Filed 8/29/11 P. v. Armstrong CA3

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Respondent, v. TONY ARMSTRONG, Defendant and Appellant.	C063362 (Super. Ct. No. 08F05656)

Along with six others, defendant Tony Armstrong was charged with murdering Jose Guerrero on Memorial Day in 2008. There was no evidence defendant was present when Guerrero was shot to death; instead, the prosecution contended defendant was guilty of the murder because just before the shooting, he aided and abetted the offense of fighting or challenging another person to fight, and the murder was the natural and probable consequence of that target offense. The jury found defendant guilty of first degree murder, and the trial court sentenced him to 50 years to life in prison.

On appeal, defendant contends: (1) there was no substantial evidence he aided and abetted the target offense; (2) the jury instructions on the natural and probable consequences doctrine were erroneous; and (3) his trial attorney was ineffective for failing to object to improper opinion testimony from a gang expert and improper argument by the prosecutor.

We conclude the evidence was sufficient to support defendant's conviction and defendant has failed to prove he received ineffective assistance of counsel; however, we agree the jury instructions were erroneous 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. Consistent with our prior decisions on this issue, we will reverse defendant's conviction and remand for a retrial unless the People accept a reduction of the conviction to second degree murder.

FACTUAL AND PROCEDURAL BACKGROUND

The victim, Jose Guerrero, lived on Lindley Drive in Sacramento, in an area known as the Flats. At the time of his death, he had lived there for about eight years with his wife, Celica Cardenas, and their children.[1]

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[1] Together, Guerrero and Celica had two young daughters, and Celica had three other children of her own -- a daughter and two sons.

The Flats is predominantly controlled by two street gangs, the Norteños and the Bloods, both of which identify with the color red. The Norteños and the Bloods are known to associate with each other in the Flats. There are also Sureños in the area, however. The Sureño street gang, which identifies with the color blue, is the main rival of the Norteños. A Norteño gang member would take it as a sign of disrespect if a Sureño gang member wore blue in a Norteño neighborhood, and such an act could lead to a verbal or physical confrontation.

The house where Guerrero and Celica lived with their children was on the north side of Lindley between Grove Avenue to the east and Edgewater Road to the west. The house was known in the Flats as being associated with the Sureños. In fact, Celica's 21-year-old son, Federico, who had been living in the house off and on up until the time of the shooting, was a validated Sureño gang member.

Defendant is a validated member of the Del Paso Heights Bloods who goes by the nickname "T Blood." Among others, he has a tattoo on his stomach that reads, "Hood Boss," a tattoo on his left forearm that reads, "Da Flats," and a tattoo on his back that reads, "Blood 4 Life."

Defendant was known to associate with Norteño gang members. In particular, he was friends with Noe Ortiz, a Norteño

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Because many of the people involved in this case have the same surnames (e.g., Cardenas, Torres, Gonzales), to avoid confusion we will often refer to people by their first names or nicknames.

associate who lived on the northwest corner of Lindley and Edgewater, down the street from Guerrero's house. Defendant was also friends with Jose Gonzalez (also known as Pepe), a friend of Noe's who is a validated Norteño gang member. Defendant and Pepe sold "weed" back and forth to each other.

Noe and Pepe were part of a group of friends -- all of whom are associated with the Norteño gang -- who went to Grant High School and hung out together. The other members of the group were Pepe's brother, Juan Carlos Gonzalez (also known as Cho Che); Jaime Torres; Jaime's brother, Hugo Torres; Jaime and Hugo's uncle, Sergio Torres; and Mario Vargas. Jaime, Hugo, Sergio, and Vargas are all Norteño gang members (Vargas is validated), and Juan Carlos is a Norteño associate.

In the early evening on Memorial Day in 2008, Guerrero was sitting out in front of the open garage door of his house visiting with a friend and the friend's two children. One of the friend's children, Christian, who was 15 years old, was wearing a blue baseball cap and long blue shorts.

While they were sitting there, Christian noticed a Hispanic male drive by twice on a four-wheeled motorcycle, staring and "giving [them] a bad look." Fifteen to 30 minutes later, Christian saw a blue car with four or five people in it driving past from east to west. The person in the front passenger seat, who was wearing a red bandana covering his nose and mouth, was leaning out of the car window flashing a gang sign -- specifically, an "L" made with his thumb and forefinger, which Christian understood to be a Norteño gang sign signifying the

"l" in Gardenland. The car was initially going fast as it approached Guerrero's house, but it slowed down for the speed bump in the street just beyond Guerrero's driveway, then sped away.

Around this same time (7:00 p.m.), down Lindley to the west, about three houses west of the intersection with Edgewater, Luis Cabrera was in his front yard barbecuing when he saw a blue Chevrolet four-door "going really fast" westward on Lindley with "somebody hanging out the window." Cabrera could tell the driver was a black man, but could not tell more than that because the car was going too fast; he did, however, recognize the car as one defendant regularly drove. (Other evidence confirmed that the blue Chevrolet Lumina with the grey hood was defendant's car.) The person hanging out the front passenger window was a Hispanic male who had a "red rag" covering his face and was throwing gang signs. The car drove past Cabrera's house and out of sight.

Thinking that the guy wearing the red rag going by Guerrero's house might be some kind of gang challenge, Cabrera walked from near his front door, where he was standing when the car went by, to the sidewalk and looked back up the street. There, he saw two cars parked near the intersection of Lindley and Edgewater -- a white car he did not recognize and a two-tone Chevelle he recognized as one that Pepe drove. He also saw four or five Hispanic males, including "the guy with the rag on his face," "[k]ind of like power walking" from out of his view on Edgewater, turning up Lindley toward Guerrero's house, pulling

up their pants and cinching their belts as if they were preparing for a fight.[2] Cabrera recognized Pepe as being among that group.

Cynthia Gutierrez, Noe's girlfriend at the time, lived on the south side of Lindley, approximately midway between Guerrero's house and the intersection of Lindley and Edgewater. She was sitting in a car in front of her house with a friend when she saw Pepe and Jaime, who had a red bandana on his face, walking fast up Lindley toward Guerrero's house. They looked mad and like they were about to fight. Gutierrez moved the car down the street and parked in front of the friend's house, which was across the street and two houses down from Guerrero's house. When she got out of the car, Gutierrez saw Jaime and Guerrero yelling at each other.

