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CERTIFIED FOR PARTIAL PUBLICATION*

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. ROBERT CANIZALEZ et. al., Defendants and Appellants.	B218515 (Los Angeles County Super. Ct. No. KA080781)

APPEALS from judgments of the Superior Court of Los Angeles County. Robert M. Martinez, Judge. Affirmed.

Richard D. Miggins, under appointment by the Court of Appeal, for Defendant and Appellant Robert Canizalez.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant Martin Morones.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lawrence M. Daniels, Joseph P. Lee and Ana R. Duarte, Deputy Attorneys General, for Plaintiff and Respondent.

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* Under California Rules of Court, rules 8.1100 and 8.1110, only the introduction paragraphs, Facts, parts I and V of the Discussion, and the Disposition are certified for publication. Parts II, III and IV are not certified for publication.

Robert Canizalez (Canizalez) and Martin Morones (Morones) (collectively appellants) appeal from the judgments entered upon their convictions by jury of three counts of second degree murder (Pen. Code, § 187, subd. (a), counts 1-3)[1] and three counts of vehicular manslaughter (§ 192, subd. (c)(1), counts 5-7). Canizalez also appeals from his conviction of dissuading a witness by force or threat (§ 136.1, subd. (c)(1), count 4). The jury found to be true as to counts 1 through 3 the allegation that appellants had personally inflicted great bodily injury (§ 1203.075, subd. (a)). The trial court sentenced Canizalez and Morones to prison terms of 48 years to life and 45 years to life, respectively.

Appellants contend that (1) there is insufficient evidence to sustain their second degree murder convictions, (2) the trial court erred in admitting gruesome and inflammatory evidence regarding the victims' deaths, (3) appellants were deprived of their Sixth and Fourteenth Amendment rights to confrontation and cross-examination, when a medical examiner testified from reports regarding two autopsies he did not perform, and (4) the cumulative effect of the errors was prejudicial, requiring reversal. Morones further contends that (5) the trial court abused its discretion by permitting the prosecutor to introduce a photograph of the deceased victims while alive, (6) the trial court erred in instructing the jury in accordance with CALCRIM No. 400, which erroneously requires that an aider and abettor be found "equally guilty" with the direct perpetrator, (7) the trial court erred in instructing the jury in accordance with CALCRIM No. 403, which, as given, only states that the jury could find appellants guilty of murder as an aider and abettor under the natural and probable consequences theory, not that it could find them guilty of vehicular manslaughter, and (8) the trial court erred in refusing to give a pinpoint instruction on the relationship between implied malice and natural and probable consequences of aiding and abetting. Canizalez further contends that (9) the trial court abused its discretion and deprived him of due process and a fair trial by allowing evidence of prior acts of bad driving, (10) he suffered ineffective assistance of

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

counsel by reason of his attorney's failure to (a) seek to exclude the hearsay testimony of the medical examiner, and (b) seek to exclude the medical examiner's testimony regarding the horrific and gruesome details of the injuries to the victims, and (11) CALCRIM No. 403 was erroneous because appellant could not be convicted of murder as the natural and probable consequence of aiding and abetting a misdemeanor.

Each appellant joins in the contentions of the other, as applicable. (Cal. Rules of Court, rule 8.200(a)(5); see *People v. Stone* (1981) 117 Cal.App.3d 15, 19, fn. 5.)

We affirm.

FACTS

Background

In October 2007, Dora Groce (Dora) resided at Brookside Mobile Home Park (Brookside) in El Monte with her husband and their two children, eight-year-old Robert and four-year-old Katherine. Brookside had approximately 500 units and only one entrance and exit, which was on Elliott Avenue, east of Parkway Drive. Proceeding east on Elliott Avenue across Parkway Drive led directly into Brookside. Dora drove a 2002 Nissan Altima (Altima).

The intersection of Parkway Drive and Klingerman Street was a quarter of a mile south of the intersection of Parkway Drive and Elliott Avenue. Both intersections had four-way stop signs. The posted speed limit on Parkway Drive was 30 miles per hour. Mountain View High School was in the area.

The crash

On October 8, 2007, between 5:00 and 5:30 p.m., Canizalez driving a red Mustang and Morones driving a brown Honda north on Parkway Drive, at Klingerman Street, stopped side by side. They exchanged words, their tires screeched and they raced side by side on Parkway Drive, attaining speeds up to 87 miles per hour.

According to two witnesses, German Uruena (German) and his son Victor Uruena (Victor), the Honda took the lead. At that time, Dora was proceeding from Brookside into the intersection of Elliott Avenue and Parkway Drive in her Altima. The Mustang and Honda ran through the four-way stop sign at that intersection, the Honda hitting the

rear of the Altima and then the Mustang hitting the front.[2] The Altima was pushed into a green truck driven by Miguel Robles (Robles) and burst into flames. The truck was turned 180 degrees. The Honda hit a red Nissan Sentra driven by Marivel Villagrana (Villagrana), who was in her car parked on Parkway Drive, a few houses north of Elliott Avenue. Villagrana's Sentra then hit a red Camaro in front of it.

The fatalities

Los Angeles County Fire Captain Henry Rodriguez responded to the accident scene, where he saw the Altima "totally involved with fire." Black smoke and flames were inside the car, with a burning woman visible in the front seat. " . . . [V]oices of children screaming," were coming from the back of the car. The flames and intense heat made it difficult to break the windows and impossible to free the occupants. When the fire was extinguished, three bodies were found inside the car. The two in the rear had their arms stretched out as if reaching for each other. The victims were later identified as Dora, Katherine and Robert.

Appellants flee the scene

After the collision, Canizalez got out of his Mustang, walked to the Honda and helped Morones and a few other men push the Honda into Brookside. Gilbert Canizalez (Gilbert), Canizalez's brother, lived with his family at Brookside. At approximately 5:30 p.m., he saw Canizalez running toward their home shaking, with a cut on his arm. Canizalez first told him that he had been in a fight. When Gilbert said he did not believe his brother, Canizalez told him that he was racing Morones, had just crashed, lost consciousness and woke up when he smelled smoke. Gilbert drove him back to the accident scene to get medical assistance from an ambulance. Gilbert admitted to detectives that Canizalez told him that he and Morones had been drinking beer before the crash.[3]

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2 Another witness was unable to tell if one or both cars hit the Altima.

3 In a taped telephone conversation between Canizalez and his father, Canizalez told his father to tell Gilbert to say that the detective had intimidated Gilbert. Gilbert was

El Monte Police Sergeant Richard Williams was the first responder to the accident scene and learned that "somebody . . . had been pushing one of the cars that was involved in the accident." He located the car, parked in a space 50 to 75 yards from the entrance to Brookside. He contacted Marvin Morones (Marvin), Morones's brother, and asked him who had been driving the car. Initially, Marvin said that he did not know, but that it belonged to his father. After Sergeant Williams showed the Honda to Marvin, Marvin admitted it belonged to Morones. Morones fled to Mexico but was later deported back to the United States.

Canizalez's accident-scene statements

When Canizalez returned to the accident scene, Victor heard him tell a firefighter that the Mustang was not his car but that it had been stolen and was being driven by someone else. Victor told Canizalez not to lie because Victor had seen him jump from the Mustang, do nothing to help the victims and help move the Honda. Canizalez responded, "I know where you live. I know where you go to school, and I'll kill you." A firefighter stepped between them.

Robles heard Canizalez admit to a paramedic that he was driving the Mustang. Robles interjected that Canizalez was racing, which Canizalez denied, claiming he was not racing and that it was an accident.

Gerardo Romero (Romero), a bystander, also heard Canizalez say that he was the driver of the red Mustang. Romero also heard him say, "[L]ook at [my] car. [I] crashed [my] car. [My] car is fucked up." Romero and Canizalez's friends told him to be quiet "there's kids in that vehicle." Canizalez responded, "I don't give a fuck about those kids. I give a fuck – look at my car. I don't give a fuck about those kids."

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later convicted of being an accessory after the fact for helping to push the Honda away from the scene of the accident.

The investigation

Irwindale Police Officer John Fraijo, a former mechanic and street racer, testified that he inspected the Honda and Mustang, which was known for being a fast car. The tread wear on the Mustang's driver's side rear tire was consistent with rapid acceleration, and the rims and tires were larger than standard. He was unable to determine if there were any engine modifications due to the extensive front end and fire damage. The Honda, on the other hand, had been lowered "by changing out the coil springs," the diameter of its rims had been changed to lower its height and increase its maneuverability at high speeds, it had an illegally modified air intake system, its catalytic converter had been removed, and there had been "modification of the headers," part of the exhaust system. These modifications increased horsepower and speed.

Fontana Police Captain Dave Faulkner, a traffic collision reconstruction expert, reviewed the investigation file, including diagrams, police reports and photographs, went to the scene and took photographs, and inspected the involved cars. He calculated that the minimum highest potential speed of the Mustang was 77 miles per hour, and could have been as high as 87 miles per hour, and of the Honda was 80 miles per hour, and could have been as high as 86 miles per hour. Based upon damage to the two vehicles, Captain Faulkner believed that, at some point, they had hit each other.

In his report, Captain Faulkner stated that the primary collision factor was attributed to the driver of the Mustang because it was "his impact and his cause that was the direct result of your party's death." "[T]he Vehicle Code and the California reporting system that deals with traffic collision requires [*sic*] you to pick the one cause." However, he nonetheless opined that both drivers shared the cause of the collision. It was caused by the running of the stop sign by the two cars and their unsafe speed. While he believed that the Honda did not hit the Altima, because there was so much damage from the fire to the back and side of the Altima, "[t]here was no way to tell."

Canizalez's prior dangerous driving

Earlier in the day of the accident, Araceli Mata (Mata) and Jennifer Castro (Castro) saw the red Mustang. Mata was driving north on Parkway Drive when she saw the Mustang driving south at a high rate of speed, near Mountain View High School. She pulled over because the Mustang approached "very fast." As it approached the stop sign, it braked very hard, and Mata heard the screeching of the tires, as it stopped behind another car. Mata later recognized the Mustang involved in the collision as the one she had seen, but she could not identify its driver.

Castro was driving south on Parkway Drive when she saw a red Mustang in front of her and another car in front of it, stopped at the stop sign at Elliott Avenue. Castro heard and smelled the burning of the Mustang's rear tires as she waited and rolled her windows up due to the smoke. After the first car moved, the Mustang made a U-turn and almost struck Castro's driver's side. Castro made eye contact with appellant, who was driving, and said to herself, "You could kill somebody doing this."[4] From its shiny rims, she later identified the Mustang involved in the accident as the same Mustang. She identified Canizalez in a photographic six-pack.

