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People v. Bongard

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Appellants Matthew Bongard, David Neitz, Ronald Rath and Marty Schwind were all jointly tried and convicted of second degree murder (Pen. Code, § 187). Their four separate appeals have been consolidated. [1] We conclude that the judgments against all four appellants must be reversed for multiple instructional errors, and infringement of the right to cross-examine a crucial eyewitness to the crime.

STATEMENT OF FACTS

On the afternoon of October 10, 1998, Todd Butturini went to the home of his best friend, the victim Darren Siebert, on Woodbury Circle in Vacaville. From there Siebert and Butturini proceeded to the residence of another friend, Elmore Williams, on Bel Air Drive, a few blocks away. They "had been drinking," so they walked rather than drove to Williams's house. After visiting with Williams and his wife for 20 or 25 minutes, Siebert and Butturini began to walk back to Siebert's house. They each carried a 12-ounce glass partially filled with gin and Snapple.

During the return trip to Siebert's house, Siebert parted from Butturini as they walked on the sidewalk southbound on Bel Air, with the explanation that he "needed to use the bathroom." Butturini took Siebert's glass and walked across the street to the east sidewalk, while Siebert went to a park on the west side of the road near the intersection of Bel Air and Longview. "It was getting dark," so Butturini lost sight of Siebert as he continued to walk slowly south on Bel Air between Longview and Woodbury.

About half way down the block, Butturini noticed a small white or yellow car right next to him traveling the opposite direction, northbound, on Bel Air. Butturini briefly glanced at the car as it passed him. It screeched to a halt a "couple car lengths" away. When the car stopped, Butturini observed the driver in a white tank top shirt, whom he positively identified at trial as Neitz, quickly get out and advance upon him at a fast walk. [2] Neitz cursed loudly and asked Butturini, "What are you looking at?" Butturini said, "I don't want any trouble," as he backed away. Neitz added, "This is my hood. You know I live here," to which Butturini replied, "What are you talking about?" Butturini repeated that he didn't want any trouble, but Neitz "just kept coming." When Neitz advanced to within about three feet of him, Butturini turned and walked away, confused and nervous. Neitz continued to follow Butturini, about five or six feet away from him.

As Butturini reached the middle of the street, he heard "loud voices" south of his position on Bel Air asking, "What's up?" or "What's going on?" Butturini turned to see three or four people in the street

"running towards" him and Neitz. Butturini walked away from the group to the east side of the street. He then observed Siebert stride past him and ask, "What's going on?" Butturini did not respond as Siebert proceeded to the west side of the street between Neitz's car and the approaching group.

Butturini noticed that when Siebert reached the other side of the street he was tightly surrounded by the group of three to five people. Neitz was also on the opposite side of the street from Butturini, only three feet from Siebert. A "whole bunch of scuffling" began. In the very dim light, Butturini could only perceive "grunt noises" and arms flailing as he moved to the middle of the street within ten feet of the group. Siebert fell to the ground, whereupon he was stomped and kicked by at least three of the people who surrounded him. After 30 to 40 seconds, Butturini called out "help" before he threw away the two glasses he had been holding and ran to a house on Woodbury for assistance. Butturini saw four or five "kids" in a lighted garage, and yelled at them "to call 911." One "young man" in the garage responded by running into the house.

Butturini "ran back to the scene" of the confrontation, where he found Siebert alone, lying on the sidewalk, with his head on the grass. He was unconscious and gasping for air. Butturini tried to talk with Siebert for about 20 seconds, but received no response, so he scurried back to the house "to see if they actually called" the police. He then "grabbed a pipe" for protection and returned once again to Siebert. By the time Butturini reached Siebert, a police officer was already there. Siebert was no longer conscious when the police arrived, and he was subsequently pronounced dead after resuscitation efforts by paramedics failed.

According to the testimony of a forensic pathologist who conducted the autopsy, the cause of Siebert's death was "closed, blunt force injuries due to stomping" that inflicted "subarachnoid hemorrhage" or "bleeding around" "most of the external surfaces of the brain." The "stomping" blows of "substantial force" were administered while the victim was on the ground with his head fairly immobile against a hard surface, like the sidewalk. At least "a dozen" different blows were inflicted upon the victim, but "no one blow" caused his death. Rather, "the accumulation of blows" produced "all the internal bleeding that caused death." No fractures or internal injuries, other than those to the brain, were detected during the autopsy. Nor did Siebert suffer any bruising or other injuries "below the shoulder," other than a swollen left ring finger and a severe lacerated contusion of the penis caused by blunt force trauma. The pathologist did not observe extensive bleeding on the victim's body, and not much blood was found on Siebert or around him at the scene of the beating. Siebert's blood-alcohol level at the time of his death was .10.

The altercation that resulted in Siebert's death was also witnessed by Richard Romero from the passenger seat of a Nissan pickup truck driven by his father. His account of the details of the incident was rather conflicting. Romero testified that his father drove the pickup truck very slowly southbound on Bel Air Drive as the sun was just "going down," and "[i]t was starting to get dark." Romero's attention was drawn to a group of perhaps four males in their "mid-20's" who were

"shuffling around" in the street and moving north at a fast walk. The people in the group appeared to be about to "go get into a fight." Romero observed hands raised, fingers pointed, fists "balled up," and angry yelling. As the group passed within five feet of the pickup truck, Romero recognized appellant Ron Rath as the person who had been gesturing and pointing with his fists. Romero was acquainted with Rath from "school and the neighborhood." Romero also saw two people, one of them he thought was a "Black gentleman," walking "side by side" northbound on the sidewalk, apart from the group. [3]

Romero's father turned the truck around and "came back down northbound" on Bel Air Drive at about 15 miles per hour. Romero observed one man in the group of four hit in the face or head by one of the two men he had previously seen on the sidewalk. The rest of the group then surrounded the man who had been hit, "held him and beat him." Romero testified that the group, and particularly Rath, "just came behind" the victim and "mauled him."

Romero described the beating of Siebert as "a whole bunch of punches, kicks," and stomping on the head and "in the groin area." The victim was struck all "over his body," but most of the blows were to his head. Romero estimated that at least 50 to 60 blows were inflicted on Siebert. The victim remained standing for about 45 seconds, but then fell to the ground as the beating continued. According to Romero, with the victim lying on his back on the ground, the assailants "would kick here for a minute and play ring around the rosy with the guy and kick him somewhere else and turn and rotate again."

