person aids and abets the commission of the crime when he, (1), with knowledge of the unlawful purpose of the perpetrator, and (2), with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and (3), by act or advice aids, promotes, encourages or instigates the commission of the crime."

The jury was instructed on first degree murder and second degree murder. The jury was told a conviction for first degree murder required a finding of an intent to kill "which was the result of deliberation and premeditation . . . ." The jury was told "[m]urder of the second degree is the unlawful killing of a human being with malice aforethought where the perpetrator intended unlawfully to kill a human being, but the evidence is insufficient to prove deliberation and premeditation."[3](https://www.leagle.com/decision/incaco20101213025#fid3)

After defining first degree murder and second degree murder, the trial court instructed: "Murder is classified into two degrees. If you should find the defendant guilty of murder, you must determine and state in your verdict whether you find the murder to be of the first or second degree. [¶] If you are convinced beyond a reasonable doubt and unanimously agree that the crime of murder has been committed by a defendant, but you unanimously agree that you have a reasonable doubt whether the murder was of the first or of the second degree, you must give the defendant the benefit of that doubt and return a verdict fixing the murder as of the second degree, as well as a verdict of not guilty of the murder in the first degree. [¶] Before you may return a verdict in this case, you must agree unanimously not only as to whether the defendant is guilty or not guilty, but also if you should find him guilty of an unlawful killing, you must agree unanimously as to whether he is guilty of murder of the first degree or murder of the second degree."

Later in the instructions, the trial court emphasized that the guilt or innocence of each defendant was to be determined independently: "You must decide separately whether each of the defendants is guilty or not guilty. If you cannot agree upon a verdict as to both of the defendants but do agree upon a verdict as to any one of the defendants, you must render a verdict as to the one as to whom you agree."

**c. *Further instructions during deliberations.***

The jurors interrupted their deliberations to ask the trial court for "the definition of aiding and abetting." The trial court responded by reiterating the instructions, based on CALJIC Nos. 3.00 and 3.10, which they had already been given.

After further deliberation, the jury asked another question: "If we reach a verdict for a crime, does the aiding and abetting by a principal in that crime have to receive the same verdict at the same level or degree as the primary principal?" The trial court discussed this question with the parties and everyone agreed the correct answer was "Yes." The trial court then told the jury: ". . . I wanted to answer your last question. [¶] Before I do that, I'm going to reread to you two instructions that you have in the jury room, and then I'll answer your question." The court reread the instructions based on CALJIC Nos. 3.00 and 3.01, and then told the jury: "If you find that a principal committed the crime, and that the other person was aiding and abetting the principal of that crime by the definitions that you have been given, then the answer to your question is yes."

The jury went back to deliberating. Meanwhile, the prosecutor brought to the trial court's attention the case of *People v. Woods* (1992) [8 Cal.App.4th 1570](https://www.leagle.com/cite/8%20Cal.App.4th%201570). *Woods* held: "[U]nder Penal Code section 31 an aider and abettor is liable vicariously for any crime committed by the perpetrator which is a reasonably foreseeable consequence of the criminal act originally contemplated by the perpetrator and the aider and abettor. It follows that an aider and abettor may be found guilty of a lesser crime than that ultimately committed by the perpetrator where the evidence suggests the ultimate crime was not a reasonably foreseeable consequence of the criminal act originally aided and abetted, but a lesser crime committed by the perpetrator during the accomplishment of the ultimate crime was such a consequence." (*Id.* at p. 1577.)

While acknowledging *Woods* had been specifically addressing the natural and probable consequences doctrine, the prosecutor asserted "the point of the case is that the jury . . . could find a shooter premeditated and that a driver did not; and . . . therefore, you can have separate and distinct verdicts as to that." "Just because [the jurors] find that the shooter premeditated, it doesn't automatically mean that it applies to the driver, and they should have to make a separate finding . . . as to the driver."

After much discussion the parties agreed the prosecutor was right. The trial court suggested telling the jury: "`In order to find a defendant guilty of first-degree murder, you must determine whether each defendant committed murder with premeditation, deliberation, and willfulness separately.'" Robbins's attorney agreed to giving this instruction, but Mathis's attorney said, "I'm just wondering, in light of [*Woods*], if the . . . answer to the last juror's question should be no, because we are giving them conflicting instructions otherwise. We're saying if you find one degree on one it has to be the same on the other, and, yet, we are giving them this instruction saying you must find it separately." The trial court replied, "I'm going to tell them that I have a different instruction to give them that applies to the last question."

The jury was then brought into the courtroom. The trial court began by saying, "I just wanted to give you a different definition," and then instructed: "Previously you sent out a question, and regarding that answer I'm going to basically withdraw that and add something to it, and it will be the following: In order to find a defendant guilty of first-degree murder in this case, you must determine whether each defendant committed murder with premeditation, deliberation, and willfulness separately."