DISCUSSION

I. Sufficiency of the evidence

A. Contention

Appellants contend that there is insufficient evidence to sustain their murder convictions. They argue that neither direct perpetrator with implied malice culpability nor aider and abettor culpability based upon the natural and probable consequences theory was established. There was no implied malice "because there was absolutely no evidence introduced on [appellants'] subjective [mental] appreciation of the risk." Simply because "the end result of the race proved to be dangerous to human life cannot serve to satisfy the element of intent . . . ." Appellants further argue that murder is not

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[4] The record also states that Castro told Canizalez, "You could kill somebody doing this act."

the natural and probable consequence of engaging in a speed contest, because "[i]f it were probable, or likely to occur, . . . then every act of engaging in a street race would be tantamount to an act of attempted murder, which it certainly is not." This contention is meritless.

B. Standard of review

"In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses 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. [Citations.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) All conflicts in the evidence and questions of credibility are resolved in favor of the verdict, drawing every reasonable inference the jury could draw from the evidence. (*People v. Autry* (1995) 37 Cal.App.4th 351, 358.) Reversal on this ground is unwarranted unless '"upon no hypothesis whatever is there sufficient substantial evidence to support [the conviction].'" (*People v. Bolin*, *supra*, at p. 331.) This standard applies whether direct or circumstantial evidence is involved. (*People v. Catlin* (2001) 26 Cal.4th 81, 139.)

C. Direct perpetrator theory of culpability

The prosecution argued and tried the murder charges on both a direct perpetrator with implied malice theory and on an aider and abettor based on the natural and probable consequences theory. With respect to the direct perpetrator theory, appellants argue that their murder convictions are unsupported by the evidence because there was insufficient evidence of implied malice. Morones adds that, as to him, there was insufficient evidence that he caused the victims' deaths, as Canizalez's car, not Morones's, hit the victims' vehicle.

1. Murder with Implied malice

Murder is the unlawful killing of a human being with malice aforethought. (§ 187, subd. (a).) Malice may be either express or implied. It is express when the defendant manifests "a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "when no considerable provocation appears, or when the

circumstances attending the killing show an abandoned and malignant heart." (§ 188; *People v. Dellinger* (1989) 49 Cal.3d 1212, 1217.) Malice should be implied when """the killing proximately resulted from an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life."""" (*Id*. at p. 1218.) Implied malice requires that the defendant act with a wanton disregard for the high probability of death (*People v. Schmies* (1996) 44 Cal.App.4th 38, 46, fn. 4), thereby requiring a *subjective awareness* of a high degree of risk. (*People v. Watson* (1981) 30 Cal.3d 290, 296.) It is not enough that a *reasonable person* would have been aware of the risk. (*Id.* at pp. 296–297.) Malice may be inferred from the circumstances of the murder. (*People v. Harmon* (1973) 33 Cal.App.3d 308, 311.)

Appellants do not dispute that they were speeding, participated in a street race, and were guilty of vehicular manslaughter. Rather, ignoring a tsunami of contrary circumstantial evidence, they argue that there is insufficient evidence they acted with conscious disregard for life because there is no evidence they were aware of the risk involved in their conduct. They are wrong. That evidence is overwhelming.

Appellants were fully aware of the conditions at the accident scene which would make racing there dangerous. They had long resided at Brookside, within yards of where the fatal crash took place, and inferentially knew the residential nature of the neighborhood, the traffic conditions, caused in part by cars entering and exiting the only exit from the 500-unit Brookside mobile home park onto Elliott Avenue, the presence of a four-way stop sign at Elliott Avenue and Parkway Drive, and the presence nearby of Mountain View High School.

Canizalez was seen driving recklessly in the area just hours before the collision. Castro saw Canizalez's red Mustang headed south on Parkway Drive, stopped at a stop sign at the intersection of Elliott Avenue, where the fatal accident later occurred, burning the Mustang's rear tires and making a precipitous U-turn, almost striking Castro's car. Castro commented, "You could kill somebody doing this." In a second incident that day, Mata saw the red Mustang speeding south on Parkway Drive and being forced to brake

very hard at a stop sign, with its tires screeching, in order to stop behind another car. This alerted Canizalez that speeding made stopping difficult and created a dangerous condition.

Appellants' street race was not an isolated, spur-of-the-moment instance of poor judgment. It appears that the Mustang and Honda had been modified to engage in such races, and presumably appellants had done so in the past. Morones's Honda had been illegally "hopped up" so that it had more power and could go faster. It had been lowered "by changing out the coil springs," the diameter of its rims had been increased to lower its height and increase its maneuverability at high speeds, it had an illegally modified air intake system, its catalytic converter had been removed, and there had been "modification of the headers," part of the exhaust system. While the Mustang was too damaged from the collision and fire to allow an analysis of modifications to its engine, the tires and rims were not standard and the wear on the back tire indicated that it had been frequently subject to rapid acceleration.

Before their speed contest, appellants consumed beer and then raced their cars, side by side, on a residential street, reaching speeds of up to 80 to 87 miles per hour, 50 to 60 miles above the speed limit. They ran through a stop sign, which they must have known was there, living just yards away and Canizalez having stopped there just hours earlier, crashing into the Altima and other cars. While a dangerous act may be insufficient by itself to establish that the actor had subjective knowledge of the risk, in situations such as this, it is a relevant consideration.[5] As stated by Justice Gilbert in *People v. Moore* (2010) 187 Cal.App.4th 937, 941 (*Moore*): "Whether Moore was subjectively aware of the risk is best answered by the question: how could he not be? It

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[5] Morones argues that relying upon appellants' dangerous conduct in determining whether they had subjective knowledge of the danger their conduct created "would impose an improper 'reasonable man' objective standard for the proper subjective test." (*People v. Watson*, *supra*, 30 Cal.3d at pp. 296–297.) While this argument has appeal, it does not preclude drawing an inference of subjective awareness of the grave risk when the risk created is extremely high, which inference can be considered along with other circumstantial evidence to support a finding of subjective knowledge.

takes no leap of logic for the jury to conclude that because anyone would be aware of the risk, Moore was aware of the risk."

Echoing this same sentiment here, the trial court aptly pointed out, "[T]hey're engaged in a speed contest—at 80 or 90 miles per hour. How much more knowledge do they need? They've got a thousand—several thousand-pound vehicle that they're running at 70, 80 miles per hour. I mean, what does it take for a person to understand that what they're doing is inherently dangerous to human life?"

Appellants' callous disregard for the safety of others was no more evident than by their conduct after the crash. With Dora and her two children being incinerated in the Altima, appellants showed no remorse or concern. They made no effort to help the victims or even inquire about their condition. Rather, they tried to remove the evidence by pushing the Honda into Brookside. Morones fled to Mexico. Canizalez went to his residence and lied to his brother about the incident and then went back to the accident scene only for the purpose of receiving medical attention. There, he initially denied driving the Mustang and later that he was speeding. Canizalez was heard saying, "[L]ook at his car. [I] crashed [my] car. [My] car is fucked up," and, "I don't give a fuck about those kids. I give a fuck – look at my car. I don't give a fuck about those kids."

This mountain of circumstantial evidence overwhelmingly establishes appellants' subjective awareness of the risk of death that their racing created and their callous indifference to its consequences.

Moore is instructive. In that case, the defendant drove through city streets at excessive speed. He passed one victim going 80 to 90 miles per hour in a 35-miles-per-hour zone. He ran a red light and collided with another car which in turn hit a third car, causing the death of one victim and serious injury to another. The defendant did not get out of his car and check on the victims but continued to drive. When arrested, he claimed that he did not intend to kill anyone and did not experience any mechanical failure, but was simply going too fast. He said that he had no problem leaving the accident scene because the victims were dead. He was going home "'to clean up[,] probably have a

beer, sit down, sit at home and watch television.'" (*Moore, supra,* 187 Cal.App.4th at p. 940.)

On appeal, like appellants here, the defendant conceded that the evidence was sufficient to support a finding of gross vehicular negligence but claimed it was insufficient to show that he had a subjective awareness of the risk for manslaughter. Justice Gilbert rejected this claim stating: "Here Moore drove 70 miles per hour in a 35-mile-per-hour zone, crossed into the opposing traffic lane, caused oncoming drivers to avoid him, ran a red light and struck a car in the intersection without even attempting to apply his brakes. His actions went well beyond gross negligence. He acted with wanton disregard of the near certainty that someone would be killed." (*Moore, supra,* 187 Cal.App.4th at p. 941.)

2. Causation

Morones argues that in any event he cannot be liable for murder as a direct perpetrator because there is no credible evidence that his Honda hit the Altima. He argues that, "[T]he weight of the credible evidence supports the conclusion that [Morones's] vehicle passed behind the Altima and impacted Villagrana's car." Only German and Victor testified that he was the first to hit the back of the Altima, but they were 300 to 400 feet away. In opening statement, the prosecutor told the jury that Morones did not strike the Altima and was not involved in that collision but struck another vehicle. The accident reconstruction expert, Captain Faulkner, testified that the cause of the accident was Canizalez's failure to stop at the stop sign, not the racing. Morones contention lacks merit.

It was for the jury, not us, to determine the weight to be given to the testimony of German and Victor, as compared to the testimony on which Morones relies. We simply assess whether there was sufficient evidence to support the jury's verdict. There was sufficient evidence here for the jury to find that Morones's Honda hit the Altima. German and Victor, who actually saw the accident, both testified that the Honda was the first car to hit the Altima. Captain Faulkner testified that "there was no way to tell" if the Honda hit the Altima. The testimony of a single witness is sufficient to support a

conviction. (*People v. Scott* (1988) 21 Cal.3d 284, 296 ["The uncorroborated testimony of a single witness is sufficient to sustain a conviction, unless the testimony is physically impossible or inherently improbable"].)

But, even if the jury concluded that Morones's car did not hit the Altima, the evidence was still sufficient to support a finding that he caused the victims' deaths. It is proximate causation, not direct or actual causation, which together with the requisite mental state determines the defendant's liability for murder. (*People v. Sanchez* (2001) 26 Cal.4th 834, 845 (*Sanchez*).) Just because the actual cause of death cannot be determined does not undermine a first degree murder conviction. (*Ibid.*) There may be multiple proximate causes even where there is but one actual cause. (*Id.* at p. 846.) The People's burden of proving causation is met if evidence is produced from which it may be reasonably inferred that the defendant's act was a substantial factor in producing the result of the crime. (*People v. Scola* (1976) 56 Cal.App.3d 723, 726 (*Scola*), cited with approval in *People v. Caldwell* (1984) 36 Cal.3d 210, 220.) The prosecution does not have to prove to a mathematical certainty that the killing would have occurred absent the defendant's act. (*Scola*, *supra*, at p. 727.)