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[2] An aerial photograph of the neighborhood shows that after crossing Edgewater, Lindley bends southwest, then -- about six houses past Cabrera's -- turns 90 degrees to the northwest where, one house later, it dead ends into Redondo Avenue, such that the houses on the north side of Lindley (including Cabrera's) back up to the houses on the south side of Redondo. Following Redondo northeastward, the street bends to the east just before it crosses Edgewater two houses north of Edgewater's intersection with Lindley. The block on Redondo between Lindley and Edgewater consists of 12 houses. Thus, a car passing Cabrera's house could follow Lindley to its end, turn right on Redondo and be at the intersection of Redondo and Edgewater, two houses north of the intersection of Edgewater and Lindley, within a matter of moments.

In fact, Cabrera estimated that it was "within about two minutes" from the time he saw the blue car pass his house until he saw the group walking up Lindley toward Guerrero's house.

Meanwhile, about 10 minutes after the blue car drove past Guerrero's house, Christian saw "like 15" or "like 20 people" walking up to the house from the west. One of them, who was wearing a red bandana on his face and whom Christian thought was the same person who had leaned out of the blue car when it drove by, came onto the sidewalk, while the others remained in the street. (Based on Gutierrez's testimony, and other evidence, the person with the red bandana on the sidewalk was Jaime.) Jaime said, "where are your cousins," then began moving up the driveway cursing repeatedly, "where are the fucking scraps?" "Scrap" is a derogatory word for a Sureño. At some point, Jaime, who was in the middle of the driveway, stared at Christian, who was wearing blue, pulled out a gun and showed it to them, then put it back. Jaime then backed up.

When Guerrero saw the gun, he stood up and took out his cell phone and announced two or three times that he was calling the police. Jaime told him not to call the police, that they only wanted to talk to "the cousins" -- which Christian understood to refer to Celica's sons, Roberto and Federico. When Guerrero did not put down the phone, Jaime took out his gun again and pointed it at Guerrero. Guerrero dropped his cell phone and rushed at Jaime, then grabbed him and started wrestling with him. The struggle moved from the driveway, onto the sidewalk, and into the street. As Guerrero struggled to get the gun, the bandana slipped from Jaime's face, and he struggled to pull it back up. Guerrero managed to hit the gun and knock it out of Jaime's grasp into the street, where the rest of the

group was standing. One of the members of the group picked up the gun and approached to where Guerrero and Jaime were still struggling against each other. He pointed the gun at Guerrero and fired once, but missed. He fired a second time, and the bullet struck Guerrero in the head, penetrating through his brain into his neck. Guerrero immediately fell forward on his face and later died at the hospital from the gunshot wound.

Meanwhile, when Guerrero fell, Jaime and everyone else in the street ran back down Lindley toward Edgewater. Vargas (who testified at trial under a grant of immunity) admitted to police he was outside Noe's house with Noe, Pepe, Juan Carlos, Hugo, and Sergio. He claimed he remained at the corner, and while he said he did not remember whether his friends walked up the street, he did tell the police they came running back, and Jaime said "'[m]an, that guy just shot.'"

According to Vargas, he, Pepe, Juan Carlos, Sergio, and Hugo fled in the Chevelle, while Jaime left in another car. On a nearby street (Arcade Boulevard), the Chevelle got stuck briefly on a tree stump that was in the road. When the two front occupants got out of the car, they were holding large beer bottles. They managed to free the car from the stump and drive away, but they left one of the beer bottles behind, as well as a trail of fluid from the car. The next morning, the police followed the trail to the home of Pepe and Juan Carlos.

Meanwhile, about three to five minutes after the Chevelle drove away leaving the beer bottle behind, a police car came by and the witness who saw the Chevelle pointed the police in the

direction the car went. The police officer immediately departed without further conversation. A minute or so later, another police officer came by, and the witness told that officer what she had seen. The officer told her to watch the bottle, then left in the direction the other officer had gone.

Five or 10 minutes later, a black SUV came by. Defendant was one of the occupants of the SUV. As the SUV was driving down Arcade, defendant told the driver to stop. When the SUV stopped, defendant got out and picked up the beer bottle that had been left behind by the occupants of the Chevelle, then got back in the SUV. During the incident, the witness watching the bottle heard someone in the SUV say, "Get that bottle so they can't get any prints off it."

In September 2008, the People charged defendant, Pepe, Juan Carlos, Noe, Hugo, Jaime, Sergio, and Vargas with Guerrero's murder. (The People later dropped the charge against Vargas and granted him immunity for his testimony.) The information included allegations that at least one principal intentionally and personally discharged a firearm, causing death, and that the crime was committed for the benefit of, at the direction of, and in association with a criminal street gang.

The prosecution's theory against defendant was that defendant aided and abetted the crime of fighting or challenging another person to fight by driving some of the Norteños by Guerrero's house just before the confrontation, and the murder of Guerrero was a natural and probable consequence of that target offense.

The jury found defendant guilty of first degree murder and also found the firearm use and gang enhancement allegations true. The trial court imposed a sentence of 25 years to life on the murder charge and a consecutive sentence of 25 years to life on the firearm use enhancement.[3] Defendant timely appealed.

DISCUSSION

I

Sufficiency Of The Evidence

Defendant contends his murder conviction must be reversed because there was insufficient evidence he aided and abetted the target offense of fighting or challenging another person to fight (Pen. Code, § 415, subd. (1)).[4] More specifically, defendant asserts "there was grossly insufficient evidence . . . that [he] had knowledge of the perpetrator's purpose to commit the target offense, that [he] had the intent of at least encouraging or facilitating commission of the target crime and that [he] acted to aid, promote, encourage or instigate the commission of the crime."

As we will explain, we disagree. Although the evidence was circumstantial, that evidence, when viewed in the light most favorable to the jury's verdict, was nonetheless sufficient to

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[3] Pursuant to subdivision (e) of Penal Code section 12022.53, no sentence was imposed on the gang enhancement. (See *People v. Brookfield* (2009) 47 Cal.4th 583.)