**c. *Closing argument.***

During closing argument, the prosecutor asserted the evidence showed that seconds before Crayton was shot he had flashed a Rolling 40s gang sign, either as a friendly gesture to an acquaintance on the street or in a confrontational way at the occupants of the Cobalt. The prosecutor argued that, in reaction to Crayton's gang sign, Robbins stopped the car so Mathis could shoot him; that Mathis got out, shot Crayton and then got back into the car. As he did so, he handed the murder weapon to Robbins, who shoved it under the driver's seat. The prosecutor argued premeditation and deliberation had been established by the evidence showing Robbins borrowed someone else's rental car for the very purpose of carrying out a drive-by shooting in rival gang territory.

The closing argument by defense counsel for Mathis consisted of disputing the accuracy of the identifications made by the eyewitnesses, Gonzalez and Officer Carrillo.

Robbins's defense counsel conceded he had been driving the Cobalt, but argued Robbins had no idea there was going to be a shooting. Counsel suggested the gunman must have asked Robbins to stop the car, then became involved in a confrontation during which he spontaneously shot Crayton. Defense counsel argued Robbins really did borrow the rental car in order to visit his girlfriend.

In rebuttal, the prosecutor asserted both defendants decided to kill Crayton when they saw him flash a Rolling 40s gang sign. The prosecutor's implicit argument was that Mathis and Robbins had purposely gone driving into rival gang territory in order to carry out a drive-by shooting.

**d. *Discussion.***

Robbins contends the trial court erred by initially telling the jury it had to find both him and Mathis guilty of the same degree of murder, and that the court's subsequent instructions failed to cure the error. We conclude the trial court's ultimate instruction did cure the error.

Robbins argues: "The trial court erred four times in informing the jurors about the scope of appellant's vicarious liability. First, it told the jurors that appellant was `equally guilty' to Mathis if he was an aider and abettor under the standard instructions. Second, it repeated those specific instructions when the jurors asked for a definition of aiding and abetting. Third, it told the jurors that appellant had to have the exact same level and degree of guilt as Mathis if he was an aider and abettor in answer to the jurors' lucid and pointed question. And fourth, it did not categorically renounce those previous three errors, but instead `basically withdrew' — sort of? — only the third of the errors while simultaneously `adding something to it' — building on the broken — and directed them to determine the presence of deliberation separately."

The Attorney General counters that "although the trial court initially responded to the jury's question by stating that an aider and abettor had to receive the same level or degree of crime as the other perpetrator, the potential instructional error was cured by the court's subsequent response. Upon realizing that the initial response was inaccurate, the court brought the jurors back into the courtroom, advised them that it was withdrawing its prior response, and then instructed them to consider the mental state of each perpetrator `separately' in deciding their respective level of culpability. [Fn. omitted.] There would be no need to `separately' consider the mental state of each defendant if the jury was required to find them equally culpable. Given the correction made by the court, appellant has failed to show there is a reasonable likelihood the jury believed that an aider and abettor could not be convicted of a lesser degree of murder than the actual killer. (See *People v. Lewis* (2008) [43 Cal.4th 415](https://www.leagle.com/cite/43%20Cal.4th%20415), 532 [relevant inquiry is whether there is a `reasonable likelihood the jury understood the instruction in an impermissible way'].)"

In rebuttal, Robbins argues the Attorney General has "ignore[d] the analysis in *People v. Nero* (2010) [181 Cal.App.4th 504](https://www.leagle.com/cite/181%20Cal.App.4th%20504), where [an] instruction to consider guilt `separately' was found insufficient to cure the `equal guilt' error." Robbins also complains the trial court "told the jurors that its final instruction was simply `adding' to its prior incorrect `equally guilty' instructions. It did not disavow either its `must-be-the-same-verdict' response or the `equally guilty' language in the standard instructions. *That creates a conflict, not a cure.*"

We are not persuaded by Robbins's arguments. Our opinion in *Nero* is inapposite because there, when the jury asked if it could find the aider and abettor less culpable than the direct perpetrator, the trial court failed to correct its initial instruction that all principals, including aiders and abettors, are equally guilty.[4](https://www.leagle.com/decision/incaco20101213025#fid4) We concluded in *Nero* that "where, as here, the jury asks the specific question whether an aider and abettor may be guilty of a lesser offense, the proper answer is `yes,' she can be. The trial court, however, by twice rereading CALJIC No. 3.00 in response to the jury's question, misinstructed the jury." (*People v. Nero, supra,* 181 Cal.App.4th at p. 518.)

In the case at bar, on the other hand, the trial court responded by ultimately telling the jury: "In order to find a defendant guilty of first-degree murder in this case, you must determine whether each defendant committed murder with premeditation, deliberation, and willfulness *separately.*" (Italics added.) Thus, the trial court here did not rely on the fact the jury had been instructed with CALJIC No. 17.00, directing it to "decide separately whether each of the defendants is guilty or not guilty." Rather, the trial court here explicitly directed that the premeditation and deliberation element as to each defendant had to be decided separately. And contrary to Robbins's argument, the trial court here did disavow its erroneous instructions when it told jurors: "I just wanted to give you a *different definition,*" and "Previously you sent out a question, and *regarding that answer I'm going to basically withdraw that* and add something to it, and it will be the following . . . ."