The analysis in *People v. Kemp* (1957) 150 Cal.App.2d 654 (*Kemp*), another speed contest case, cited with approval by our Supreme Court in *Sanchez*, *supra*, 26 Cal.4th at page 846, is applicable here. Kemp and Coffin engaged in a car race down a public street, resulting in the death of a person driving a car hit by Coffin's car. Kemp, as Morones does here, "'contended that there was no showing of anything attributable to him which was a proximate cause of the death.'" He argued that the mere violation of the Vehicle Code section precluding speed contests could not constitute a proximate cause of death because the death was caused by either the excessive speed or reckless driving of Coffin. The Court of Appeal disagreed stating, "The evidence here strongly indicates that Kemp and Coffin were inciting and encouraging one another to drive at a fast and reckless rate of speed on a residence street and as they closely approached a blind intersection. It was by the merest chance that Kemp was able to avoid hitting the other car, and that Coffin was not. Only the matter of a split second and a few inches made the

difference. They were both violating several laws, *the acts of both led directly to and were a proximate cause of the result*, and the fact that the appellant happened to narrowly escape the actual collision is not the controlling element. The evidence is sufficient to show that they were not acting independently of each other, and that they were jointly engaged in a series of acts which led directly to the collision." (*Kemp, supra*, at p. 659.)

Canizalez and Morones were similarly jointly engaged in a speed race that led directly to the fatal collision and deaths. Captain Faulkner testified that the cause of the accident was the running of the stop sign *by the Honda and the Mustang* and *their unsafe speed* and that both drivers were responsible. Officer Darrell Carter concluded in a report that the primary cause of the collision was street racing. The evidence amply supports that Morones's actions were a proximate cause of the victims' death and that appellants were coperpetrators in the crimes. (See *People v. Thompson* (2010) 49 Cal.4th 79, 118.)

D. Aiding and abetting on natural and probable consequence theory

Because we conclude that there is sufficient evidence to support both appellants' second degree murder convictions based upon their direct actions with implied malice, we need not consider whether there was also sufficient evidence to support aider and abettor liability on the natural and probable consequences theory.

II. Errors in admission of evidence

A. Gruesome evidence regarding victims' deaths

1. Background

a. Exclusion of gruesome photographs

Before trial, appellants successfully moved to exclude from evidence gruesome and inflammatory crime scene and autopsy photographs, arguing that they were irrelevant, cumulative, and that their prejudice substantially outweighed any probative value under Evidence Code section 352. There was no dispute that the victims died in the crash, to which appellants offered to stipulate. Furthermore, appellants argued that there was no need for the photographs because the medical examiner was going to testify to the victims' injuries, and the accident reconstruction expert was going to testify to the speed of the vehicles.

The prosecutor argued that the jury had "an absolute right to see what happened during this collision," which was the result of appellants' conduct, and the influence on jurors of such photographs "'exists more in the imagination of judges and lawyers than in reality.'"

The trial court found the challenged photographs "horrific" and that their prejudice exceeded any probative value, especially because it was readily apparent from inspection of the vehicle and the vehicle photographs what happened to the victims.[6]

b. Exclusion of gruesome percipient witness testimony

Later, Canizalez's counsel made an Evidence Code section 402 motion to exclude testimony of percipient witnesses who were going to testify to the "physical changes in the human being while they're being burned." Canizalez's counsel argued that the description of what witnesses saw was "ghastly and terribly graphic," would deprive him of a fair trial and should be excluded under Evidence Code section 352. The trial court stated that it would not restrict any witnesses from testifying to anything that they observed, but told counsel to raise Evidence Code section 352 objections when the witnesses were about to testify.

During trial, disturbing evidence of the victims' deaths was admitted through the testimony of percipient witnesses. There was testimony that while Dora was burning, she attempted to reach out to German and to speak and then placed her hands over her face in pain. Her hair was burned off, and her skin was turning pink and then black, "like chicken on a grill." One witness heard a scream from the car, and another heard the children screaming in the backseat. Over defense's objection that this evidence was cumulative, the trial court allowed the prosecutor to ask the position of the children in the backseat. The witness testified that they "had their arms reached out as if they were reaching toward each other."

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6 Before rendering its ruling on the photographs, the trial court granted the prosecutor's request for the jury to be allowed to inspect the mangled vehicles and to visit the accident scene.

c. Gruesome medical examiner's testimony

Dr. Stephen Scholtz, testified regarding the autopsy he performed on Katherine, noting that she had suffered charring to three-fourths of her body, exposing muscle, some bone, the skull and the brain, had a laceration to the spleen, with "free blood" in the abdomen and chest cavities, which was consistent with a collision, had excess fluid in the lungs and soot in her airway, "a sign of the effect of inhalation of smoke," and that charring had caused her windpipe to be exposed. He determined that her death resulted from the "combined effect of the blunt injury and thermal smoke."

Dr. Scholtz also testified regarding the autopsy reports prepared by Dr. Vadims Poukens, who had performed the autopsies on Dora and Robert. Dr. Scholtz testified that Dora's body was charred, exposing her abdominal contents. She died of multiple blunt force trauma, including multiple fractures of ribs, contusions of the lungs, fracture to the spine and pelvis and laceration of the liver, which caused blood to be released into the chest and abdominal cavities. Her death was "not necessarily instantaneous." Robert's skull was charred, exposing brain tissue, there was soot in his trachea, his right elbow was fractured, and his right hand and left fingers were burned off. Robert died of thermal burns.

2. Contentions

Appellants contend that the trial court erred in failing to exclude "horrific," and "gruesome" evidence regarding the details of the injuries and disfigurement to the bodies of the victims, depriving appellants of due process and a fair trial in violation of the state and federal Constitutions. They argue that that evidence is irrelevant and was unduly prejudicial.[7] Canizalez challenges the admission of the medical examiner's detailed testimony, while Morones challenges that testimony as well as details of the deaths

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[7] We interpret this argument to be a reference to Evidence Code section 352. (See *People v. Morris* (1991) 53 Cal.3d 152, 188 [no set form of words required for an objection], disapproved on other grounds in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1.)

provided by percipient witnesses. Alternatively, Canizalez contends that if objection to this evidence was forfeited, he suffered ineffective assistance of counsel.

The People contend that appellants forfeited this contention with respect to the medical examiner's testimony because there was no objection to that testimony in the trial court. In fact, when arguing for exclusion of the autopsy photographs, defense counsel said that the medical examiner would testify to the victims' injuries, using autopsy diagrams.

3. Forfeiture

We agree with the People that appellants have forfeited this claim with respect to the medical examiner's testimony. Generally, objections to evidence on the specific grounds asserted must be made or the objection is forfeited. (*People v. Derello* (1989) 211 Cal.App.3d 414, 428; Evid. Code, § 353, subd. (a).) Constitutional objections must similarly be interposed in the trial court in order to preserve them for appeal. (See *People v. Williams* (1997) 16 Cal.4th 153, 250.) Appellants made no objection to admission of the medical examiner's testimony regarding the details of the victims' deaths. Instead, they argued that the coroner's graphic photographs should be excluded because the medical examiner and the percipient witnesses would provide the details of the deaths.[8]

Even if appellants had not forfeited this contention with respect to the medical examiner's testimony, we would not find the admission of the challenged evidence to have been unduly prejudicial.

4. Standard of review

We evaluate a trial court's relevance and Evidence Code section 352 rulings under the abuse of discretion standard. (*People v. Kipp* (2001) 26 Cal.4th 1100, 1123 [relevance]; *People v. Greenberger* (1997) 58 Cal.App.4th 298, 352 [Evid. Code, § 352].) The trial court's discretion is as "'broad as necessary.'" (*People v. Kwolek* (1995) 40 Cal.App.4th 1521, 1532.) "'[I]n most instances the appellate courts will uphold its

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8 We discuss whether appellants' failure to object constituted ineffective assistance of counsel in part IVA, *post*.

exercise whether the [evidence] is admitted or excluded.'" (*Ibid.*) "'A trial court's exercise of discretion will not be disturbed unless it appears that the resulting injury is sufficiently grave to manifest a miscarriage of justice.'" (*Id.* at p. 1533.) We find this to be one of those rare cases in which the trial court abused its discretion in allowing the challenged evidence.

5. *Relevance*

"Except as otherwise provided by statute, all relevant evidence is admissible." (Evid. Code, § 351.) Relevant evidence is evidence "having any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210.)

No objection was made to the medical examiner's gruesome testimony, so the trial court was not called upon to exercise its discretion in ruling on whether the evidence was relevant. We nonetheless conclude that much of the medical examiner's testimony, as well as that of the percipient witnesses, was of little or no relevance. As appellants point out, there was no dispute that Dora, Robert and Katherine were killed in the car accident. Witnesses saw the collision, saw the victims unable to escape the flaming vehicle, and the fire captain saw the charred bodies when the flames were finally extinguished. Dora's husband identified the Altima as that driven by his wife. Appellants offered to stipulate that the victims died in the collision, leaving as the principal contested issue whether appellants acted with conscious disregard.

Even if the cause of death was in issue, some of the medical examiner's and percipient witnesses' gruesome testimony regarding the accident had nothing to do with the cause of death. For example, Dr. Scholtz testified that Robert's right hand and left fingers were burnt off *post-mortem*, which therefore could not have contributed to his death. Evidence of the screams in the car by the children and the details of how Dora looked as her skin burned as she was dying had little bearing on what caused her death, only reflecting the pain and suffering she experienced.

6. Evidence Code section 352

Evidence Code section 352 provides: "The court in its discretion may exclude evidence 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."

Even if the challenged evidence here had any minimal relevance to the causes of deaths, the extent and nature of the evidence went far beyond that necessary for that purpose. Any relevance of the evidence of the victims' suffering and death was far outweighed by the prejudice of such disturbing, inflammatory and emotionally charged evidence.

7. Right to a fair trial

Canizalez argues that admission of the irrelevant and gruesome evidence rendered his trial fundamentally unfair, thereby running afoul of the due process clause. (*People v. Englebrecht* (2001) 88 Cal.App.4th 1236, 1250 [the touchstone of due process is fundamental fairness].) We disagree. While the challenged evidence was inflammatory, as discussed below, it was largely cumulative and must be viewed in the context of the egregious and horrifying nature of the crime itself.

8. Harmless error

Even if the trial court erred in admitting the gruesome evidence of the victims' deaths, we conclude that even under the most stringent beyond a reasonable doubt standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24, had the evidence been excluded appellant would not have obtained a more favorable result.