[4] That statute makes it a misdemeanor for a person to "unlawfully fight[] in a public place or challenge[] another person in a public place to fight."

allow the jury to conclude three things beyond a reasonable doubt. First, the jury could have reasonably concluded that defendant aided, promoted, or encouraged his Norteño gang member friends to commit the offense of fighting or challenging another person to fight when he drove some of them by Guerrero's house, then dropped them off just down the block, from where they immediately proceeded to Guerrero's house for the confrontation that resulted in Guerrero's death. Second, the jury could have reasonably concluded that when defendant drove by Guerrero's house and dropped his cohorts off nearby, he knew they intended to pick a fight with Guerrero or with other persons at the house. And third, the jury could have reasonably concluded that when he drove by Guerrero's house and dropped his companions off, defendant intended to aid, encourage, or facilitate their commission of the crime of fighting or challenging another person to fight. Accordingly, the evidence was sufficient to convict defendant of murder as an aider and abettor under the natural and probable consequences doctrine.

A

Standard Of Review

"Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. [Citations.] Consequently, '"all intendments are in favor of the judgment and a verdict will not be set aside unless the record clearly shows that upon no hypothesis whatsoever is there sufficient substantial evidence to support it."'" (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

"'In determining whether a reasonable trier of fact could have found defendant guilty beyond a reasonable doubt, the appellate court "must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence."' [Citation.] The same standard also applies in cases in which the prosecution relies primarily on circumstantial evidence." (*People v. Young* (2005) 34 Cal.4th 1149, 1175, italics omitted.)

"'"If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment."'" (*People v. Bean* (1988) 46 Cal.3d 919, 933.) "'An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.'" (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.)

"Circumstantial evidence is like a chain which link by link binds the defendant to a tenable finding of guilt. The strength of the links is for the trier of fact, but if there has been a conviction notwithstanding a missing link it is the duty of the reviewing court to reverse the conviction." (*People v. Redrick* (1961) 55 Cal.2d 282, 289-290.)

B

Aiding And Abetting Liability

"[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of

the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

"Except for strict liability offenses, every crime has two components: (1) an act or omission, sometimes called the actus reus; and (2) a necessary mental state, sometimes called the mens rea. [Citations.] This principle applies to aiding and abetting liability as well as direct liability. An aider and abettor must do something *and* have a certain mental state." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.) Thus, under the elements stated in *Beeman*, the "act" component of aiding and abetting consists of doing something that aids, promotes, encourages, or instigates the commission of a crime, while the "mental state" component consists of knowing the unlawful purpose of the perpetrator and intending to commit, encourage, or facilitate the commission of the offense.

Additionally, there must be a concurrence between the act and the mental state -- that is, "'the two elements of crime must be "brought together" in the sense of a causal relation between the mens rea and the *actus reus*. Stated in other words, the *actus reus* must be attributable to the mens rea . . . .'" (*People v. Martinez* (1984) 150 Cal.App.3d 579, 602-603, disapproved on other grounds in *People v. Hayes* (1990) 52 Cal.3d 577, 628, fn. 10.)

Thus, to be guilty of a crime as an aider and abettor, the defendant must have engaged in the act that aided, promoted, encouraged, or instigated the commission of a crime by the perpetrator because he knew the unlawful purpose of the perpetrator and he intended to commit the crime with the perpetrator or intended to encourage or facilitate the perpetrator's commission of the crime.

"[I]n general neither presence at the scene of a crime nor knowledge of, but failure to prevent it, is sufficient to establish aiding and abetting its commission. [Citations.] However, '[a]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.'" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

C

The Natural And Probable Consequences Doctrine

"[A] defendant may be held criminally responsible as an accomplice not only for the crime he or she intended to aid and abet (the target crime), but 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.)

"The test for an aider and abettor's liability for collateral criminal offenses . . . is objective; it is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of the act aided and

abetted." (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.) "In criminal law, as in tort law, to be reasonably foreseeable '[t]he consequence need not have been a strong probability; a possible consequence which might reasonably have been contemplated is enough. . . .'" (*Ibid.*) Furthermore, the test "is case specific, that is, it depends upon all of the facts and circumstances surrounding the particular defendant's conduct." (*Ibid.*) "A reasonably foreseeable consequence is to be evaluated under all the factual circumstances of the individual case [citation] and is a factual situation to be resolved by the jury." (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

D

Analysis

With the foregoing legal principles in mind, we turn to defendant's argument challenging the sufficiency of the evidence. Before we do so, however, we pause to set forth one more very important principle of law applicable to the issue before us. As we explained several years ago in *People v. Sanghera*, *supra*, 139 Cal.App.4th at pages 1573-1574: "Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant's burden to affirmatively demonstrate error. [Citation.] Thus, when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of

convincing us otherwise. . . . [¶] . . . [¶] [T]o prevail on a sufficiency of the evidence argument, the defendant must present his case to us consistently with the substantial evidence standard of review. That is, the defendant must set forth in his opening brief *all* of the material evidence on the disputed elements of the crime in the light most favorable to the People, and then must persuade us that evidence cannot reasonably support the jury's verdict. [Citation.] If the defendant fails to present us with all the relevant evidence, or fails to present that evidence in the light most favorable to the People, then he cannot carry his burden of showing the evidence was insufficient because support for the jury's verdict may lie in the evidence he ignores."

In arguing that the evidence here was insufficient to find defendant aided and abetted the crime of fighting or challenging another person to fight, defendant's appellate counsel fails to heed our admonitions in *Sanghera*. For instance, counsel argues that "there was no evidence to support the premise that [defendant] drove by [the victim]'s house as part of an orchestrated plan to engage in a physical confrontation with Sure[ñ]os" and "[i]t appears rather that the Norte[ñ]os spotted [the victim] and his companions outside his house and then, on the spur-of-the moment, they walked to the house when drunk and intending to confront [the victim]'s Sure[ñ]o stepsons." These arguments, however, do not account for *all* of the evidence that was presented and do not view that evidence *in the light most favorable to the People*, as we must do. When we view all of the

evidence, consistent with the standard of review, the picture that emerges is far different than the one appellate counsel describes.