We conclude the trial court successfully cured any confusion regarding Robbins's potential culpability as an aider and abettor, and that the jury was not reasonably likely to have believed Robbins's culpability had to be the same as Mathis's culpability. (See *People v. Lewis, supra,* 43 Cal.4th at p. 532 [relevant inquiry is whether there is a "reasonable likelihood the jury understood the instruction in an impermissible way"].)

**2. *Correct Robbins's presentence custody credits.***

Robbins was sentenced to an indeterminate term of 50 years to life for the murder and a concurrent term of three years for the felony evasion conviction. He contends, and the Attorney General properly concedes, the trial court miscalculated his presentence custody credits.

The trial court awarded Robbins 1165 actual days of presentence custody credit, but he was entitled to 1167 days with proper accounting for partial days and one leap year. (See *People v. Morgain* (2009) [177 Cal.App.4th 454](https://www.leagle.com/cite/177%20Cal.App.4th%20454), 469 ["defendant is entitled to credit for the date of his arrest and the date of sentencing"]; *People v. Browning* (1991) [233 Cal.App.3d 1410](https://www.leagle.com/cite/233%20Cal.App.3d%201410), 1412 [day of sentencing counted for presentence custody credits even though it was only partial day]; *People v. Bravo* (1990) [219 Cal.App.3d 729](https://www.leagle.com/cite/219%20Cal.App.3d%20729), 735 ["It is presumed the Legislature intended to treat any partial day as a whole day. [Citation.] Conduct credits shall be computed on the full period of custody commencing with the day of arrest"].)

"A sentence that fails to award legally mandated custody credit is unauthorized and may be corrected whenever discovered. [Citation.]" (*People v. Taylor* (2004) [119 Cal.App.4th 628](https://www.leagle.com/cite/119%20Cal.App.4th%20628), 647; see also *People v. Acosta* (1996) [48 Cal.App.4th 411](https://www.leagle.com/cite/48%20Cal.App.4th%20411), 428, fn. 8 ["The failure to award an adequate amount of credits is a jurisdictional error which may be raised at any time."].)

Robbins and the Attorney General also agree the 1167 days should have been credited to both his determinate and his indeterminate sentences. (See *People v. Schuler* (1977) [76 Cal.App.3d 324](https://www.leagle.com/cite/76%20Cal.App.3d%20324), 330 ["It is a basic rule that where an accused person is held in custody on a number of charges and upon conviction he is ordered to serve concurrent sentences, the time to be credited pursuant to section 2900.5 must be credited to each of them."].) We will direct the trial court to prepare a corrected abstract of judgment showing the proper amount of presentence credits for each term. (See *People v. Mitchell* (2001) [26 Cal.4th 181](https://www.leagle.com/cite/26%20Cal.4th%20181), 185 [it is proper and important to correct errors and omissions in abstracts of judgment].)

**DISPOSITION**

The judgment is affirmed as modified. Robbins is entitled to two additional days of presentence custody credit, and his total of 1167 actual days should be credited to both his determinate and his indeterminate terms. The trial court is directed to prepare and forward amended abstracts of judgment to the Department of Corrections and Rehabilitation.

We concur:

KITCHING, J.

ALDRICH, J.

**FootNotes**

1. All further statutory references are to the Penal Code unless otherwise specified.

2. Brown was unavailable for trial, so her preliminary hearing testimony was admitted as evidence.

3. The jury was also instructed on implied malice second degree murder: "Murder of the second degree is also the unlawful killing of human being when, (1), the killing resulted from an intentional act; (2), the natural consequences of the act are dangerous to human life, and, (3), the act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life. [¶] When the killing is the direct result of such an act, it is not necessary to prove that the defendant intended that the act would result in the death of a human being."

4. As we explained in *Nero*: "[T]he jury indicated it was considering an outcome other than second degree murder for Brown. It expressly asked whether Brown, as the aider and abettor, could `receive a higher or lesser degree of murder, manslaughter, or innocence?' When the trial court's reinstruction on reasonable doubt did not satisfy the jury, the foreperson asked if, for example, they were to find defendant *A* guilty of second degree murder, would the aider and abettor also be guilty of second degree murder `or could they be held to the level of the manslaughter, or completely innocent?' Then, when asked if the aider and abettor could `bear less responsibility,' the court only said the person could be found not guilty. But the jury's expressed concern was not whether it could acquit the aider and abettor, but whether the aider and abettor had to be found guilty of `the same level, murder two or manslaughter, or could they be at a lower level?' Without consulting counsel, the court reread, twice, CALJIC No. 3.00, which states: `Each principal, regardless of the extent or manner of participation, is *equally guilty.*' (Italics added.) The jurors then indicated that the instruction answered their question. The next day they found both defendants guilty of second degree murder." (*People v. Nero, supra,* 181 Cal.App.4th at p. 519.)