Rath and two other men, identified by Romero at trial as appellants Neitz and Schwind, were "doing most of the damage." Neitz had a tattoo on his upper arm near the shoulder, and was wearing a white T-shirt or tank top; he looked like someone Romero "thought he knew" from school. Romero saw Neitz punch and kick Siebert many times in the head and chest. Romero testified that Schwind only kicked the victim a "couple" of times from the side, but also estimated that each of the three primary assailants, including Schwind, delivered around 30 kicks to Siebert, many of them to the victim's groin area. During the assault, Romero heard Rath cursing and yelling "to kick his ass." Rath also delivered the final blows to the victim after the others had stopped.

According to Romero, the fourth man in the group was absent during most of the beating, but was "involved a little bit" in kicking the victim in the "upper torso" two or three times "[a]lmost after it was all done and said and over with." Romero could not identify from among the group of defendants at trial the "fourth person" who "disappeared briefly" during the beating, but described him as 5' 8" to 5' 9" tall, 130 to 150 pounds, with long brown shoulder-length hair, who was "possibly" a man he recognized named Marcus Pratt. Romero also testified that Pratt was "at the scene" of the fight, but not "in the middle" of it.

Romero further vaguely testified that he believed appellant Bongard may have been one of the three men "initially involved" in the group during the beating, although he did not identify Bongard as one

of the participants at the preliminary hearing, during a photo lineup, or in statements to the police. Romero explained that in his efforts to recall the event he had "flashes" of Bongard "advancing towards the fight" and then "getting in the fight."

When the beating ended, and as the victim was convulsing in the street, Romero observed that the assailants "pranced around the street as if they were gods," yelling and "threatening people." Rath then approached the pickup truck, leaned over with his face in the window, and asked Romero's father "if he wanted to be dead like that guy." Romero said to Rath, "What's up Ron? Do you remember me?" Rath replied, "Oh, what's up Rick?" before he backed away from the truck to "shake the blood off him." Romero saw blood all over Rath's clothing, hands and face. Neitz also had blood on his torn white T-shirt.

Romero's father told Rath "he's got a problem," then drove the pickup truck away from the scene. Romero was disinclined to contact the police, but was persuaded by his father to make an anonymous call to provide "a little bit of a description" of the event he witnessed. Romero's father then "dragged" him to the Vacaville Police Department to give a statement. He did not testify willingly at trial.

Marcus Pratt was also a witness to the beating death of Siebert. He was acquainted with all of the defendants, and was particularly close friends with Rath and Bongard. On the afternoon of October 10, 1998, Pratt was visiting the home of his friend of Jason Pliler at 242 Bel Air Drive, along with Rath, Neitz, Schwind and Bongard. They all drank beer, watched television and talked. Around 7:00 that night, Neitz left the house in his "yellowish-white" Mustang. A minute later, Pratt "walked out of the door" with Rath, leaving Schwind and Bongard in the living room. Pratt parted company with Rath at the front of the house by the garage. As he walked across the street, Pratt looked northbound on Bel Air. "It was dark out," but Pratt noticed Neitz's car "parked next to another car on the street," about 100 yards away under a street light. When Pratt reached his car, he saw Neitz standing at the rear of his Mustang, with another man facing him about 15 feet away. Pratt heard two loud voices, apparently "arguing," and thought he distinguished Neitz "ask the other guy if that guy called him a bitch."

From his car, Pratt looked back at Pliler's house to see Bongard, Schwind and Rath near the front door. Pratt said to them: "I think David is about to get into a fight. It looks like he is arguing with somebody." Bongard, Schwind and Rath "started running" together north up Bel Air. Pratt was over 50 feet behind them moving at a fast walk, then a run, on the east sidewalk. Pratt could see "something going on," but he "couldn't tell what it was because it was dark." When Pratt passed the intersection at Woodbury, Rath was still ahead of him standing on the sidewalk, with Schwind and Bongard nearby in the grass. Pratt also saw another person he did not recognize, but he no longer saw Neitz anywhere in the area. Pratt joined Rath on the sidewalk. He looked northward and observed Schwind and Bongard beating a man who was already on the ground, motionless on his back. Pratt testified that Schwind kicked the man in the side while Bongard stomped his head. Pratt

did not see either Rath or Neitz strike the victim.

Pratt testified that he only observed a "few seconds" of the assault before it ended. He walked away south on the sidewalk, with Rath "a couple of feet" behind him, followed by Schwind and Bongard. A dark pickup truck with a camper shell "pulled up" and came to a stop on the other side of the street also facing south. One of the occupants of the pickup truck "started talking," but Pratt could not discern "what they were saying." Schwind and Bongard walked across the street to within a few of feet of the pickup truck; one of them told the driver to "keep driving." Rath also walked into the street, but stayed to the rear of Schwind and Bongard, farther from the truck. Pratt remained on the sidewalk "and watched."

Rath, Bongard and Schwind then "started walking away, and the pickup pulled away." Pratt separately ran to his car, got in, and drove north on Bel Air. As Pratt drove past the spot where the fight occurred, he did not see the victim, but someone-Pratt later realized it may have been Butturini-ran in front of his car with a "stick or something like that." As Pratt continued to drive down Bel Air Drive, he also saw Neitz "coming down the driveway of his house," about two minutes after the fight had ended.

Later that night, Pratt received two telephone calls from Bongard. During the second telephone conversation, Bongard told Pratt "that he thought he had killed the guy." Bongard said to Pratt, "Marc, I think I kicked his nose into his brain."

Pratt gave a lengthy "videotaped statement" to the police early the next morning. He acknowledged that he lied "a lot" in the interview, to protect himself and his friends. He falsely told the police he "showed up after" the fight was over and "didn't see anything."

Schwind was the only one of the four defendants to testify at trial. Schwind testified that he was in Jason Pliler's living room with his closest friend Bongard when Rath entered to announce that Neitz "was up the street in some trouble." [4] Schwind also "heard yelling" outside that was apparently Pratt "telling [Rath] there was a problem up the street." Schwind and Bongard sprinted north on Bel Air Drive behind Rath until they all crossed Woodbury and saw Butturini run past them through the grass. Schwind stopped to glance at Butturini. As he turned his head back to the north, Siebert was "coming out of the darkness" at him on the sidewalk. Schwind did not hear any words exchanged, but saw "some punches thrown" by both Siebert and Rath. Siebert was struck in the "chin or jaw," fell into the ivy, and "dropped to his hands and knees" only a foot from Schwind. When Siebert "spun around" and stumbled toward him, Schwind felt "a little bit" threatened. Schwind rapidly "threw a couple of kicks" into the victim's "rib area" in a period of "about five seconds." Rath also kicked Siebert in the "butt area," and Bongard administered kicks to the head of the victim. Within five or six seconds Siebert "went unconscious" and rolled onto his back, so Schwind stopped kicking after three or four blows and backed away with Rath. Bongard continued "stomping" the victim in the face "approximately eight times." Schwind did not see Neitz or Pratt in the area of the fight.