Viewed in the light most favorable to the jury's verdict, the evidence was sufficient to establish the following facts, which, when considered in their totality, reasonably support defendant's conviction:

As previously noted, Guerrero's house was known in the Flats as being associated with the Sureños. Celica's son Federico, who was a validated Sureño, testified that he and his younger brother, Roberto, would sometimes wear blue clothing around the house, but another witness testified "[t]hey wore blue a lot" at Guerrero's house and yet another testified "they were always out in the front yard with blue stuff on" and it was "the only blue house in the neighborhood."

Before the shooting, defendant was far from a stranger to Guerrero and his "blue house." Celica had seen defendant arguing with her husband four times when her husband was at home. The arguments occurred because defendant and others he was with would "go by and burn tires and drive . . . on the front yard," and Guerrero would tell them not to do that.

The evidence showed that Noe lived further down (to the west) on Lindley from Guerrero and Celica, at the corner of Lindley and Edgewater -- across Lindley from Johnson Park. The evidence also showed that defendant and Noe were friends and that defendant would hang out in front of Noe's house. Also,

there was a speed bump on Lindley just to the west beyond Guerrero's driveway, i.e., on the way to Noe's.

In testifying about the arguments between her husband and defendant, Celica testified that when she "would go to the park [she] would see [defendant] with a lot of persons there and [at] another house that is on that side at the corner." She then testified that her husband and defendant "would argue because [defendant] would go by and burn tires and drive on the yard on the front yard. They would not make a stop, *all the people [who] went to that house including him*." (Italics added.)

From this testimony, the jury reasonably could have found that defendant -- who drove down Lindley "[a]lmost every day" -- made it a practice of speeding by Guerrero's house and driving on Guerrero's yard -- perhaps to drive around the speed bump -- on his way to Noe's house. Guerrero objected to this practice. As Celica testified, "[t]here were many children around," and it was Guerrero's objection -- "tell[ing] them not to do that" -- that led to the arguments between defendant and Guerrero.

Beyond these general incidents, there was a specific incident between defendant and Guerrero about a month before the shooting. Celica was in her bedroom when her brother-in-law (who was visiting) came running in and said, "'Celica, run. They are going to kill your children.'" Celica ran out into the yard, where she saw defendant, who was at the front of a large group of people, hit one of her sons' friends in the face, knocking him to the ground. Celica got Federico and Roberto into the house, while Guerrero told defendant and his companions

to leave and that he was going to call the police. Guerrero then took out his cell phone and called the police. Defendant stood and cursed at Guerrero, but then left with the group. Sometime during this incident, defendant was heard to say that he or they "owned the streets."

From the evidence, then, it was clear that by Memorial Day 2008 there was a history of conflict between defendant and the shooting victim.

On the morning of Memorial Day, just before noon, Miguel Balderas saw defendant hanging out in front of Noe's house with Noe, Pepe, Juan Carlos, Vargas, and Jaime. There was mention of a barbecue later that day at Pepe's house. Most of the group, except for Noe and defendant, left in the Chevelle. Balderas then gave defendant a ride home to a house on Arcade.

Later, in the evening, defendant was present at a barbecue at Jaime's house with Jaime, Hugo, Sergio, Pepe, Juan Carlos, and Vargas. They all decided to go to the Flats and left in at least two vehicles, headed to Noe's house.

Cell phone records showed that defendant's cell phone connected with Noe's cell phone for nearly a minute about an hour before the shooting. Within a span of four minutes just before 7:00 p.m., four connected calls were made from Noe's cell phone to Hugo's phone. Within 20 minutes after the shooting, four connected calls were made from defendant's cell phone to Noe's phone.

As detailed previously, the evidence also showed that around 7:00 p.m. defendant drove past Guerrero's house with some

of the Norteño gang members in his car. One of them -- probably Jaime, who was wearing a red bandana on his face -- was leaning out the window flashing a Norteño gang sign. The car sped down Lindley, past the intersection with Edgewater, and out of sight. Moments later, however, the occupants of defendant's car were seen coming from Edgewater and turning up Lindley toward Guerrero's house, pulling up their pants and cinching their belts as if in preparation for a fight. They walked fast, with determination, and upon arrival at Guerrero's house, Jaime immediately called out for "the fucking Scraps," which referred to Celica's sons, one of whom was a validated Sureño. After Jaime threatened Guerrero with a gun, the fight ensued that led to Guerrero being shot to death by one of the Norteño gang members.

When interviewed by police after the shooting, defendant admitted picking up the bottle but claimed it was because he was "recycling." He claimed the Norteños were "not some people that I be around." Later, however, he claimed they "were drinking a little bit earlier." He then said, "That was it. I came back, I fucking parked." But then he immediately changed his story, saying, "I wasn't even driving. . . . [¶] . . . [¶] I wasn't even driving my car that day." He later asserted he "was in the back seat of a car" and "[w]e came back. I fucking got out to go take a piss. And I don't know, man. I just fucking -- I walked over to the fucking tree by Nicole's house, I stood there, I pissed, shit, and I turn around, motherfucker was gone. You know what I'm saying?" When the police asked who was gone,

defendant responded, "Motherfuckers was gone, man" and "Psh, people." Later in the interview, defendant changed his story again, saying, "I went and got beer, and fucking I came back. And that was, uh, fucking that."

Based on all of the foregoing facts, the jury could have drawn the reasonable inference that sometime on Memorial Day, the idea arose for the Norteños to go to Guerrero's house and confront the Sureños they knew (or believed) lived there, with whom defendant had previously had a number of arguments. Defendant helped carry out this plan by driving some of the Norteños by the house with Jaime leaning out the window with a red bandana on his face, flashing a gang sign as a provocation to the people at Guerrero's house. Defendant then dropped the Norteños in his car off at or near Noe's house, but did not accompany them to the confrontation. He did, however, make several cell phone calls to Noe shortly after the shooting, and he soon went to the place on Arcade where the fleeing Norteños had left a beer bottle when their car struck a tree trunk, picking up the bottle so the police could not get fingerprints.