As discussed in part IC, *ante,* the evidence against appellants was overwhelming. Further, the horrifying nature of the properly admitted evidence overshadowed the challenged evidence, making it unlikely to have impacted the jury's verdict. Appellants drove nearly 90 miles per hour on a 30-mile-per-hour, residential street, ran through a stop sign that was a block from their home and slammed into a car containing a mother and her two young children, who were incinerated inside. After the accident, appellants' callous indifference to their victims had to have made an indelible impression on the jury.

The jurors were aware that the Altima had caught on fire and that none of the victims had escaped from it. They personally observed the scene of the collision, Brookside and the mangled, burnt-out Altima and other involved vehicles.

Finally, the trial court attempted to mitigate the horror of the crime and the victims' death. It excluded the "horrific" medical examiner's photographs, which would have been more inflammatory than the verbal descriptions of what occurred. The trial court also invited defense counsel to raise Evidence Code section 352 objections to that evidence when the testimony was offered. Defense counsel failed to do so.

While the challenged evidence was gruesome, its exclusion would not have altered the jury's verdict. This was not a close case in which sympathy for the victims or antipathy for the perpetrators might have led the jury to improperly convict. The evidence of appellants' conduct was clear, uncontradicted and shocking, and any antipathy towards them inhered in their heinous conduct and cold, conscious disregard for the people they killed.

B. Evidence of life photograph of the victims

1. Background

Before trial began, appellants objected to the introduction of a series of life photographs of the victims. Canizalez's attorney did not object to all of the photographs but only that admission of multiple photographs was cumulative and was intended to prejudice the jury. Over defense counsel's Evidence Code section 352 objection, the trial court admitted only one of the life photographs depicting the three victims, excluding all of the others.

2. Contentions

Morones contends that the trial court abused its discretion and inflamed the jury by admitting the photograph of the victims while alive. He argues that it had no relevance because identity was not in issue, and the bodies were burned beyond recognition. The People contend that the photograph was neutral and unremarkable.

3. Relevance and Evidence Code section 352

Photographs of murder victims while alive have been routinely permitted as victim-impact evidence in the penalty phase of capital trials as a circumstance of the crime. (*People v. Booker* (2011) 51 Cal.4th 141, 191.) However, such photographs during the guilt phase of a criminal trial should be admitted only if relevant to a contested issue. It is well-settled that admission of such photographs lies within the discretion of the trial court. (*People v. Thompson* (1988) 45 Cal.3d 86, 114–115.)

Here, the trial court did not abuse its discretion in admitting a single, unremarkable life photograph of the victims. While their identity was not in dispute, the photograph was at least minimally relevant to Stephen Groce's testimony discussing his family members. The jury was entitled to see who he was talking about and who were the victims. It was appellants' egregious conduct that prevented the victims from being present at trial.

The admittedly minor relevance of the photograph was not outweighed by its prejudice under Evidence Code section 352. The trial court appropriately limited the evidence to a single life photograph that was unexceptional, neutral and objective. It added nothing to the evidence which had already established that Dora, eight-year-old son Robert and four-year-old daughter Katherine were the victims. It merely transformed them from abstractions to realities.

4. Harmless

Even if it was error to admit the photograph, the error must be deemed harmless under any standard. Contrary to appellants' arguments, the case against them was strong, if not overwhelming, as discussed in part IC, *ante*. Nothing about the photograph was inflammatory, as it was ordinary, neutral and objective. (See *People v. Anderson* (1990) 52 Cal.3d 453, 474–475.) It did not appear to be designed to elicit sympathy, as would a photograph, for example, of them going to church or at a happy family event. Moreover, the fact that it depicted the young children provided the jury with no information that was not already in evidence. The trial court excluded numerous other life photographs of the victims, allowing admission of only one. This mitigated any prejudice extensive

evidence of the victims' lives might have had on the jury. Finally, the jury was instructed not to be influenced by sympathy, passion or prejudice. We presume it followed this instruction. (See, e.g., *People v. Horton* (1995) 11 Cal.4th 1068, 1121.)

C. Evidence of prior bad acts of driving

1. Background

The trial court conducted an Evidence Code section 1101 hearing to determine the admissibility of Canizalez's prior bad driving. Witnesses testified to seeing a red Mustang driving recklessly, exceeding the speed limit and stopping abruptly at a stop sign. Some of the witnesses identified Canizalez as the driver, while some could not. Relying on *People v. Eagles* (1982) 133 Cal.App.3d 330 (*Eagles*), the prosecutor argued that the evidence was relevant to show that Canizalez knew his driving was dangerous. Canizalez argued that this evidence was admitted to show his propensity to engage in the charged conduct, the prejudice from which far outweighed its relevance. Morones joined in the objections.

The trial court found the "leap" from someone's habit of driving fast to knowledge of its danger questionable. It was also concerned that some of the witnesses could not identify Canizalez as the driver. It therefore limited the prior bad acts testimony to only that observed by Castro and Mata, who had seen Canizalez's red Mustang driving dangerously that same day, and eliminated other witnesses who had seen the red Mustang at earlier times.

The jury was instructed that it could consider the prior bad acts evidence on the question of whether Canizalez acted with the state of mind required for implied malice.

2. Contentions

Canizalez contends that the trial court abused its discretion and deprived him of due process and a fair trial by permitting evidence of prior bad acts which were irrelevant and in violation of Evidence Code sections 1101 and 352. He argues that the evidence that he had "previously driven fast and braked hard to stop [did not] impute to [him] that his driving fast was dangerous to human life . . ."

The People contend that appellant forfeited his constitutional claims by failing to object on that ground in the trial court.

3. Forfeiture

Canizalez objected at trial to admission of his prior bad acts on relevance and Evidence Code sections 352 grounds. The trial court also considered the applicability of Evidence Code section 1101. Canizalez did not explicitly object on due process grounds.

As previously stated, generally, objections to evidence on the specific grounds asserted, including to constitutional objections, must be made or the objection is forfeited. (*People v. Derello, supra,* 211 Cal.App.3d at p. 428; Evid. Code, § 353, subd. (a); see *People v. Williams, supra,* 16 Cal.4th at p. 250.) But an objection under Evidence Code section 352 preserves a due process objection on the ground that the admission of the evidence has the additional consequence of violating due process. (*People v. Partida* (2005) 37 Cal.4th 428, 435.) Canizalez's due process claim is therefore preserved for appeal by his Evidence Code section 352 objection.

4. Evidence Code section 1101

Admission of evidence of prior bad acts produces an "overstrong tendency to believe the accused guilty of the charge merely because he is a likely person to do such acts." (1A Wigmore, Evidence (Tillers rev. 1983) § 58.2, p. 1215.) Consequently, other crimes evidence, as a general proposition, is inadmissible to prove a defendant's disposition. (Evid. Code, § 1101, subd. (a).)[9]

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9 Evidence Code section 1101 provides: "(a) Except as provided in this section and in Sections 1102, 1103, 1108, and 1109, evidence of a person's character or a trait of his or her character (whether in the form of an opinion, evidence of reputation, or evidence of specific instances of his or her conduct) is inadmissible when offered to prove his or her conduct on a specified occasion."

Evidence Code section 1101, subdivision (b) expressly carves out an exception to this rule.[10] It provides that such evidence is admissible if it is relevant to an issue other than disposition to commit the act. Admissibility of other misconduct evidence depends upon (1) the materiality of the facts sought to be proved, (2) the tendency of the uncharged crime to prove those facts, and (3) any policy requiring exclusion, such as Evidence Code section 352. (*People v. Carpenter* (1997) 15 Cal.4th 312, 378-379; see also *People v. Ewoldt* (1994) 7 Cal.4th 380, 404.)

a. Materiality

A "plea of not guilty puts in issue every material allegation of the accusatory pleading, except those allegations regarding previous convictions of the defendant to which an answer is required by Section 1025." (§ 1019; see *People v. Steele* (2002) 27 Cal.4th 1230, 1243 [guilty plea to charged murder "put in issue all of the elements of the offenses"].) In order to prove implied-malice murder, as discussed in part I, *ante*, the prosecution must prove that appellants acted in conscious disregard for the risk to the safety of others, that is, the defendant must be subjectively aware of that risk.

b. Probative value

"In ascertaining whether evidence of other crimes has a *tendency* to prove the material fact, the court must first determine whether or not the uncharged offense serves "'logically, naturally, and by reasonable inference'" to establish that fact. [Citations.] The court 'must look behind the label describing the kind of similarity or relation between the [uncharged] offense and the charged offense. . . .'" (*People v. Thompson* (1980) 27 Cal.3d 303, 316.)

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10 "(b) Nothing in this section 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, or whether a defendant in a prosecution for an unlawful sexual act or attempted unlawful sexual act did not reasonably and in good faith believe that the victim consented) other than his or her disposition to commit such an act."

In *Eagles*, the Court of Appeal held that the trial court did not err in admitting evidence of the defendant's reckless driving during the afternoon before the charged accident, as it was admissible to prove implied malice. The Court of Appeal stated: "Evidence of excessive speed resulting in a near collision is relevant to knowledge of risk, 'an actual awareness of the great risk of harm' of excessive speed." (*Eagles, supra,* 133 Cal.App.3d at p. 340.)

Canizalez's reckless driving on the day of, and in the same neighborhood as, the fatal accident was relevant to his awareness of the risks of his conduct and hence to his implied malice. Mata observed the Mustang driving south on Parkway Drive at a high rate of speed, requiring appellant to brake so abruptly to stop that his tires screeched, making appellant aware that speeding required extraordinary action to stop. Further, Castro testified that she saw appellant stopped at the stop sign at Elliott Avenue, the very intersection at which the fatal crash occurred hours later. This testimony established, if it was not otherwise established, that appellant was aware that there was a stop sign at that location, which he later raced through at nearly 90 miles per hour without stopping.

c. Evidence Code section 352

We cannot say that the trial court abused its discretion in finding that the probative value of the evidence outweighed its prejudice under Evidence Code section 352. The evidence that Canizalez had been speeding requiring him to brake abruptly and nearly hit Castro's car at the same corner at which the fatal collision occurred was relevant on the critical issue of his knowledge of risk caused by speed racing and running through that stop sign. Also, the prior conduct was far less heinous or inflammatory than the charged offenses, making it unlikely to have made a significant impression on the jury.

Canizalez's claim that the prior bad conduct was introduced as evidence of his propensity to drive recklessly is specious. It was unnecessary and cumulative for that purpose as there was no dispute that he drove the red Mustang, was involved in a speed contest at the time of the accident, was speeding and ran through the stop sign on Parkway Drive and Elliott Avenue. If the challenged evidence had any meaningful

purpose, it was not on the undisputed issue that he engaged in dangerous driving, but to show that he was aware of the grave risk to others that his conduct created.