A few seconds after the assault upon Siebert ended, a pickup truck "pulled up" just as Schwind began to walk back to Pliler's house with Rath and Bongard. Bongard immediately "threw his shirt over his head and ran behind the truck" toward Pliler's house. One of the occupants of the pickup truck said, "You guys got a problem," whereupon angry words were exchanged with Rath. Schwind heard Romero from inside the pickup truck ask Rath, "Do you remember me?" before the truck drove away. As Schwind continued to walk south back toward Pliler's house, he observed Butturini run "up Woodbury with a pole or pipe" in his hand. Schwind proceeded on to Pliler's house without confronting Butturini.

Schwind remained at Pliler's residence for no more than a minute before he and Bongard jumped the back fence to flee before the police arrived. They ran to the house of a friend, Joshua Ransbottom, less than half a mile away. Bongard and Schwind informed Ransbottom that they "got into a fight." According to Schwind, he and Bongard changed clothes at Ransbottom's house to avoid any identification when they returned to the area of the fight.

Schwind then called a mutual friend, Lindsay Mason, who drove him and Bongard to her house after they purchased alcohol. At Mason's house, Bongard called Pratt and learned that Siebert had died. When Mason asked what happened, Schwind replied, "We have been in a fight, and we might have killed somebody." Bongard admitted to Mason that "he did it." Mason testified that Bongard told her, "I killed him Linds." Bongard explained, "I kicked him on top of his head," and demonstrated for Mason "how he did it" with a stomping motion of his foot. Schwind informed Mason that he kicked the victim "just a couple of times" in the chest. Schwind "seemed real upset," and repeatedly declared to Mason, "I didn't kick him on his head."

Monica Keels testified that her friend Bongard called her just after 10:00 the night of October 10, 1998, to ask for a ride home from Mason's house. In the car, Bongard told Keels "he killed someone." Bongard added that he "was the one that stomped on his face and he couldn't stop." Bongard thereafter became "more aggressive," and threatened Keels that he "would come after" her or "have someone come after" her if she repeated his statements to "anybody."

Ransbottom denied that Schwind and Bongard changed or discarded their clothes at his house after the fight. He testified that Schwind and Bongard appeared calm while they were at his house that night, and told him only that "there was a fight." Appellant Schwind's father Daniel testified, however, that five or six days after the fight Ransbottom admitted to him that Schwind and Bongard "had changed their clothes" in his garage, and the "clothes had been disposed of" in a dumpster in Davis or Sacramento. Ransbottom also mentioned to Daniel Schwind "that there may have been blood" on Bongard's tennis shoes.

Appellant Bongard offered expert testimony in his defense from Rickey Cooksey, a criminalist for the California Department of Justice, who tested a pair of shoes "under the label of Ronald Rath" "for possible blood stains." [5] Cooksey found "small spots on these shoes" that gave "a positive screening

test for blood." The stains "looked like spatter" from "spots of blood striking the shoes" and "a smear from contact with the bloody item." The samples were of such a "limited amount," however, that Cooksey could not test to determine if the blood was human in origin. Officer Joe Iaocono testified that the shoes tested by Cooksey were seized from "an apartment in Concord." One of the occupants of the apartment was asked "where suspect Rath's shoes were, and he said to check the bathroom." The shoes were found "next to the shower."

DISCUSSION [6]

I. The Violation of Appellants' Rights to Disclosure of Impeachment Evidence and Cross-Examination (All Appellants).

Appellants have all joined in the two-pronged argument that they were erroneously denied discovery of Romero's juvenile record, and then precluded from effective cross-examination of him with impeachment evidence of his current probationary status and prior commission of criminal offenses. The record shows that before trial the defendants requested discovery of "impeachment evidence" for all prosecution witnesses (People v. Wheeler (1992) 4 Cal.4th 284), specifically including prior offenses of moral turpitude, or pending parole or probation status information. The trial court ordered the prosecution to turn over any exculpatory information to the defense, and agreed to conduct an in-camera review of the requested impeachment evidence of the witnesses' "juvenile records" and "rap sheets." After review, the court informed defense counsel that "nothing discoverable" had been found in Romero's "rap sheets." In fact, Romero's records revealed that he suffered prior convictions and juvenile adjudications between 1993 and 1996-for carrying a knife on school grounds (Pen. Code, § 626.10), malicious vandalism (Pen. Code, § 594), possession of methamphetamine (Health & Saf. Code, § 11377), and battery (Pen. Code, § 242) - had repeatedly violated his grants of juvenile probation, and was currently on adult probation.

At trial, defense counsel attempted to cross-examine Romero about a statement he made to the police that he was "on probation." The prosecutor's objection to the inquiry was sustained, and the jury was admonished by the trial court to disregard the question as having "absolutely no bearing on this case." During closing argument, the prosecutor directed comments in response to defense claims that Romero was "lying, lying, lying" during his testimony. The prosecutor asserted to the jury: "Rickey Romero has no motive to lie. He has no interest in lying. He has no benefit to gain by coming forward at all, to tell the truth or to lie. None. He did not want to come forward. He has nothing to gain by that."

Following the verdicts, appellants [7] moved for new trials based upon, among other grounds, discovery of "new evidence" of Romero's adult and juvenile "criminal record" previously withheld from the defense, and the resulting infringement upon the right to cross-examine and impeach the witness. In his revised motion Schwind presented additional new evidence from an acquaintance of Romero who spoke with him during the course of the trial in the summer of 1999. Romero mentioned that he was

"a witness in a murder case" prosecuted against defendants who had "done things to him in the past," and he would "do anything" to "get them back," even "lie." [8] The motions for new trial were denied. [9]