Based on the evidence, the jury could have reasonably found that when he drove the Norteños by Guerrero's house and dropped them off nearby, defendant knew they intended to pick a fight with Guerrero or with other persons at the house and he intended to aid, promote, or encourage the commission of that offense by his actions. Accordingly, the evidence was sufficient to convict defendant of the murder of Guerrero under the natural and probable consequences doctrine because a reasonable person

in defendant's position would have or should have known that murder was a reasonably foreseeable consequence of the confrontation he aided and abetted.

Defendant contends "it is not known why the Norte[ñ]os decided to go to Noe Ortiz's house on that Memorial Day" or "whether the Norte[ñ]os had decided to go to Guerrero's house when they left [Jaime's]." Defendant further contends "[i]t is pure speculation that a plan was hatched at [Jaime's]." Regardless of the exact time when they formed the plan, that there *was* a plan is reasonably inferable from all of the evidence. As we have explained, the evidence supports the conclusion that the Norteño gang members proceeded directly and with determination toward Guerrero's house the moment defendant dropped them off near Noe's after having driven them by Guerrero's house with Jaime issuing a gang challenge as they passed. This conduct is far more consistent with a planned confrontation than with a "spur-of-the[-]moment" decision, as defendant suggests.

Defendant contends "[t]here was no evidence [he] acted in any way to encourage the Norte[ñ]os to walk to Guerrero's house." Again, we disagree. He drove some of the Norteños past the house and dropped them off nearby, from where they immediately proceeded to the confrontation that resulted in Guerrero's death. The jury could infer from this -- and the other evidence of defendant's connections with the Norteños and his history with Guerrero -- that defendant knew of the confrontation that was to come and intended to aid, promote, or

encourage that confrontation by acting as their "transporter" -- driving the Norteños past the house to scout the scene and initiate the challenge, then dropping them off nearby so they could make their way to the house.

Defendant argues that "[h]ad [he] been interested in [the Norteños'] venture, he would have" "walk[ed] down the block with [them]." That is an argument for a jury, not an appellate court. There is no way we can say, as a matter of law, that the *only* reasonable inference to be drawn from defendant's failure to join his Norteño friends in the actual confrontation is that he never intended to aid, promote, or encourage that confrontation. That was for the jury to decide, and we cannot say the jury acted without the benefit of substantial evidence in deciding that defendant intended to aid, promote, or encourage the confrontation even though he did not attend it.

We need not detail the remainder of defendant's arguments, which are all in the same vein. Suffice it to say that in making his arguments defendant refuses to consider *all* of the evidence against him, taken *as a whole* and viewed *in the light most favorable to the jury's verdict*. We, however, have done so, and for the reasons set forth above we conclude that the evidence was sufficient to support defendant's conviction.

II

Jury Instructions

Defendant contends the trial court's instructions were erroneous because they "made it appear that if the perpetrator shot Guerrero with deliberation and premeditation, [defendant]

was guilty of first degree murder too." Stated another way, defendant contends the instructions "failed to convey that [he] could be found guilty of second degree murder, though the killer was guilty of first degree murder."

The People respond that there was no error "because under the natural and probable consequence theory of liability, the aider/abettor cannot be guilty of a lesser crime than that of the perpetrator." Adhering to our decision nearly 20 years ago in *People v. Woods* (1992) 8 Cal.App.4th 1570, we reject the People's argument and instead conclude that the jury instructions here *were* prejudicially erroneous because they did not allow the jury to consider whether defendant might have been guilty of only second degree murder, even if the perpetrator was guilty of first degree murder.

As relevant to the present issue, the jury instructions here began by explaining that a person may be guilty of a crime either because he was the perpetrator who directly committed it or because he aided and abetted the perpetrator. The court then explained the elements of aiding and abetting. The court then instructed the jury as follows:

"Before you may decide whether the defendant is guilty of the crime charged of first degree murder or the lesser crime of second degree murder, you must decide whether he is guilty as an aider and abettor of fighting or challenging to fight in violation of Penal Code Section 415.

"To prove that the defendant is guilty of murder as an aider and abettor, the People must prove that:

"1. The defendant is guilty as an aider and abettor of fighting or challenging to fight.

"2. During the commission of fighting or challenging to fight a coparticipant in that crime committed the crime of murder.

"And 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 fighting or challenging to fight.

"A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include the victim or innocent bystander. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes.

"[¶] . . . [¶]

"To decide whether crimes of murder and fighting or challenging to fight were committed, please refer to the separate instructions that I will give you on those crimes."

Thereafter, in instructing the jury on murder, the court gave the following instructions:

"If you decide that the defendant has committed murder as an aider and abettor, you must decide whether it is murder of the first or second degree. The perpetrator is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation.

"[¶] . . . [¶]

"All other murders are the second degree. The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime."

Under the foregoing instructions, once the jury found defendant "committed murder as an aider and abettor" because (among other things) a coparticipant in the offense of fighting or challenging to fight committed "murder" and a reasonable person in defendant's position would have known the commission of "the murder" was a natural and probable consequence of the other offense, the jury had to determine the degree of the murder defendant had committed. To make that determination, the jury was instructed to decide only whether "[t]he perpetrator . . . acted willfully, deliberately, and with premeditation." Thus, as defendant contends, "[t]he instructions le[ft] the distinct impression that if murder was a natural and probable consequence of [the offense defendant aided and abetted], and the perpetrator committed first degree murder, then [defendant] was also automatically guilty of first degree murder."