While there was some prejudice, as there always is, in introducing evidence of prior misconduct, that prejudice was mitigated by the limiting instruction that the jury was only to consider the evidence on the question of Canizalez's mental state for murder. We presume the jury followed the instruction. (See, e.g., *People v. Horton*, *supra*, 11 Cal.4th at p. 1121.)

5. *Harmless error*

Even if the evidence of defendant's prior dangerous driving was improperly admitted, we would nonetheless find the error to have been harmless in that a result more favorable to the defendant would not have been reasonably probable if such evidence were excluded. (*People v. Scheer* (1998) 68 Cal.App.4th 1009, 1018–1019; *People v. Watson* (1956) 46 Cal.2d 818, 836.) The evidence in this case was overwhelming, as discussed in part IC, *ante*. The evil inherent in prior bad acts evidence, its tendency to show the defendant's propensity to engage in the charged conduct, was not a risk in this case. Appellants conceded their conduct and that they caused the fatal accident. The prior bad acts evidence was therefore at most cumulative and unnecessary. It was only admitted for the limited purposes of assessing Canizalez's knowledge of risk of street racing. The jury was so instructed. We presume it followed those instructions. (See, e.g., *People v. Horton, supra,* 11 Cal.4th at p. 1121.) Given the inherently horrendous nature of this crime, the comparatively innocuous prior conduct was unlikely to have impacted the jury's decision.

6. Due process

As previously stated, the essence of due process is fundamental fairness. (*People v. Englebrecht, supra*, 88 Cal.App.4th at p. 1250.) Given the strength of the case against Canizalez, the lack of importance of the prior bad acts evidence to prove the charged conduct, and the comparatively minor behavior reflected in that evidence, we cannot say that it pervaded the trial, rendering it fundamentally unfair.

III. *Crawford*[11] right to confrontation

A. Background

On June 23, 2009, Dr. Scholtz testified about how and when autopsy reports were prepared. He then testified regarding the autopsy he performed on Katherine and, from Dr. Poukens's reports, about the autopsies conducted by Dr. Poukens on Robert and Dora. By June 25, 2009, the date the United States Supreme Court rendered its decision in *Melendez-Diaz v. Massachusetts* (2009) 557 U.S.___ [129 S.Ct. 2527] (*Melendez-Diaz*), both sides had rested and closing argument had commenced.

B. Contentions

Appellants contend that admission of the nontestifying medical examiner's autopsy findings and report through the testimony of a different medical examiner violated his Sixth Amendment right to confrontation and cross-examination, as articulated in *Crawford* and *Melendez-Diaz*.[12]

The People contend that this claim has been forfeited by reason of appellants' failure to object in the trial court on confrontation clause grounds. Appellants respond that objection on confrontation clause grounds would have been futile because at the time of trial, the California Supreme Court had decided *People v. Geier* (2007) 41 Cal.4th 555

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11 *Crawford v. Washington* (2004) 541 U.S. 36 (*Crawford*).

12 Numerous cases raising the issue of whether the results of a forensic report by an expert who did not conduct the testing violates the right to confrontation are now pending before the California Supreme Court. (*People v. Rutterschmidt* (2009) 176 Cal.App.4th 1047, review granted Dec. 2, 2009, S176213; *People v. Gutierrez* (2009) 177 Cal.App.4th 654, review granted Dec. 2, 2009, S176620; *People v. Dungo* (2009) 176 Cal.App.4th 1388, review granted Dec. 2, 2009, S176886; *People v. Lopez* (2009) 177 Cal.App.4th 202, review granted Dec. 2, 2009, S177046; *People v. Benitez* (2010) 182 Cal.App.4th 194, review granted and holding for lead case, May 12, 2010, S181137; *People v. Bowman* (2010) 182 Cal.App.4th 1616, review granted and holding for lead case, June 9, 2010, S182172.) On September 28, 2010, the United States Supreme Court granted certiorari in *Bullcoming v. New Mexico*, No. 09-10876, to consider a similar issue.

(*Geier*), which found no confrontation clause violation in the admission of such evidence, and the United States Supreme Court had not yet rendered its decision in *Melendez-Diaz*.

We conclude that appellants' Sixth Amendment claim was not forfeited, but that it is meritless and, if not meritless, is harmless.

C. Forfeiture

Appellants did not object to Dr. Scholtz's testimony regarding Dr. Poukens's autopsies of Dora and Robert. Generally, a defendant forfeits his right to claim error on appeal under the Sixth Amendment's confrontation clause by failing to object on that ground in the trial court. (*People v. Lewis* (2006) 39 Cal.4th 970, 1028, fn. 19 ["We reiterate that defendants have forfeited this confrontation clause claim by failing to raise it below"].)

Appellants argue that they did not forfeit this claim because at the time Dr. Scholtz testified, it would have been futile to have made the objection in light of *Geier*, which was then controlling on this issue. (See *People v. Sandoval* (2007) 41 Cal.4th 825, 837, fn. 4 ["An objection in the trial court is not required if it would have been futile"].) We agree with appellants that making the objection would have been futile for, as discussed below, *Melendez-Diaz* had not been decided, and the trial court would have been obliged under *Geier* to deny a confrontation clause objection.

D. Crawford and its progeny

The confrontation clause provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." (U.S. Const., 6th Amend.) The object of that clause is to "ensure the reliability of the evidence against a criminal defendant by subjecting it to rigorous testing in the context of an adversary proceeding before the trier of fact." (*Maryland v. Craig* (1990) 497 U.S. 836, 845.)

In *Crawford*, the United States Supreme Court concluded that nontestimonial hearsay remains subject to state hearsay law and may be exempted from confrontation clause scrutiny entirely. (*Crawford, supra*, 541 U.S. at p. 68.) But where testimonial hearsay is involved, "the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." (*Ibid.*) While the Supreme

Court left for another day any effort to spell out a comprehensive definition of "'testimonial'" (*ibid.*), it stated that it includes "'statements that were made under circumstances which would lead an objective witness reasonably to believe that the statement would be available for use at a later trial.'" (*Id*. at p. 52.)

In *Davis v. Washington* (2006) 547 U.S. 813 (*Davis*), the Supreme Court elaborated on what constitutes testimonial hearsay. (*Id.* at p. 822.) In concluding that questioning during a 911 call is not testimonial hearsay, the Supreme Court held that, "Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution." (*Ibid.*) Interrogations "solely directed at establishing the facts of a past crime, in order to identify (or provide evidence to convict) the perpetrator" are clearly testimonial. (*Id.* at p. 826.)

In *Geier*, our Supreme Court applied the *Crawford/Davis* analyses in the context of presenting expert forensic evidence. It held that a DNA report, testified to by the laboratory director who did not conduct the DNA test but oversaw testing and supervised the laboratories' six analysts who did the testing, was not testimonial for *Crawford* purposes because the observations in the report were a "contemporaneous recordation of observable events rather than the documentation of past events." (*Geier, supra*, 41 Cal.4th at p. 605.) The Court emphasized that "the crucial point is whether the statement represents the contemporaneous recordation of observable events" and not whether "it might be reasonably anticipated [that the statement] will be used at trial." (*Id*. at pp. 606–607.) Records of the laboratory protocols used and the results acquired are not accusatory. "'Instead, they are neutral, having the power to exonerate as well as convict.'" (*Id*. at p. 601.) Furthermore, the results were a business record which, even if hearsay, could be relied upon by another medical examiner to formulate his or her opinion. (*Id.* at p. 608, fn. 13.)

E. Melendez-Diaz

After the parties rested in the trial of this matter, the United States Supreme Court rendered its decision in *Melendez-Diaz,* visiting the issue of out-of-court testimonial statements regarding forensic findings. There, Massachusetts authorities arrested the defendant in possession of bags containing a substance that resembled cocaine. (*Melendez-Diaz, supra,* 557 U.S. at p. ___[129 S.Ct. at p. 2530].) At trial, the prosecution placed into evidence the bags seized from the defendant and submitted three '"certificates of analysis"' showing the results of the forensic analysis performed on the seized substances. The certificates, which were prepared almost a week after the testing of the substance occurred, reported the weight of the seized bags and stated that the substance inside the bags '"was found to contain: Cocaine."' (*Id*. at p. ___ [129 S.Ct. at p. 2531].) The certificates were sworn to before a notary public by analysts at the state's department of health laboratory, as required by Massachusetts law. (*Ibid*.) Further, under Massachusetts law, "the *sole purpose* of the affidavits was to provide 'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance. . . ." (*Id*. at p. ___ [129 S.Ct. at p. 2532].)

In a four-vote plurality opinion and five to four decision, the United States Supreme Court held that these certificates of analysis were "quite plainly affidavits" and thus, "within the 'core class of testimonial statements,'" subject to the confrontation restrictions in *Crawford*. (*Melendez-Diaz, supra,* 557 U.S. at p. ___ [129 S.Ct. at pp. 2531–2532].) Because the certificates were testimonial in nature, the defendant was entitled to confront the analysts who signed them absent a showing that the analysts were unavailable to testify at trial and that the defendant had a prior opportunity to cross-examine them. (*Ibid*.) At the conclusion of its decision, the majority noted that its holding in *Melendez-Diaz* was "little more than the application of [its] holding in *Crawford* . . ." because the certificates in question were simply "*ex parte* out-of-court

affidavits," which the prosecution could not rely on to prove its case. (*Id.* at p. ___ [129 S.Ct. at p. 2542].)[13]

In Justice Thomas's concurring opinion, he expressed the view that testimonial evidence consisted of extrajudicial statements "'only insofar as they are contained in formalized testimonial materials, such as affidavits, depositions, prior testimony, or confessions,' [citations]" (*Melendez-Diaz*, *supra*, at p. ___ [129 S.Ct. at p. 2543] [Thomas, J., concurring]) and joined the plurality because "the documents at issue in this case 'are quite plainly affidavits,'" and fell within "'the core class of testimonial statements' governed by the Confrontation Clause. [Citation.]" (*Ibid.*)

F. Geier or Melendez-Diaz

Appellants argue that the decision of the United States Supreme Court in *Melendez-Diaz* calls into question the continued viability of the *Geier* decision. We conclude that *Geier* is distinguishable from *Melendez-Diaz* on the bases discussed below, and based on those distinctions, and, the implicit limitations in *Melendez-Diaz* in light of Justice Thomas's concurring opinion, *Geier* is controlling here.