Established principles govern our review of appellants' interconnected claims that they were improperly denied the right to obtain and present impeachment evidence. "The prosecutor has a constitutional (Brady v. Maryland [(1963)] 373 U.S. 83, 87 [10 L.Ed.2d 215, 218]) and statutory (§ 1054.1, subd. (e)) duty to disclose to the defense any exculpatory evidence." (People v. Robinson (1995) 31 Cal.App.4th 494, 498, fn. omitted; see also In re Jackson (1992) 3 Cal.4th 578, 593-594; People v. Superior Court (Barrett) (2000) 80 Cal.App.4th 1305, 1312; Merrill v. Superior Court (1994) 27 Cal.App.4th 1586, 1594.) [10] The prosecution's duty to disclose also applies to evidence relating to the credibility of material witnesses. (People v. Wright (1985) 39 Cal.3d 576, 590; see also People v. Ruthford (1975) 14 Cal.3d 399, 405-406.) " ` "[S]uppression of substantial material evidence bearing on the credibility of a key prosecution witness is a denial of due process . . . ." [Citation.]' [Citation.] Thus, `[w]hen the "reliability of a given witness may well be determinative of guilt or innocence," nondisclosure of evidence affecting credibility' may require a new trial. [Citation.]" (People v. Hayes (1992) 3 Cal.App.4th 1238, 1244-1245, fns. omitted; see also People v. Santos (1994) 30 Cal.App.4th 169, 178.)

In order to comply with this duty the prosecution not only must disclose evidence in its possession, but also accessible evidence possessed by the investigating agencies. (People v. Kasim (1997) 56 Cal.App.4th 1360, 1380.) In addition, it is presumed that the prosecutor has knowledge of all of the information assembled by the state's investigation. (In re Brown (1998) 17 Cal.4th 873, 879.)

The extent of the due process right of a criminal defendant to disclosure of evidence, while broad, is limited. Although a criminal defendant has the constitutional right of meaningful access to evidence to establish a defense, more than mere failure to disclose evidence is necessary to establish a violation of statutory discovery obligations or due process principles. (United States v. Valenzuela-Bernal (1982) 458 U.S. 858, 867; United States v. Nesbitt (7th Cir. 1988) 852 F.2d 1502, 1517; In re Martin (1987) 44 Cal.3d 1, 31-32.) Due process principles require " ` "disclosure only of evidence that is both favorable to the accused and `material either to guilt or to punishment.' " [Citation.] . . .' [Citation.]" (People v. Memro (1995) 11 Cal.4th 786, 837; see also United States v. Bagley (1985) 473 U.S. 667, 678; In re Brown, supra, 17 Cal.4th 873, 884; In re Sassounian (1995) 9 Cal.4th 535, 544.) "Evidence is material under the Brady[, supra, 373 U.S. 83] standard `if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.' [Citation.]" (City of Los Angeles v. Superior Court (2002) 29 Cal.4th 1, 7-8.) " ` "A `reasonable probability' is a probability sufficient to undermine confidence in the outcome." [Citation.]' [Citation.]" (People v. Memro, supra, at p. 837.) "Material evidence in this context is evidence `which "tends to influence the trier of fact because of its logical connection with the issue." [Citation.]' [Citation.]" (People v. Garcia (1993) 17 Cal.App.4th 1169, 1179.) "Evidence is `favorable' if it hurts the prosecution or helps the defense." (People v. Earp (1999) 20 Cal.4th 826, 866.)

Moreover, "The court retains wide discretion to protect against the disclosure of information that might unduly hamper the prosecution or violate some other legitimate governmental interest." (People v. Superior Court (Barrett), supra, 80 Cal.App.4th 1305, 1316.)

"When the evidence that was withheld goes to the credibility of a witness, `[t]he defendant must make a showing of substantial materiality and even after this showing is made reversal is not required if the prosecution establishes the failure to disclose was harmless beyond a reasonable doubt.' [Citation.]" (People v. Boyd (1990) 222 Cal.App.3d 541, 569.) Speculation or only a mere possibility that undisclosed evidence might have aided the defense or affected the trial's outcome is not sufficient. (People v. Fauber (1992) 2 Cal.4th 792, 829.) " `[R]eversal is required "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." [Citation.]' [Citation.]" (People v. Hayes, supra, 3 Cal.App.4th 1238, 1245; see People v. Santos, supra, 30 Cal.App.4th 169, 179.)

As a fundamental element of due process of law, a criminal defendant must also be afforded a meaningful opportunity to present a complete defense, subject to the limitations imposed by the rules of evidence. (People v. Lucas (1995) 12 Cal.4th 415, 464.) "The Confrontation Clause of the Sixth Amendment guarantees the right of an accused in a criminal prosecution `to be confronted with the witnesses against him.' The right of confrontation . . . `means more than being allowed to confront the witness physically.' [Citation.] Indeed ` "[t]he main and essential purpose of confrontation is to secure for the opponent the opportunity of cross-examination." ' [Citations.]" (Delaware v. Van Arsdall (1986) 475 U.S. 673, 678.) "Cross-examination is the principal means by which the believability of a witness and the truth of his testimony are tested." (Davis v. Alaska (1974) 415 U.S. 308, 316.)

" `[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, "to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness." ' [Citations.]" (People v. Frye (1998) 18 Cal.4th 894, 946.) Confrontation Clause questions arise where restrictions imposed by the trial court effectively " `emasculate the right of cross-examination itself.' " (Delaware v. Fensterer (1985) 474 U.S. 15, 19, quoting Smith v. Illinois (1968) 390 U.S. 129, 131.) " `It is the essence of a fair trial that reasonable latitude be given the cross-examiner, even though he is unable to state to the court what facts a reasonable cross-examination might develop.' [Citations.]" (Alvarado v. Superior Court (2000) 23 Cal.4th 1121, 1139-1140.)

Like the right to the disclosure of evidence, the "right of confrontation is not absolute, however [citations], `and may, in appropriate cases, bow to accommodate other legitimate interests in the criminal trial process.' [Citation.]" (Alvarado v. Superior Court, supra, 23 Cal.4th 1121, 1138-1139; see also People v. Stritzinger (1983) 34 Cal.3d 505, 515; People v. Harris (1985) 165 Cal.App.3d 1246, 1257.) " `[A] certain threshold level of cross-examination is constitutionally required, and in such cases the

discretion of the trial judge is obviously circumscribed.' [Citation.]" (In re Anthony P. (1985) 167 Cal.App.3d 502, 513.) In all other cases, the courts retain a traditional and extrinsic authority to control admission of evidence in the interests of orderly procedure, and preventing harassment, prejudice or confusion of the issues. (Delaware v. Van Arsdall, supra, 475 U.S. 673, 679; People v. Cooper (1991) 53 Cal.3d 771, 817.) Ordinarily, proper application of the statutory rules of evidence does not impermissibly infringe upon a defendant's due process rights. (See People v. Lucas, supra, 12 Cal.4th 415, 464; People v. Fudge (1994) 7 Cal.4th 1075, 1102-1103; People v. Hawthorne (1992) 4 Cal.4th 43, 58.) "The confrontation clause `guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish.' [Citations.]" (People v. Clair (1992) 2 Cal.4th 629, 656, fn. 3; see also People v. Cooper, supra, at p. 817.) " `Thus, unless the defendant can show that the prohibited cross-examination would have produced "a significantly different impression of [the witnesses'] credibility" [citation], the trial court's exercise of its discretion in this regard does not violate the Sixth Amendment.' [Citation.]" (People v. Hillhouse (2002) 27 Cal.4th 469, 494.)