Such instructions are contrary to our decision in *Woods*. Like this case, *Woods* involved a murder charge based on aiding and abetting liability and the natural and probable consequences doctrine. (See *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 review, in a majority opinion written by Justice Scotland (over Justice Sparks' dissent), this court agreed with the defendant that the trial court had misinstructed the jury. (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1580.) The court first discussed the statutory basis for aiding and abetting liability: Penal Code section 31, which declares that "[a]ll persons concerned in the commission of a crime," including an aider and abettor, "are principals in any crime so committed." (*Woods*, at pp. 1581-1583.) The court then discussed the natural and probable consequences doctrine, concluding that "in specifying an aider and abettor is liable for 'any crime so committed' by the perpetrator, the Legislature intended--consistent with common law--that the aider and abettor is guilty not only of the criminal act originally contemplated and abetted but also of any other crime by the perpetrator which is a reasonably foreseeable consequence of the offense originally contemplated by the aider and abettor." (*Id.* at p. 1584.) The court then explained that "where 'any crime so committed' by the perpetrator is determined to be first degree murder, it is murder in the first degree for which section 31 assigns responsibility to an aider and abettor *provided said crime is a reasonably foreseeable consequence of the criminal act originally contemplated by the perpetrator and the aider and abettor.*" (*Ibid.*) According to the court, "the continuing viability of the common law rule of aider and abettor liability for reasonably foreseeable consequences of the criminal act originally contemplated compels the conclusion that, in enacting

section 31, the Legislature intended that an aider and abettor may be found guilty of a lesser crime or lesser degree of crime than the ultimate offense the perpetrator is found to have committed." (*Id.* at pp. 1585-1586.) The court continued 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.) The court explained that "[a]lthough necessarily included offenses need not be charged, the perpetrator nevertheless committed them as he or she committed the greater criminal offense," and "[t]he fact the perpetrator cannot be found guilty of both a greater and a necessarily included offense [citations] should not preclude an aider and abettor from being found guilty of an uncharged, necessarily included offense when the lesser, but not the greater, offense is a reasonably foreseeable consequence of the crime originally aided and abetted." (*Id.* at pp. 1587-1588.) The court concluded, "Therefore, in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider

uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence. Otherwise, . . . the jury would be given an unwarranted, all-or-nothing choice for aider and abettor liability." (*Id.* at p. 1588.)

More recently, in *People v. Hart* (2009) 176 Cal.App.4th 662, this court followed *Woods* in a case much like the one before us. *Hart* involved a charge of *attempted* murder based on aiding and abetting liability and the natural and probable consequences doctrine. (See *id.* at p. 668.) Like the jury instructions here 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 Rayford 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." (*Id.* at p. 665.) The court 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."[5] (*Id.* at p. 673.) The court 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, there is no question the jury instructions were deficient because they failed to inform the jury that 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 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 the target offense of fighting or challenging to fight.

The People contend that for two reasons we should follow the dissent in *Woods* rather than following *Hart* and the *Woods* majority. First, they contend, "the murder statute does not require that the individual personally deliberated and premeditated." Instead, Penal Code "[s]ection 189 states only that the killing must have been 'willful, deliberate, and

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[5] This issue is presently on review in the California Supreme Court. (See *People v. Favor* (2010) 190 Cal.App.4th 770, review granted Mar.16, 2011, S189317.)

premeditated,' not that the killer personally acted willfully and with deliberation and premeditation." Second, they contend, "under the natural and probable consequence theory, the aider's liability is derivative in nature. The aider's exposure stems from reasonably foreseeable crimes found to have been actually committed. It matters not that lesser crimes were also in the realm of foreseeability."

We find neither point persuasive as a reason for deviating from *Hart* and the *Woods* majority. First, the error in the instructions here was not -- as the People's first argument presumes -- that they did not tell the jury to determine whether *defendant*, as well as the perpetrator, acted with deliberation and premeditation. The error was that the instructions did not tell the jury to determine whether a reasonable person in defendant's position would have known that a deliberate and premeditated killing with malice aforethought -- as opposed to simply a killing with malice aforethought -- was likely to happen as a consequence of the target offense of fighting or challenging to fight. Thus, the People's first argument is of no moment.

As for the People's second argument, we absolutely agree that under the natural and probable consequences doctrine, "The aider's exposure stems from reasonably foreseeable crimes found to have been actually committed." But this point only serves to show why the *Woods* majority was correct. As the *Woods* majority explained, a perpetrator who commits a greater offense also commits, at the same time, any necessarily included lesser

offense. (*People v. Woods*, *supra*, 8 Cal.App.4th at p. 1587.) Because second degree murder -- a killing with malice aforethought -- is a necessarily included offense of first degree murder -- a killing with malice aforethought that was willful, deliberate, and premeditated -- the jury here necessarily found that the shooter committed both offenses when he shot and killed Guerrero. The question left unresolved by the jury instructions was whether the greater offense of first degree murder was reasonably foreseeable, or whether only "murder" -- that is, a killing with malice aforethought -- was reasonably foreseeable. Because the jury instructions did not direct the jury to resolve this question, they were erroneous and require reversal. Before addressing the scope of the reversal required, however, we turn to defendant's remaining ineffective assistance of counsel arguments.

III

Ineffective Assistance Of Counsel

Defendant asserts his trial attorney was ineffective in two instances: (1) he did not object to improper testimony from the prosecution's gang expert; and (2) he did not object to prosecutorial misconduct during closing argument. We conclude defendant has failed to prove he received ineffective assistance of counsel.

"Generally, a conviction will not be reversed based on a claim of ineffective assistance of counsel unless the defendant establishes *both* of the following: (1) that counsel's representation fell below an objective standard of

reasonableness; *and* (2) that there is a reasonable probability that, but for counsel's unprofessional errors, a determination more favorable to defendant would have resulted. [Citations.] If the defendant makes an insufficient showing of either one of these components, the ineffective assistance claim fails." (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1126.)

A

Gang Expert Testimony

Defendant contends his trial attorney was ineffective because he failed to object to the testimony of the prosecution's gang expert in response to "a so-called hypothetical that used [defendant]'s name and summarized the prosecution's evidence." According to defendant, "[t]his testimony crossed over the line into impermissible expert testimony by using improper hypothetical questions to opine as to [defendant]'s mindset."