In *Geier*, the director of the laboratory where the DNA testing occurred testified that she supervised the work of six analysts in the laboratory, including the analyst who matched the DNA found on the victim's body to the defendant's DNA. (*Geier*, *supra*, 41 Cal.4th at p. 594.) The director reviewed the testing conducted and determined that it was according to protocol. (*Id.* at p. 596.) The results of the DNA testing were admitted through the testimony of the director, who was subject to cross-examination.

In contrast, in *Melendez-Diaz* no live testimony was offered on the composition of the seized substance. The admitted evidence consisted only of affidavits. The United States Supreme Court emphasized that the affidavits "contained only the bare-bones statement" that the seized substance contained cocaine, and the defendant "did not know what tests the analysts performed, whether those tests were routine, and whether

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13 Four days after issuing its decision in *Melendez-Diaz*, the United States Supreme Court denied certiorari in *Geier*. (*Geier, supra*, 41 Cal.4th 555, cert. den. *sub nom. Geier v. California* (2009) ___ U.S. ___ [129 S.Ct. 2856].)

interpreting their results required the exercise of judgment or the use of skills that the analysts may not have possessed." (*Melendez-Diaz, supra*, 557 U.S. at p. ___ [129 S.Ct. at p. 2537].) The affidavits were not subject to cross-examination and the prosecution, under state law, could use them as "'prima facie evidence of the composition, quality, and the net weight' of the analyzed substance. . . ." (*Id*. at p. ___ [129 S.Ct. at p. 2532].)

Here, unlike the affidavits held inadmissible in *Melendez-Diaz*, and similar to the expert testimony in *Geier,* there was live testimony by a medical examiner from the same office as the medical examiner who performed the autopsy, regarding the autopsy report. Defense counsel was free to cross-examine the witness on his opinions regarding the contents of the autopsy report and the established office procedures for performing the autopsy. In light of Justice Thomas's concurring opinion, it is doubtful that a majority of the United States Supreme Court would apply *Melendez-Diaz* to this situation, which did not involve introduction of pure testimonial documents like affidavits, with no live witnesses.

Additionally, the DNA results in *Geier* "constitute[d] a contemporaneous recordation of observable events rather than the documentation of past events." (*Geier, supra*, 41 Cal.4th at p. 605.) In contrast, the affidavits in *Melendez-Diaz* were prepared a week after the actual testing occurred. (*Melendez-Diaz, supra*, 557 U.S. at p. ___ [129 S.Ct. at p. 2535].) In this sense, the affidavits in *Melendez-Diaz* were much more like the narrative of past events to police officers deemed testimonial in *Davis*.

Finally, Dr. Scholtz gave expert opinions based upon the autopsy report of Dr. Poukens. "*Crawford* does not undermine the established rule that experts can testify to their opinions on relevant matters, and relate the information and sources upon which they rely in forming those opinions. This is so because an expert is subject to cross-examination about his or her opinions and additionally, the materials on which the expert bases his or her opinion are not elicited for the truth of their contents; they are examined to assess the weight of the expert's opinion." (*People v. Thomas* (2005) 130 Cal.App.4th 1202, 1209–1210.)

G. Harmless error

Even if admission of Dr. Scholtz's testimony regarding the autopsies performed by Dr. Poukens constituted a violation of *Crawford*, the error was harmless beyond a reasonable doubt for the reasons set forth in parts I and IIA9, *ante*. (*Lilly v. Virginia* (1999) 527 U.S. 116, 139–140.) The evidence against appellants was overwhelming. Appellants conceded that they were speed racing, were involved in the crash and that Dora, Robert and Katherine died in the accident. Thus, the autopsy reports were cumulative on the issue of the causes of death and irrelevant to the sole critical issue of whether appellants subjectively knew the risk their conduct created. Cross-examination of Dr. Poukens regarding his autopsies would have provided no evidence on the only disputed issue, implied malice, and only cumulative evidence on the conceded issue.

IV. Ineffective assistance of counsel

A. Failure to object to medical examiner's gruesome testimony

1. Contention

Because we determined in part IIA3, *ante*, that due to his counsel's failure to object, Canizalez forfeited his contention that the trial court erred in admitting the medical examiner's gruesome testimony regarding the victims' deaths, he contends that he suffered ineffective assistance of counsel under the Sixth and Fourteenth Amendments to the federal Constitution. He argues that that medical examiner's testimony was as damaging as the autopsy photographs to which counsel successfully objected.

2. Requirements for ineffective assistance of counsel

The standard for establishing ineffective assistance of counsel is well settled. The "'defendant bears the burden of showing, first, that counsel's performance was deficient, falling below an objective standard of reasonableness under prevailing professional norms. Second, a defendant must establish that, absent counsel's error, it is reasonably probable that the verdict would have been more favorable to him.'" (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1052–1053; see also *Strickland v. Washington* (1984) 466 U.S. 668, 687.) A reviewing court will indulge in a presumption that counsel's performance fell within the wide range of professional competence and that counsel's

actions and inactions can be explained as a matter of sound trial strategy. (*Strickland v. Washington, supra*, at p. 689; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.)

3. Improbability of more favorable verdict

We concluded in part IIA8, *ante*, that admission of the medical examiner's testimony regarding the victims' deaths was harmless error. It follows *a fortiori* that had defense counsel successfully challenged its admission, it is not reasonably probable that a verdict more favorable to appellants would have resulted.

B. Failure to object to the medical examiner's testimony regarding autopsies performed by another medical examiner

1. Contention

Canizalez contends that he suffered ineffective assistance of counsel by virtue of trial counsel's failure to object that portion of Dr. Scholtz's testimony discussing Dr. Poukens's autopsy reports violated Canizalez's right to confrontation and cross-examination. This contention lacks merit.

2. Improbability of more favorable verdict

Canizalez argues that he did not forfeit his confrontation clause claim because *Geier* was the controlling authority at the time and any objection on confrontation clause grounds would have been futile. In part IIIC, *ante,* we agreed with him. Consequently, the failure to object to this evidence did not forfeit the claim and was not ineffective assistance of counsel. Also, because we concluded in part IIIG, *ante*, that admission of the hearsay evidence regarding Dr. Poukens was harmless, it follows that it is not reasonably probable that a verdict more favorable to appellants would have resulted had the evidence been excluded.

V. Instructional error

A. CALCRIM Nos. 400 and 403

1. Background

The prosecutor argued the alternative theories that appellants were guilty of murder either as direct perpetrators on an implied malice theory or as aiders and abettors on a natural and probable consequences theory. There was conflicting evidence as to which appellant's car actually struck the Altima. Consequently, the jury instructions did not specify which appellant was theorized to be the direct perpetrator and which the aider and abettor.

The trial court instructed the jury regarding the relationship between being a direct perpetrator and aider and abettor in accordance with the 2009 version of CALCRIM No. 400, as follows: "A person may be guilty of a crime in two ways. One, he or she may have directly committed the crime. I will call that person the perpetrator. Two, he or she may have aided and abetted a perpetrator, who directly committed the crime. A person is *equally guilty* of the crime whether he or she committed it personally or aided and abetted the perpetrator who committed it. [¶] Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime."[14] (Italics added.) During closing argument, the prosecutor argued that, "A person is equally guilty of the crime whether he committed it as a perpetrator or as an aider and abettor."

The trial court also instructed the jury regarding the natural and probable consequences doctrine of aiding and abetting in accordance with CALCRIM No. 403. It informed the jury that it could convict appellants of the nontarget offense of murder if a reasonable person in their position would have known that commission of a murder was the natural and probable consequence of engaging in a speed contest. The jury was not

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14 The 2010 version of CALCRIM No. 400, stated in the last sentence of the first paragraph that "A person is guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator . . . ," deleting the word "equally" found in the 2009 version.

instructed that it could also find appellants guilty of the less serious vehicular manslaughter as a nontarget offense under the natural and probable consequences doctrine.[15]

During the jury instruction conference, neither appellant objected to, nor requested clarification or modification of, CALCRIM Nos. 400 or 403. However, after the prosecutor had concluded her opening argument to the jury, Canizalez, joined by Morones, objected that the prosecutor had applied the natural and probable consequences doctrine in her closing argument, denying Canizalez of his Fifth, Sixth, Eighth and Fourteenth Amendment rights because "the jury must find that the perpetrator possessed the required specific intent or mens rea for the crime itself and that natural and probable consequences doctrine lessens the burden." Murder requires implied malice, that is, that the perpetrator actually knows that the act is dangerous to human life, while the natural and probable consequences doctrine only requires that a reasonable person foresee that the non-target offense is a natural consequence of the target offense. Canizalez argued that it amounted to a "'judicially-created misdemeanor murder rule.'" During this argument, Canizalez did not specifically refer to CALCRIM Nos. 400 or 403.

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15 CALCRIM No. 403, as given, provides in its entirety: "Before you may decide whether a defendant is guilty of murder based on aiding and abetting, you must decide whether he is guilty of engaging in a speed contest. [¶] To prove that the defendant is guilty of murder, the People must prove that: [¶] 1. A defendant is guilty of engaging in a speed contest; [¶] 2. During the commission of engaging in a speed contest, a coparticipant in that speed contest 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 crime of murder was a natural and probable consequence of engaging in a speed contest. [¶] A *coparticipant* in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a 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. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the speed contest, then the commission of murder was not a natural and probable consequence of the speed contest. [¶] To decide whether the crime of engaging in a speed contest was committed, please refer to the separate instructions that I will give you on that crime."

2. Contentions

Morones contends that the trial court erred in instructing the jury in accordance with the 2009 version of CALCRIM No. 400 in tandem with CALCRIM No. 403. He argues that CALCRIM No. 400 told the jury that an aider and abettor is "equally guilty" as the direct perpetrator and failed to tell the jury that an aider and abettor can be convicted of a less serious offense than that of which the direct perpetrator is convicted. CALCRIM No. 403 told the jury that it could find appellants guilty of murder under the natural and probable consequences doctrine, but did not tell it that it also had the option of finding him guilty of the less serious vehicular manslaughter under that doctrine. He claims that "where only the non-target offense of murder was specified [in CALCRIM No. 403], a reasonable jury would believe that it could not convict of the less serious vehicular manslaughter based upon natural and probable consequences aiding and abetting. . . . Without the option of vehicular manslaughter, the murder verdict was directed by the 'equally guilty' language."

Canizalez contends that CALCRIM No. 403 is contrary to law because it allows a defendant to be convicted of murder as a natural and probable consequence of committing a mere misdemeanor. "One who does no more than aid and abet a misdemeanor does not possess malice aforethought. On the other hand, the Legislature has spoken on the liability of one who commits a misdemeanor which results in a homicide; he is guilty only of involuntary manslaughter."