Appellants' claim of denial of due process and confrontation rights is directly supported by the decision of the United States Supreme Court in Davis v. Alaska, supra, 415 U.S. 308 (Davis), in which a "crucial witness for the prosecution," who testified that he saw the defendant with a crowbar near the place where an empty safe taken during a burglary was discovered, was on juvenile probation both when the events about which he testified occurred and at trial. (Id. at pp. 310-311.) Defense counsel asserted that cross-examination of the witness's status as a probationer was necessary to reveal possible bias and motive to fabricate testimony. The prosecution sought to prevent any reference to the confidential juvenile criminal record of the witness by the defense. The trial court granted a protective order foreclosing the defendant from impeaching the witness with his probationary status, based upon an Alaska statute that protected the anonymity of juvenile offenders. (Id. at pp. 310-311.) The Supreme Court found that the blanket prohibition upon cross-examination of the witness about his juvenile record violated the defendant's confrontation rights. The court declared: "The State's policy interest in protecting the confidentiality of a juvenile offender's record cannot require yielding of so vital a constitutional right as the effective cross-examination for bias of an adverse witness. The State could have protected [the witness] from exposure of his juvenile adjudication in these circumstances by refraining from using him to make out its case; the State cannot, consistent with the right of confrontation, require the [defendant] to bear the full burden of vindicating the State's interest in the secrecy of juvenile criminal records." (Id. at p. 320.)

While appellants' pretrial right to acquisition of confidential information about the witness may be subject to dispute, the right of appellants under Davis to impeach Romero at trial with evidence of his juvenile or adult probation status is unassailable. [11] Disclosure to the defense of Romero's prior felony or misdemeanor convictions, or pending charges, was also constitutionally compelled. (People v. Wheeler, supra, 4 Cal.4th 284, 294-295; People v. Santos, supra, 30 Cal.App.4th 169, 178-179; People v. Hayes, supra, 3 Cal.App.4th 1238, 1244.) Appellants were not merely denied pretrial discovery of Romero's juvenile records, they were effectively prohibited from any inquiry at trial into the

witness's probationary status or prior offenses. By the time Romero testified, he obviously was a vital and unique percipient witness for the prosecution: the only one who purportedly observed the entire incident and identified some of the defendants-particularly Neitz-as active participants in the assault upon Siebert. In contrast to evidence adduced from other witnesses, Romero presented testimony that distinguished the roles of the defendants in the attack: he identified Neitz and Rath as the assailants who inflicted "most of the damage" with blows to the victim's head, and minimized the responsibility of Schwind or Bongard. Thus, the critical nature of the issue of Romero's credibility at trial was manifest. (Cf., People v. Carpenter (1999) 21 Cal.4th 1016, 1051-1052.)

While appellants managed to elicit extensive discrepancies in Romero's description of the event during cross-examination, they were denied the opportunity to offer reasons for his lack of credibility. Inquiry into his prior adult convictions and juvenile adjudications may have demonstrated a character for dishonesty, and evidence of his probationary status constitutes a classic form of bias or motive to fabricate. (Davis, supra, 415 U.S. 308, 318; People v. Wheeler, supra, 4 Cal.4th 284, 294-295.) Also, "the high court has ` "recognized that the exposure of a witness' motivation in testifying is a proper and important function of the constitutionally protected right of cross-examination." ' [Citations.]" (People v. Williams (1997) 16 Cal.4th 153, 207.) The defense was thus entitled to elicit impeachment evidence of Romero's status as a probationer to demonstrate an expectation of leniency or immunity as possible motive to cooperate with the authorities, regardless of the act that got him on probation in the first place, and to probe his potential bias or prejudice based upon concern of jeopardy to his probation. (See Davis, supra, at p. 311; People v. Dyer (1988) 45 Cal.3d 26, 49; People v. Bento (1998) 65 Cal.App.4th 179, 194; People v. Jimenez (1985) 171 Cal.App.3d 411, 416; People v. Adams (1983) 149 Cal.App.3d 1190, 1193; People v. Espinoza (1977) 73 Cal.App.3d 287, 291.)

"The inability of defense counsel to conduct effective cross-examination into possible bias from the probationary status of an adverse witness constitutes a denial of the right of confrontation." (United States v. Simmons (8th Cir. 1992) 964 F.2d 763, 769.) Barred by the trial court from any reference to evidence that Romero was on probation, the defense "was unable to make a record from which to argue why [the witness] might have been biased or otherwise lacked that degree of impartiality expected of a witness at trial." (Davis, supra, at p. 318; see also Nielsen v. Superior Court (1997) 55 Cal.App.4th 1150, 1155; People v. Reber (1986) 177 Cal.App.3d 523, 530.) " ` "[A] criminal defendant states a violation of the Confrontation Clause by showing that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby, `to expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.' " [Citations.]' . . . [Citation.]" (People v. Hillhouse, supra, 27 Cal.4th 469, 494.)

We further conclude that the prohibited cross-examination reasonably may have produced a significantly different impression of the witness's credibility. Evidence of Romero's probationary status, prior offenses, and pending charges was not of marginal relevance in the case. He was a

crucial prosecution witness whose testimony was subject to intense dispute. At trial, he offered an account of the beating that incriminated some, if not all, of the defendants more extensively than his prior statements or preliminary hearing testimony. His reliability as a witness was in question, but without the impeachment evidence, the jury was left without potential, identifiable reasons to explain discrepancies in his testimony, and was thereby prevented from fairly assessing his credibility. Without knowledge of potential bias or motive to fabricate, the jury was more inclined to overlook the flaws in Romero's account and accept the entirety of his testimony as trustworthy, as the prosecution urged by suggesting during closing argument that the witness had no reason to lie. We cannot speculate upon the jury's ultimate assessment of Romero's credibility if the defense had been granted the opportunity to fully present the impeachment evidence, but "the jurors were entitled to have the benefit of the defense theory before them so that they could make an informed judgment as to the weight to place" on his testimony. (Davis, supra, 415 U.S. 308, 317.) "Although trial courts retain wide latitude to impose reasonable limits on defense inquiry into the potential bias of a prosecution witness (Delaware v. Van Arsdall, supra, 475 U.S. 673, 679 [89 L.Ed.2d 674, 683, 106 S.Ct. 1431]), the trial court here clearly erred in precluding all inquiry" into the probationary status and prior criminal offenses committed by Romero. (People v. Price (1991) 1 Cal.4th 324, 422-423.) Appellants were thus denied the right of effective cross-examination.