Near the end of the direct examination of the gang expert, Sacramento Police Detective John Sample, the prosecutor asked an extended hypothetical question that incorporated specific details of the case, including defendant's name ("Tony"), the type of car he drove ("a blue Lumina"), and the name of the street ("Lindley"). Based on that hypothetical, the prosecutor asked Detective Sample if he had "an opinion on whether or not this person Tony did an act for the benefit of or in association with the Norte[ñ]os?" Detective Sample testified that he had an opinion and it was "[t]hat Tony did commit an act both again in benefit of the Norte[ñ]o gang as well as in association with the

Norte[ñ]o gang." Detective Sample then offered the reasons for his opinion. The detective then testified as to his opinion that "Tony" "had a specific intent to both promote and assist the Norte[ñ]os." Defense counsel did not object.

Defendant contends Detective Sample's expression of his opinion that "Tony" acted for the benefit of or in association with the Norteños and with the specific intent to promote and assist the Norteños violated recognized limits on gang expert testimony identified in *People v. Killebrew* (2003) 103 Cal.App.4th 644.[6] In *Killebrew*, "a . . . police officer who testified as an expert witness on gangs, [was allowed] to give an opinion about the intent and knowledge of gang members when in the presence of guns." (*Id.* at p. 650.) Specifically, "[t]hrough the use of hypothetical questions, [the officer testified] that each of the individuals in the three cars (1) knew there was a gun in the Chevrolet and a gun in the Mazda, and (2) jointly possessed the gun with every other person in all three cars for their mutual protection. In other words, [the officer] testified to the subjective *knowledge and intent* of each occupant in each vehicle." (*Id.* at pp. 650, 658.) Because the officer's "testimony was the only evidence offered by the People to establish the elements of the crime," it was "the type of opinion that did nothing more than inform the jury how [the

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[6] Another case on which defendant relied in his opening brief has since been taken for review by the California Supreme Court. (See *People v. Vang* (2010) 185 Cal.App.4th 309, review granted Sept. 15, 2010, S184212.)

officer] believed the case should be decided," and thus "[i]t was an improper opinion on the ultimate issue and should have been excluded." (*Id.* at p. 658.)

In an attempt to bring this case closer to *Killebrew*, defendant contends that Detective Sample's testimony as to his opinion that "Tony" acted for the benefit of or in association with the Norteños and with the specific intent to promote and assist the Norteños was, "[i]n effect, . . . testimony that [defendant] aided and abetted the crime, for [defendant] could not be acting in association with them and to benefit them and to promote the crime without aiding and abetting the crime." Thus, in defendant's view, "Detective Sample expressed his opinion as to how the jury should decide the case," which is impermissible.

"Expert opinions which invade the province of the jury are not excluded because they embrace an ultimate issue, but because they are not helpful (or perhaps too helpful). '[T]he rationale for admitting opinion testimony is that it will assist the jury in reaching a conclusion called for by the case. "Where the jury is just as competent as the expert to consider and weigh the evidence and draw the necessary conclusions, then the need for expert testimony evaporates." [Citation.]' [Citations.] In other words, when an expert's opinion amounts to nothing more than an expression of his or her belief on how a case should be decided, it does not *aid* the jurors, it *supplants* them." (*Summers v. A. L. Gilbert Co.* (1999) 69 Cal.App.4th 1155, 1183.)

Keeping in mind that the question before us is not whether Detective Sample's testimony that "Tony" acted for the benefit of or in association with the Norteños and with the specific intent to promote and assist the Norteños should have been excluded, but whether defense counsel's failure to object to that testimony fell below an objective standard of reasonableness and whether it is reasonably probable the verdict would have been different if defense counsel had objected, we conclude defendant has failed to make the requisite showing. "Failure to object rarely constitutes constitutionally ineffective legal representation . . . ." (*People v. Boyette* (2002) 29 Cal.4th 381, 424.) Moreover, in this specific context, even *Killebrew* held that "[a] bright line cannot be drawn to determine when opinions that encompass the ultimate fact in the case are or are not admissible" and "[t]he issue has long been a subject of debate." (*People v. Killebrew*, *supra*, 103 Cal.App.4th at pp. 651-652.) "'[T]he true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved.'" (*Id.* at p. 652, quoting *People v. Wilson* (1944) 25 Cal.2d 341, 349.) Under the circumstances here, defendant cannot show that had his trial counsel objected to Detective Sample's opinion testimony the trial court would have excluded it. (See *People v. Roberts* (2010) 184 Cal.App.4th 1149, 1194.) Furthermore, we are not persuaded that had the evidence been excluded it is reasonably probable defendant would have received a better result. Defendant himself admits "[t]hat

the incident was gang-related was overwhelmingly proven by other evidence." Nor are we inclined to believe that Detective Sample's testimony that "Tony" acted for the benefit of or in association with the Norteños and with the specific intent to promote and assist the Norteños was, as defendant suggests, the evidence that tipped the scale on the jury's determination "of whether [defendant] had aided and abetted the Norte[ñ]os in their crime." Accordingly, we reject defendant's assertion of ineffective assistance based on defense counsel's failure to object to that evidence.

B

Closing Argument

Defendant contends his trial counsel was ineffective because he failed to object to prosecutorial misconduct in closing argument. Specifically, he complains that "[t]he prosecutor argued that if [defendant] aided and abetted the fistfight, he was guilty of murder because the authoritative body of the courts had said so," and his trial attorney "failed to object to this argument until too late."

In arguing his case to the jury, the prosecutor told the jury, "There are three things I get to argue in every case. I get to argue the law which is kind of what we've been talking about. I get to argue about the evidence, and I get to argue common sense." After briefly addressing common sense and the evidence (specifically, some of Detective Sample's testimony), the prosecutor finished with "the law," arguing as follows: "Some time ago there was an old California case called People

versus Butts.[7] And this case was back in 1965, and this case said that murder is never a natural probable consequence of a fistfight. You just can't have it. So that was the court back in 1965. [¶] Well, the Court's have changed with the times. They've kind of caught up with society. And 34 years later in 1999, there was a case call[ed] Montez.[8] I am going to quote a couple of sentences." At that point, defense counsel interrupted, and a unreported discussion occurred. After that discussion, the prosecutor resumed his argument as follows: "So, we got this court back in 1965, that says a fistfight is never a natural and probable consequence of murder. What I am going to tell you now is the courts have changed their stance, and the courts have totally done away with that line of thinking because they have caught up with society, and have recognized that murder is a natural and probable consequence of a fistfight. And that's common sense. Common sense tells you that. The evidence tells you that based on the expert who is uncontroverted and the law tells you that. [¶] So whether the plan here was just to go fight some rivals, you know the outcome was much different. It was much different, but it was not unexpected. Murder was foreseeable. You know it. Detective Sample knows it and the courts know it."