The People contend that Morones forfeited his claims by failing to ask the trial court to modify or clarify CALCRIM Nos. 400 and or 403. We agree.

3. Forfeiture

Generally, """[a] party may not complain on appeal that an instruction *correct in law* and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language."""" (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 (*Samaniego*), italics added; see also *People v. Hart* (1999) 20 Cal.4th 546, 622; *People v. Guerra* (2006) 37 Cal.4th 1067, 1134.) We must therefore first determine whether CALCRIM Nos. 400 and 403, as given here, are correct in law, in

order to decide whether appellants were obligated to request clarification in order to preserve their challenge to those instructions on appeal.

CALCRIM Nos. 400 and 403 are correct in law. As we said in *Samaniego*, the statement in CALCRIM No. 400 that an aider and abettor is "equally guilty" with the direct perpetrator of the target crime "is generally an accurate statement of law." (*Samaniego, supra,* 172 Cal.App.4th at p. 1163.) Thus, to the extent Morones believed that the instruction was inaccurate in the facts presented in this case, he was obliged to object to it or to request clarification or modification, which he failed to do. He has therefore forfeited his claim as to CALCRIM No. 400.

Similarly, Morones has forfeited his claim regarding CALCRIM No. 403, which is also correct in law. As discussed in part VA5, *post,* that instruction accurately states that an aider and abettor can be guilty of murder under the natural and probable consequences doctrine, if a reasonable person in his or her position would have known that murder was a natural and probable consequence of a speed contest. The instruction's failure to state that the aider and abettor could also be guilty of vehicular manslaughter on the natural and probable consequences theory made the instruction, at most, incomplete in the context of this case, not incorrect. Therefore, Morones was required to request clarification or modification of this instruction to add that appellants could alternatively be guilty of involuntary manslaughter as a natural and probable consequence of the target offense. Having failed to do so, he forfeited this contention as to CALCRIM No. 403.

But even if these contentions had been preserved for appeal, we would nonetheless find that they did not result in prejudicial error.

4. Morones's challenge to CALCRIM Nos. 400 and 403

In criminal cases "'[a] trial court has a duty to instruct the jury "sua sponte on general principles which are closely and openly connected with the facts before the court."'" (*People v. Gutierrez* (2009) 45 Cal.4th 789, 824; see *People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*).) We review de novo a claim that the trial court failed to properly instruct the jury on the applicable principles of law. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.)

As previously stated, appellants' guilt was premised upon one of two alternative theories; (1) they were both direct coperpetrators, or (2) one was the perpetrator and the other was culpable as an aider and abettor under the natural and probable consequences doctrine.[16] We conclude that under either theory, the statement in the 2009 version of CALCRIM No. 400, that appellants are "equally guilty" as the direct perpetrator is correct.

a. Direct perpetrator culpability

As we concluded in part IC, *ante*, there was not only sufficient, but overwhelming, evidence to support a jury finding that both appellants were guilty of second degree murder as joint, direct perpetrators of the deaths of Dora and her children. As joint perpetrators they were "equally guilty" of the charged offense.

b. Aider and abettor culpability

If the jury found either appellant guilty only as an aider and abettor under the natural and probable consequence doctrine, the "equally guilty" statement is also correct.[17] "[U]nder the general principles of aiding and abetting, 'an aider and abettor [must] act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.]" (*People v. Prettyman* (1996) 14 Cal.4th 248, 262 (*Prettyman*).) When the offense is a specific intent offense, """"the accomplice must 'share the specific intent of the perpetrator;' this occurs when the accomplice 'knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime.'""" (*Samaniego*, *supra*, 172

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16 The only theory of aider and abettor culpability argued by the prosecutor was the natural and probable consequences doctrine because there was no evidence appellants intended to aid and abet commission of the murders, only that they intended to aid and abet in the speed contest.

17 It is clear under the evidence that if anyone was an aider and abettor rather than a perpetrator, it would be Morones. The weight of the evidence is that either his car did not hit the Altima, or if it did, it was Canizalez's impact with the Altima that inflicted the deadly damage.

Cal.App.4th at p. 1164.) Consequently, an aider and abettor of the target crime will ordinarily have the same mens rea as the direct perpetrator and be "equally guilty."

However, in some extraordinary circumstances, our Supreme Court has stated that an aider and abettor can be *more* culpable than the direct perpetrator, if the aider and abettor has a more culpable state of mind (*People v. McCoy* (2001) 25 Cal.4th 1111, 1122, (*McCoy*)), or, as we have stated, less culpable, if the aider and abettor has a less culpable state of mind (*Samaniego, supra,* 172 Cal.App.4th at p. 1164).

But neither *McCoy* nor *Samaniego* involved the natural and probable consequences doctrine. Each reached its conclusion only for aiders and abettors of a target offense. *McCoy* expressly stated, "Nothing we say in this opinion necessarily applies to an aider and abettor's guilt of an unintended crime under the natural and probable consequence doctrine." (*McCoy, supra,* 25 Cal.4th at p. 1117.) Its analysis was only to apply "when guilt does not depend on the natural and probable consequences doctrine. . . ." (*Id*. at p 1118.)

The natural and probable consequences doctrine provides that: "'[An aider and abettor] is guilty not only of the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the person he aids and abets. . . . [¶] It follows that a defendant whose liability is predicated on his status as an aider and abettor need not have intended to encourage or facilitate the particular offense ultimately committed by the perpetrator. His knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator. It is the intent to encourage and bring about conduct that is criminal, not the specific intent that is an element of the target offense, which . . . must be found by the jury.' [Citation.] Thus, . . . 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." (*Prettyman, supra,* 14 Cal.4th at p. 261.)

Aider and abettor culpability under the natural and probable consequences doctrine for a nontarget, or unintended, offense committed in the course of committing a target offense has a different theoretical underpinning than aiding and abetting a target crime. Aider and abettor culpability for the target offense is based upon the intent of the aider and abettor to assist the direct perpetrator commit the target offense. By its very nature, aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all. It imposes vicarious liability for any offense committed by the direct perpetrator that is a natural and probable consequence of the target offense. (*People v. Garrison* (1989) 47 Cal.3d 746, 778 [accomplice liability is vicarious].) Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be "equally guilty" with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime.

Consequently, the statement in CALCRIM No. 400 that "[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it" (CALCRIM No. 400, italics added), is a correct statement of the law when applied to natural and probable consequence aider and abettor culpability and was properly given in this case.

We need not decide whether CALCRIM No. 403 was erroneous for failing to include vehicular manslaughter as a potential nontarget offense of which appellants could be found guilty under the natural and probable consequence doctrine, for, as discussed below, it is clear that that omission was harmless.

c. Harmless error

Even if the "equally guilty" language in the 2009 version of CALCRIM No. 400 was an incorrect statement of the law, we nonetheless conclude that giving it here was harmless under even the most stringent harmless error standard. (*Chapman v. California*,

supra, 386 U.S. at p. 24.) As set forth in part I, *ante*, the evidence that Morones and Canizalez were coparticipants in the speed contest and coperpetrators of the victims' deaths is overwhelming. Captain Faulkner opined that both appellants shared the cause of the collision, which was caused by running the stop sign and speeding. It would be virtually impossible to conclude that either one of appellants was aiding the other, as they were both full and equal participants in the speed contest that resulted in the fatal accident.

Similarly, any error in failing to include vehicular manslaughter as a possible nontarget offense in CALCRIM No. 403 was harmless beyond a reasonable doubt. The jury was separately instructed on the elements of the offenses of murder and vehicular manslaughter. On an aider and abettor theory, one of the appellants had to be the direct perpetrator and the other the aider and abettor. The jury found both appellants guilty of second degree murder. Hence, if it decided the matter on an aider and abettor theory, it had to have found that the direct perpetrator satisfied the required elements for murder. If the direct perpetrator committed murder, as discussed above, the aider and abettor was "equally guilty" of murder under the natural and probable consequences doctrine. Thus, even if manslaughter was included in CALCRIM No. 403, the aider and abettor would be guilty of murder.

In summary, under either the direct perpetrator or the aider and abettor theories, appellants suffered no prejudice from CALCRIM Nos. 400 and 403.

5. Canizalez's challenge to CALCRIM No. 403

a. Contention

CALCRIM No. 403 instructed the jury that if it found that one of the appellants committed the misdemeanor of engaging in a speed contest, and the other appellant aided and abetted in the commission of that crime, the aider and abettor could be found guilty of murder under the natural and probable consequence theory. Canizalez contends that that instruction was erroneous because a defendant cannot be convicted of murder as the natural and probable consequence of a misdemeanor. He argues that, "'Pursuant to our statutory scheme, murder is defined as the unlawful killing of a human being with malice

aforethought.' [Citation.] One who does no more than aid and abet a misdemeanor does not possess malice aforethought. On the other hand, the Legislature has spoken on the liability of one who commits a misdemeanor which results in a homicide: he is guilty only of involuntary manslaughter. (Pen. Code, § 192.)" This contention is without merit.

b. Misdemeanor as basis for murder under natural and probable consequences theory

It is unclear whether there is a blanket prohibition against finding an aider and abettor guilty of murder under the natural and probable consequences doctrine when the target offense is only a misdemeanor. Canizalez argues that a misdemeanor can at most support a voluntary manslaughter conviction under the natural and probable consequences doctrine, citing *People v. Munn* (1884) 65 Cal. 211 and *People v. Spring* (1984) 153 Cal.App.3d 1199. Those cases are inapposite, as neither involves the natural and probable consequences doctrine. The language in some cases, however, has suggested that a misdemeanor target offense cannot support a natural and probable consequences conviction of murder. (See, i.e., *People v. Huynh* (2002) 99 Cal.App.4th 662, 681 [concluding that because target offenses of conspiracy to commit an assault and a battery could be misdemeanors, the trial court should have instructed sua sponte on involuntary manslaughter, a lesser included offense of murder, suggesting that misdemeanor will only support involuntary manslaughter as a natural and probable consequence].)

On the other hand, Morones concedes that "a target misdemeanor may support a conviction for a non-target murder under the [natural and probable consequences] theory." (See *People v. King* (1938) 30 Cal.App.2d 185, 200 [plan for misdemeanor simple assault resulted in death when one conspirator used a deadly weapon]; *People v. Lucas* (1997) 55 Cal.App.4th 721, 732–733 (*Lucas*) [misdemeanor brandishing a gun].) "The natural and probable consequences doctrine . . . allows an aider and abettor to be convicted of murder, without malice, even where the target offense is not an inherently dangerous felony." (*People v. Culuko* (2000) 78 Cal.App.4th 307, 322.)