The denial of the right to cross-examine a witness is of constitutional dimension. (People v. Acevedo (2001) 93 Cal.App.4th 757, 766.) The error, however, is subject to a harmless-error analysis. (People v. Greenberger (1997) 58 Cal.App.4th 298, 350.) " `The correct inquiry is whether, assuming that the damaging potential of the cross-examination were fully realized, a reviewing court might nonetheless say that the error was harmless beyond a reasonable doubt. Whether such an error is harmless in a particular case depends upon a host of factors, all readily accessible to reviewing courts. These factors include the importance of the witness' testimony in the prosecution's case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and, of course, the overall strength of the prosecution's case.' [Citations.]" (Id. at p. 350; see also Delaware v. Van Arsdall, supra, 475 U.S. 673, 684.)

As we have observed, Romero's testimony was both essential to the prosecution's case and fraught with inconsistencies. Butturini, Pratt, and Schwind also provided partial eyewitness accounts of the beating, but Romero alone offered a description of the entire incident and the disparate roles played in it by all the defendants. He was also the sole prosecution witness to incriminate some of the defendants, with testimony that differed markedly from other witnesses. His report of the incident was neither cumulative nor corroborated in important respects by other evidence. The impeachment evidence was therefore imperative to a fair assessment by the jury of the personal criminal liability of each defendant for the assault on Siebert. The critical nature of Romero's testimony is underscored by the fact that it was the only evidence the jury asked to have read back during deliberations. Finally, although the cross-examination of Romero revealed inconsistencies in the content of his testimony, the efforts of the defense to establish his bias, motive to fabricate, or character for

dishonesty were not just curtailed, but entirely precluded. [12]

II. The Felony Murder Instruction.

We turn to appellants' many claims of instructional error, the first of which is that the trial court gave an "unauthorized" instruction on felony murder over defense objection. Along with an instruction on assault "by means of force likely to produce great bodily injury," the court instructed the jury in the terms of CALJIC No. 8.51 that, "If a person causes another's death while committing a felony which is dangerous to human life, the crime is murder." Appellants point out that felony murder predicated upon the underlying offense of felonious assault is a theory "not sanctioned by law" in California. Therefore, their argument proceeds, the trial court's erroneous felony murder instruction-together with a defective instruction on the natural and probable consequences doctrine of aiding and abetting pursuant to CALJIC No. 3.02-impermissibly authorized the jury to return a second degree murder verdict without a finding that any one of the four defendants entertained the requisite mental state of malice aforethought.

The failure of the Attorney General to respond to this contention is perhaps an acknowledgment that error was committed. Even if not, the instructional error was palpable.

"Murder is the unlawful killing of a human being, or a fetus, with malice aforethought. (§ 187, subd. (a).) Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder. [Citations.] [¶] Malice may be express or implied. (§ 188.) It is express `when there is manifested 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.) . . . [I]mplied malice has both a physical and a mental component, the physical component being the performance of ` "an act, the natural consequences of which are dangerous to life," ' and the mental component being the requirement that the defendant ` "knows that his conduct endangers the life of another and . . . acts with a conscious disregard for life." ' [Citations.]" (People v. Hansen (1994) 9 Cal.4th 300, 307-308.)

Under the felony-murder rule the People are not required to prove malice; the intent to commit a felony inherently dangerous to human life is substituted for malice. (People v. Patterson (1989) 49 Cal.3d 615, 626.) "The felony-murder rule operates to eliminate the need to establish malice, an element of a murder charge, for the person who perpetrates certain felonies, rendering irrelevant whether he acted with actual malice." (People v. Smith (1998) 62 Cal.App.4th 1233, 1237.) The requisite malice for a second degree murder conviction is imputed "to those who commit a homicide during the perpetration of a felony which is not an enumerated felony, but is one inherently dangerous to human life." (People v. Baker (1999) 74 Cal.App.4th 243, 249.)

As far back as People v. Ireland (1969) 70 Cal.2d 522 (Ireland), "our Supreme Court held that a felony-murder theory cannot be based upon a felony which is an integral part of the homicide, in that case assault with a dangerous weapon and second degree murder, because such a theory would preclude the jury from considering malice aforethought in all cases where the homicide has been committed as a result of a felonious assault." (People v. Baker, supra, 74 Cal.App.4th 243, 250.)

The defendant in Ireland shot and killed his wife, and was convicted of second degree murder. The court reversed for error in a second degree felony-murder verdict based upon the underlying felony of assault with a deadly weapon. In its adoption of the merger rule, the court reasoned that "[t]o allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault-a category which includes the great majority of all homicides. This kind of bootstrapping finds support neither in logic nor in law." (70 Cal.2d 522, 539.) The court therefore concluded that the offense of assault with a deadly weapon, which was "an integral part of" and "included in fact" within the homicide, cannot support a second degree felony-murder instruction. (Ibid.) "[W]hen the Legislature has prescribed that an assault resulting in death constitutes second degree murder if the felon acts with malice, it would subvert the legislative intent for a court to apply the felony-murder rule automatically to elevate all felonious assaults resulting in death to second degree murder even where the felon does not act with malice. In other words, if the felony-murder rule were applied to felonious assaults, all such assaults ending in death would constitute murder, effectively eliminating the requirement of malice-a result clearly contrary to legislative intent." (People v. Hansen, supra, 9 Cal.4th 300, 314, citing People v. Taylor (1970) 11 Cal.App.3d 57, 63.) The essence of the merger doctrine articulated in Ireland is that "it would be inappropriate bootstrapping to uphold a conviction of murder based upon assault without consideration of malice aforethought." (People v. Billa (2002) 102 Cal.App.4th 822, 833.)