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7 *People v. Butts* (1965) 236 Cal.App.2d 817.

8 *People v. Montes* (1999) 74 Cal.App.4th 1050.

After the prosecutor finished his initial argument, outside the presence of the jury the trial court noted that defense counsel had "asked that the District Attorney be prohibited from reading an excerpt from this case and I sustained that objection" because "the passage selected had a factual character to it that was inappropriate."[9] Defense counsel then added the following: "One brief comment because I didn't get to articulate it. It wasn't just the reading of the passage. It was some of the argument in which he essentially said the [courts] have found that murder is [the] natural [and] probable consequence of a fistfight that is the province of that jury. I think it improper. It is improper to tell this jury that has been decided, that was a suggestion." The court responded that "at sidebar that argument was not articulated or objection was not articulated. The one that was the objection with regard to the reading. I sustained that objection. The District Attorney complied then with my order, request not to -- not to read it. [¶] And I didn't address this other issue because it was not raised at that time and it is not raised now in the sense of

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[9] It is most likely the prosecutor wanted to read the following passage: "*Butts* is also more than three decades old, a remnant of a different social era, when street fighters commonly relied on fists alone to settle disputes. Unfortunately, as this case illustrates, the nature of modern gang warfare is quite different. When rival gangs clash today, verbal taunting can quickly give way to physical violence and gunfire. No one immersed in the gang culture is unaware of these realities, and we see no reason the courts should turn a blind eye to them." (*People v. Montes*, *supra*, 74 Cal.App.4th at p. 1056.)

asking for action." When defense counsel responded, "True," the court closed with, "So I treat it as an observation."

On appeal, defendant contends his attorney was ineffective in failing to make a timely objection that encompassed not only the prosecutor's intended reading from the *Montes* decision but also the prosecutor's representation to the jury that "the courts . . . have recognized that murder is a natural and probable consequence of a fistfight." In defendant's view, the prosecutor misstated the law by "telling the jury that as a matter of law, murder *is* a natural and probable consequence of a fistfight in all cases, when the issue is a fact-specific determination to be made by the jury based on the individual facts of the case."

"Although counsel have broad discretion in discussing the legal and factual merits of a case [citation], it is improper to misstate the law . . . ." (*People v. Bell* (1989) 49 Cal.3d 502, 538.) To the extent the prosecutor could be understood to argue that, following *Montes*, the courts have recognized that murder is *always* a natural and probable consequence of a fistfight, that was an improper misstatement of the law. As we have previously noted, whether one offense is a natural and probable consequence of another is a "case specific" inquiry that "depends upon all of the facts and circumstances surrounding the particular defendant's conduct." (*People v. Nguyen*, *supra*, 21 Cal.App.4th at p. 535.)

In light of defense counsel's closing argument to the jury, however, we cannot conclude that his conduct, viewed as a whole,

fell below an objective standard of reasonableness, nor can we conclude that it is reasonably probable defendant would have received a better result if defense counsel had offered a complete contemporaneous objection to the prosecutor's argument. This is so because, as the People point out, defense counsel effectively addressed this aspect of the prosecutor's argument in his own closing. Specifically, defense counsel argued, "Yes, disturbing the peace can result in shooting. No, it is not a natural likely and probable consequence." He then turned directly to the prosecutor's previous assertions based on *Montes*:

"I mean, in his argument, unless I misunderstood him, I thought [the prosecutor] was trying to say that, hey, it has been found that shootings are [a] likely consequence of disturbing the peace.

"Okay. Well, there is only one person in this courtroom who is going to give you the law, and it isn't him, and it isn't me. It is Judge Connelly. And he's not going to tell you that. So you ask yourself this question, if you get to the point and I don't think you can or will, but if you get to the point where you think that Tony Armstrong was in that car in that Lumina, he had planned and assisted in this whatever challenge disturbance of the [peace], if you get to that point, you have to ask yourself: Is it likely? Is it a natural and probable consequence that kind of challenge will result in a shooting death? Not can it. Not might it. Not did it. But is it a natural and probable result? Would an objective person in that

setting expect that's what will lead, the answer to that question is no."

Subsequently, the trial court instructed the jury, "You must follow the law as I explain it to you even if you disagree with it. If you believe the attorneys' comments on the law conflict with my instructions, you must follow my instructions." Thereafter, the court instructed the jury that "[t]o prove that the defendant is guilty of murder as an aider and abettor, the People must prove that: [¶] . . . [¶] . . . [u]nder 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 fighting or challenging to fight" and that "[i]n deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence."

In assessing whether defense counsel's conduct was unreasonable, we refuse to view his failure to offer a complete contemporaneous objection to the prosecutor's argument in isolation from the thorough response he offered in his own closing. When defense counsel's conduct in closing is viewed as a whole, it is plain that he performed more than adequately. Moreover, given the instructions the trial court gave -- which we presume the jury followed (*People v. Boyette*, *supra*, 29 Cal.4th at p. 453) -- we can find no reasonable probability that, based on what the prosecutor had earlier argued with respect to the *Montes* decision, the jury misunderstood the natural and probable consequences doctrine and believed that

murder is always to be treated as a natural and probable consequence of a fistfight. Accordingly, we reject defendant's assertion of ineffective assistance based on the prosecutor's closing argument.

IV

Conclusion

Because we have rejected defendant's arguments (insufficiency of the evidence and ineffective assistance of counsel) that, if successful, would have required an outright reversal, our disposition of this appeal is governed by *Woods*. 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.

DISPOSITION

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 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.

ROBIE, J.

I concur:

MAURO, J.

I concur in the judgment and in the opinion except as to Part I in which I concur in the result.

BLEASE, Acting P. J.