We believe that the cases cited by Morones set forth the more logical position. Given that the natural and probable consequences doctrine looks to the reasonable likelihood that the nontarget murder will result from the target offense, it would appear that applying the label "felony" or "misdemeanor" to the target offense is not talismanic in deciding whether the aider and abettor can be convicted of a nontarget murder. The key factor is the ability to anticipate the likelihood that the nontarget offense will result from the target offense. We cannot look to the naked elements of the target crime but must consider the full factual context in which appellants acted. (*Lucas*, *supra*, 55 Cal.App.4th at p. 733.) The requirement that the nontarget offense be reasonably foreseeable from the nature of the target offense insures that in most circumstances, aiding and abetting a misdemeanor will not have murder as its natural and probable consequence, but it does not mandate it. Here, given the facts and circumstances of the speed contest, as earlier discussed, the likelihood that someone would be killed was reasonably foreseeable.

However, we need not decide whether a misdemeanor, can ever support a murder conviction under the natural and probable consequence doctrine because here the speed contest was a felony.

c. Speed contest here was not a misdemeanor

Canizalez's contention is based on the faulty premise that engaging in a speed contest is a misdemeanor. In this case, it was a felony. Vehicle Code section 23109 subdivision (a), provides that "[a] person shall not engage in a motor vehicle speed contest on a highway." Vehicle Code section 360 defines a highway to include a street. Vehicle Code section 23109.1 provides: "(a) A person convicted of engaging in a motor vehicle speed contest in violation of subdivision (a) of Section 23109 that proximately causes one or more of the injuries specified in subdivision (b) to a person other than the driver, shall be punished by imprisonment in the state prison, or by imprisonment in a county jail for not less than 30 days nor more than six months, or by a fine of not less than five hundred dollars ($500) nor more than one thousand dollars ($1,000), or by both that fine and imprisonment. [¶] (b) This section applies to all of the following injuries:

[¶] (1) A loss of consciousness. [¶] (2) A concussion. [¶] (3) A bone fracture. [¶] (4) A protracted loss or impairment of function of a bodily member or organ. [¶] (5) A wound requiring extensive suturing. [¶] (6) A serious disfigurement. [¶] (7) Brain injury. [¶] (8) Paralysis."

As these code sections make clear, engaging in a speed contest can be a wobbler, if any of the injuries enumerated in Vehicle Code section 23109.1, subdivision (b) occur. The testimony of the medical examiner establishes that many of the specified injuries were suffered by the victims before their death. For example, Robert suffered a right elbow fracture and Dora a spinal fracture. (Veh. Code, § 23109.1, subd. (b)(3).) Given the egregious nature of appellants' conduct and the fatal injuries to the victims, the speed contest offense would undoubtedly be considered a felony. Moreover, it is hard to see how it would not be considered an inherently dangerous felony since driving a vehicle can be considered a dangerous weapon. (See *People v. Wright* (2002) 100 Cal.App.4th 703.) Appellants drove at nearly 90 miles per hour, racing side by side on a residential street, not bothering to stop at a stop sign. The risk to the public is manifest.

B. Failure to give pinpoint instruction

1. Background

The trial court instructed the jury that it had to unanimously agree as to which appellant committed the murder or that both did so.[18] After the instructions were given, Canizalez's attorney argued: " . . . [T]here's nothing in the instructions that requires the

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18 The unanimity instruction given was as follows: "During the arguments relating to this instruction, Ladies and Gentlemen, there was some argument that the defendants were allegedly engaged in a speed contest and, two, that during the commission of engaging in that speed contest a co-participant in the speed contest committed the crime of murder. The argument was that the facts could be interpreted to show either defendant had committed murder. What you are going to have to do, you are going to have to decide whether one or both of the defendants committed the crime of murder but you cannot come to a conclusion that six of you believe one defendant did or six of you – and six of you believe the other one did. [¶] In order to have this principle of law apply, you have to be in agreement as to which defendant committed murder or both committed murder. You can't be split in your conclusion as to which or both committed murder during the participation in a street speed contest."

jury upon finding, unanimously finding, that one of the two were the perpetrator. That first they must find that the perpetrator had the mental state as is required for the implied malice. Because the instruction on natural and probable consequences and especially the third line of that instruction it reads, quote, to prove that the defendant is guilty of murder, the defendant—the People must prove guilty of engaging in a speed contest; during the commission of engaging in it, a co-participant in that speed contest committed the crime of murder; and, under all circumstances, a reasonable person in the defendant's position would have known that the commission of the crime of murder was a natural and probable consequence."

When the trial court indicated that the commission of the crime would include implied malice, Canizalez's counsel continued: "I appreciate that. But I think that it's vague and I understand it but it takes several readings to understand it and I would submit that the language is vague and confusing and could confuse the jury whereby they could end up theoretically convicting on a charge of murder and not finding the necessary mental intent and it's that failing that I think—it gives me real concern in terms of the due process and the Fifth, Sixth, and Eighth Amendments of the U.S. Constitution."

Morones's counsel joined in the objection.

2. Contention

Morones contends that the trial court erred in refusing to give a pinpoint instruction relating implied malice to natural and probable consequences aiding and abetting. He argues that "[c]ounsel here had a legitimate concern which could have easily been addressed by a short pinpoint instruction telling the jury that in order to convict the aider and abettor under a natural and probable consequences theory they would first have to find that the direct perpetrator acted with implied malice and that implied malice required that the direct perpetrator have the required mental state of subjective understanding of the risk and conscious regard of it." This contention is without merit.

3. Requested pinpoint instruction redundant

"A criminal defendant is entitled, on request, to instructions that pinpoint the theory of the defense case." (*People v. Gutierrez* (2002) 28 Cal.4th 1083, 1142.) Specifically, a criminal defendant "is entitled to an instruction that focuses the jury's attention on facts relevant to its determination of the existence of reasonable doubt . . . ." (*People v. Johnson* (1992) 3 Cal.4th 1183, 1230.) But where standard instructions fully and adequately advise the jury upon a particular issue, a pinpoint instruction on that point is properly refused. (See *People v. Gutierrez, supra,* at p. 1144 ["[T]he standard manslaughter instructions given adequately covered the valid points in the proposed pinpoint manslaughter instructions"].)

Appellants requested a pinpoint instruction telling the jury that it had to find that the perpetrator had the mental state required for implied malice to find him guilty of murder. This instruction was unnecessary because other instructions adequately informed the jury of this point. (*People v. Coffman and Marlow* (2004) 34 Cal.4th 1, 99 [a trial court need not give a pinpoint instruction if it merely duplicates other instructions].)

CALCRIM No. 403 informed the jury that to be guilty as an aider and abettor under the natural and probable consequences doctrine, it had to determine that a coparticipant in the speed contest committed the crime of murder and that "a reasonable person in the defendant's position would have known that the commission of the crime of murder was a natural and probable consequence of engaging in a speed contest." It referred the jury to the separate instructions "[t]o decide whether crime of [murder] was committed." CALCRIM No. 520 informed the jury of the elements of murder which included the need for the prosecution to prove implied malice. The prosecutor argued in closing that the perpetrator had to have implied malice. As a result, instructions that were given adequately informed the jury that the perpetrator of the murder had to have acted with implied malice. The requested pinpoint instruction was therefore redundant, unnecessary and properly rejected.

Morones relies on the decision in *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*) to support his contention that the trial court erred in failing to give a pinpoint instruction. In *Hart*, the defendant and an accomplice, Rayford, attempted an armed robbery of a liquor store. Hart shot the owner, and he and Rayford were convicted of attempted robbery and premeditated attempted murder. (*Hart, supra*, at p. 666.) The jury was instructed that it could find both men guilty of attempted murder if it found that attempted murder was a natural and probable consequence of the attempted robbery. (*Id.* at p. 669.) On appeal, Rayford argued that the instructions "did not sufficiently instruct the jury concerning the relationship between the natural and probable consequence doctrine and the premeditation and deliberation element of attempted premeditated murder." (*Id.* at p. 668.)

The *Hart* court found the instructions to be insufficient. (*Hart, supra*, 176 Cal.App.4th at p. 673.) The jury was not informed that in order to find the aider and abettor guilty of attempted premeditated murder, "it was necessary to find that attempted premeditated murder, not just attempted murder, was a natural and probable consequence of the attempted robbery." (*Ibid.*) "The trial court properly instructed the jury concerning premeditation and deliberation, as it relates to attempted murder, stating, in essence, that it is a subjective state of mind. However, in determining whether the premeditation and deliberation element was a natural and probable consequence of the attempted murder, the jury does not look at the aider and abettor's subjective state of mind. Therefore, the general instruction concerning the premeditation and deliberation element of attempted murder did not properly inform the jury concerning its duty with respect to the natural and probable consequences doctrine." (*Ibid.*)

Hart is inapposite. There, the instructions erroneously failed to inform the jury that to find the aider and abettor guilty of the nontarget offense of willful and deliberate attempted murder, it had to be instructed that willful and deliberate attempted murder, not just attempted murder, had to be a the natural and probable consequence of the target offense. No instruction so informed the jury. Here, on the other hand, the requested instruction did not pertain to the aider and abettor's culpability under the natural and probable consequence doctrine, but that the direct perpetrator had to have acted with implied malice. That information was included in the other instructions.

4. Harmless error

Any "misdirection of the jury" (Cal. Const., art. VI, § 13), that is instructional error (*Breverman, supra*, 19 Cal.4th at p. 173), cannot be the basis of reversing a conviction unless "'an examination of the *entire cause, including the evidence*,'" indicates that the error resulted in a "'miscarriage of justice.'" (*Ibid.*) "Under such circumstances, '[t]he prejudicial effect of such error is to be determined, for purposes of California law, under the generally applicable reasonable-probability test" in *Watson.* (*Breverman, supra,* at p. 174.) Applying that test here, we find the instructional error to be harmless, as the jury was instructed on the requested points.

VI. Cumulative error

Appellants contend that the cumulative effect of the errors they assert are not only individually prejudicial, but if not, they cumulatively rise to the level of reversible, prejudicial error, depriving appellants of due process and a fair trial. This contention lacks merit.

"Lengthy criminal trials are rarely perfect, and this court will not reverse a judgment absent a clear showing of a miscarriage of justice. [Citations.]" (*People v. Hill* (1998) 17 Cal.4th 800, 844.) "Nevertheless, a series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error." (*Ibid*.) Because we have rejected all but one of appellants' claimed errors, and, as to that one, found it to be harmless, there are no errors to cumulate.

DISPOSITION

The judgments are affirmed.

CERTIFIED FOR PARTIAL PUBLICATION.

_____, J.
ASHMANN-GERST

We concur:

_____, P. J.
BOREN

_____, J.
DOI TODD