The effect of the decision in Ireland was to restrict "the scope of the felony-murder rule, declaring it inapplicable to those felonies that are an integral part of, and included in fact within, the homicide. (People v. Ireland, supra, 70 Cal.2d at p. 539.)" (People v. Stewart (2000) 77 Cal.App.4th 785, 797.) "Subsequent decisions have applied the Ireland rule to other felonies involving assault or assault with a deadly weapon. (See People v. Smith (1984) 35 Cal.3d 798 [201 Cal.Rptr. 311, 678 P.2d 886] [felony child abuse of the assaultive category]; People v. Wilson (1969) 1 Cal.3d 431, 440 [82 Cal.Rptr. 494, 462 P.2d 22] [burglary with intent to commit the felony of assault with a deadly weapon]; People v. Landry (1989) 212 Cal.App.3d 1428, 1437-1439 [261 Cal.Rptr. 254] [assault with a deadly weapon].)" (People v. Hansen, supra, 9 Cal.4th 300, 312.) California has steadfastly adhered to the merger doctrine announced in Ireland, and it remains indisputable law that a verdict of second degree murder cannot be based upon the theory that a death occurred during the perpetration of a felonious assault upon the victim. (Suniga v. Bunnell (9th Cir. 1993) 998 F.2d 664, 667.) "Quite simply, because the underlying felonious conduct is not independent of an assault that results in death, the killing is outside of the felony-murder rule." (People v. Stewart, supra, at p. 798.)

Presentation of an instruction that essentially recited a felony murder theory to the jury was error which infringed appellants' due process rights by proposing a theory of liability to the jury that does not exist under California law. (Suniga v. Bunnell, supra, 998 F.2d 664, 666-668; People v. Vargas (2001) 91 Cal.App.4th 506, 563.) The effect of the instruction was also to eliminate the need for the prosecution to establish the mental component of implied malice. (People v. Patterson, supra, 49 Cal.3d 615, 626.) The jury was relieved of the necessity of finding that any of the defendants harbored malice aforethought if it found that the homicide was a direct result of the commission of felonious assault with force likely to inflict great bodily injury. (Ireland, 70 Cal.2d 522, 538; People v. Baker, supra, 74 Cal.App.4th 243, 250.)

The error associated with the theory of felony murder based on assault rendered the instruction "legally incorrect, and a conviction on that theory would have been erroneous." (People v. Sellers (1988) 203 Cal.App.3d 1042, 1055.) Where an instructional error presents a "legally incorrect" theory of the case which, if relied upon by the jury, cannot as a matter of law validly support a conviction of the charged offense, reversal is required absent a basis in the record to determine beyond a reasonable doubt that the verdict was actually based upon a valid ground. (People v. Aguilar (1997) 16 Cal.4th 1023, 1034; People v. Harris (1994) 9 Cal.4th 407, 418-419; People v. Guiton (1993) 4 Cal.4th 1116, 1128-1129.) The "general rule," first articulated in People v. Green (1980) 27 Cal.3d 1, 69, is that "when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand." (See also Yates v. United States (1957) 354 U.S. 298, 312; People v. Harris, supra, at p. 419; People v. Kelly (1992) 1 Cal.4th 495, 531.) "[W]hen the facts do not state a crime under the applicable statute, . . . the Green rule requiring reversal applies, absent a basis in the record to find that the verdict was actually based on a valid ground." (People v. Guiton, supra, at p. 1129, fn. omitted.)

We also cannot assume that the erroneous felony murder instruction was disregarded. (Suniga v. Bunnell, supra, 998 F.2d 664, 669-670; Krouse v. Graham (1977) 19 Cal.3d 59, 73; People v. Wooten (1996) 44 Cal.App.4th 1834, 1853.) To the contrary, " `The crucial assumption underlying our constitutional system of trial by jury is that jurors generally understand and faithfully follow instructions.' [Citations.]" (People v. Callahan (1999) 74 Cal.App.4th 356, 372.)

Neither the verdict, the state of the evidence, nor the argument of the prosecution disclose to us which theory the jury relied on to convict appellants of second degree murder. (People v. Sellers, supra, 203 Cal.App.3d 1042, 1055.) The evidence is susceptible to a number of alternative findings to support the convictions: that one or more of the co-defendants actually perpetrated second degree murder with implied malice, while others aided and abetted an assault; or, that some of the defendants committed an assault, which subjected them to a felony murder conviction under the instructions given. The jury was fully instructed on the elements of murder, complete with the definitions of express and implied malice. In addition, instructions on aiding and abetting and felony murder were separately presented to the jury. Although the prosecution conceded that appellants did

not intend to kill the victim, and thereby foreclosed a finding of second degree murder predicated on express malice, the theories of implied malice, felony murder, and aiding and abetting were all urged by the prosecution as potential alternative bases for second degree murder convictions. The prosecutor emphasized implied malice and aiding and abetting liability during closing argument, but not to the exclusion of the felony murder theory. The specific assertion was made by the prosecutor that appellants committed an intentional act, an assault, which was inherently dangerous to human life, and were therefore guilty of murder. The jury also exhibited an apparent interest in the felony murder theory by asking the court if assault with force likely to produce great bodily injury was a felony or misdemeanor.

The record is not susceptible to a determination that beyond a reasonable doubt the jury found appellants guilty on a theory other than felony murder. (People v. Ramkeesoon (1985) 39 Cal.3d 346, 352, fn. 2; People v. Baker, supra, 74 Cal.App.4th 243, 253.) If even one juror voted to convict appellants on the legally erroneous felony murder theory, the convictions are violative of due process principles and cannot stand.

III. The Aiding and Abetting Instruction (All Appellants).

Appellants claim that the aiding and abetting instruction was also faulty in its explication of the natural and probable consequences doctrine. They specifically direct our attention to the trial court's designation of the third element necessary to a finding of guilt under the natural and probable consequences doctrine: "That a . . . co-principal in that crime [of assault by means of force likely to produce great bodily injury] committed the crime of assault by means of force likely to produce great bodily injury." [13] Appellants maintain that "the trial court's instructions on element number three required only that a co-principal commit the crime of assault with force likely to produce great bodily injury, not the charged crime of murder. While the fourth element did require that the jury find the charged murder was a natural and probable consequence of the target offense of assault, it also did not require that the murder be committed by a co-principal of the defendant or defendants in the target crime of assault." They contend that the error in the instruction "relieved the prosecution of the burden of proving malice as to any of the defendants."

"[A] common law rule of aider and abettor liability which has survived in California is the doctrine that one who incites the commission of a crime can be liable not only for the crime incited but also for any incidental consequences which reasonably might be expected to result from the intended wrong." (People v. Woods (1992) 8 Cal.App.4th 1570, 1583.) " ` "[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.' [Citations.]" (People v. Laster (1997) 52 Cal.App.4th 1450, 1462; see also In re Meagan R. (1996) 42 Cal.App.4th 17, 22-23.) Like the felony murder rule, the "natural and probable consequences doctrine operates independently of the second degree felony-murder rule. It 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.)

" `To apply the "natural and probable consequences" doctrine to aiders and abettors is not an easy task. The jury must decide whether the defendant (1) with knowledge of the confederate's unlawful purpose, and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the defendant's confederate committed an offense other than the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated. Instructions describing each step in this process ensure proper application by the jury of the "natural and probable consequences" doctrine.' [Citation.]" (People v. Dawson (1997) 60 Cal.App.4th 534, 544, People v. Prettyman (1996) 14 Cal.4th 248, 267 (Prettyman).)

The Attorney General concedes that the trial court erred "by filling in one of the blanks with the target crime when that blank should have been filled in with the charged crime." For purposes of the natural and probable consequences doctrine of aiding and abetting liability, a fundamental distinction has been articulated by the California Supreme Court between the "crime the parties intended to commit," referred to as the " `predicate or target offense[],' " and the offense ultimately perpetrated by a coprincipal, or the actual offense. (People v. Dawson, supra, 60 Cal.App.4th 534, 544, quoting Prettyman, supra, 14 Cal.4th 248, 263.) In Prettyman, the court declared that to support a conviction under the natural and probable consequences doctrine, the trial court must instruct and the jury must "find that the defendant's confederate committed an offense other than the target crime, and that the nontarget offense perpetrated by the confederate was a `natural and probable consequence' of the target crime that the defendant assisted or encouraged." (14 Cal.4th at p. 254, italics added; see also People v. Hickles (1997) 56 Cal.App.4th 1183, 1194; People v. Lucas (1997) 55 Cal.App.4th 721, 727.) Thus, in the case before us, the jury could have validly found that appellants knowingly and intentionally aided and abetted an assault with force likely to produce great bodily injury, and convict all of them of murder even without proof of express or implied malice, but only if it additionally found that at least one among them, with the necessary malice, actually committed the murder which was a natural and probable consequence of the assault. (See People v. Mendoza (1998) 18 Cal.4th 1114, 1123.) The trial court's instruction, however, removed the essential element from the natural and probable consequences doctrine that a confederate actually committed a crime other

than the intended target offense of assault with force likely to produce great bodily injury. While the instructional error appears to have been merely a matter of mislabeling the actual offense, the result was that no actual offense of second degree murder committed by a coprincipal was specified for the jury.

The Attorney General submits that the error was harmless in light of the remainder of the CALJIC No. 3.02 instruction, which adequately advised the jury of the obligation "to find that a principal committed second degree murder in order to find anyone else guilty of second degree murder on a natural and probable consequences theory." The Attorney General also maintains that "there is overwhelming evidence" one or more of the co-defendants was the actual perpetrator "of a malice murder (express or implied)," and the others "aided and abetted a felony assault, a natural and probable consequence of which was second degree murder."

"[A]n erroneous instruction requires reversal only when it appears that the error was likely to have misled the jury [citations], and whether an erroneous or inartfully phrased instruction misled the jury to the defendant's prejudice is determined by reviewing the instructions as a whole." (People v. Owens (1994) 27 Cal.App.4th 1155, 1159.) " ` " `The absence of an essential element in one instruction may be supplied by another or cured in light of the instructions as a whole.' " ' [Citation.]" (People v. Van Winkle (1999) 75 Cal.App.4th 133, 147.) "When a claim is made that instructions are deficient, we must determine whether their meaning was objectionable as communicated to the jury. If the meaning of instructions as communicated to the jury was unobjectionable, the instructions cannot be deemed erroneous. [Citations.] The meaning of instructions is no longer determined under a strict test of whether a `reasonable juror' could have understood the charge as the defendant asserts, but rather under the more tolerant test of whether there is a `reasonable likelihood' that the jury misconstrued or misapplied the law in light of the instructions given, the entire record of trial, and the arguments of counsel." (People v. Dieguez (2001) 89 Cal.App.4th 266, 276.) " ` "Finally, we determine whether the instruction, so understood, states the applicable law correctly." [Citation.]' [Citation.]" (People v. Solis (2001) 90 Cal.App.4th 1002, 1020.)

The trial court's error in the designation of the actual crime committed by a coprincipal likely created confusion in the jury's assessment of appellants' liability for the natural and probable consequences of the intended assault. Much of the muddle engendered by the misstatement of the coprincipal's actual crime as assault rather than murder may have been ameliorated by the rest of the instruction. The first part of CALJIC No. 3.02 advised the jury that an aider and abettor was guilty "not only" of the target offense of assault, but in addition "any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted." The trial court also correctly recited the fourth essential element of the natural and probable consequences doctrine that, "The crime of murder was a natural and probable consequence of the commission of the crime of assault by means of force likely to produce great bodily injury." (Italics added.) The remaining homicide instructions further focused the jury on the necessity finding that one of the co-defendants actually committed second degree murder. (See People v. Francisco (1994) 22

Cal.App.4th 1180, 1190.) The jury may have properly read the CALJIC No. 3.02 instruction as a whole to mean that the "other crime" committed by a principal as a natural and probable consequence of the assault was murder.

An impediment to finding the defective instruction unobjectionable or harmless was the prosecutor's closing argument that replicated the trial court's error. The prosecutor took the jury through each element of the aiding and abetting instruction as read by the trial court. In the process he restated the element that, "A co-principal in the crime committed the crime of assault by means of force likely to produce great bodily injury," and added: "Somebody sure did actually assault Darren Siebert by that force. Is there any doubt about that?" The prosecutor somewhat ameliorated the effect of his misreading of the actual crime by immediately thereafter correctly arguing, "Ladies and gentlemen, we know that that crime was committed and it was the crime of murder, a natural and probable consequence of the commission of the crime of assault by means of force likely to produce great bodily injury." (Italics added.) The prosecutor also stressed to the jury that the malice required for second degree murder may be implied "when the killing resulted from an intentional act," the beating of Siebert, the "natural consequences" of which were "dangerous to human life." Still, at the least the jury was left with a very confounded description of the natural and probable consequences doctrine, that must be evaluated with the other instructional errors.

IV. The Omission of an Instruction on Lesser Misdemeanor Target Offenses (All Appellants).

Appellants assert that the trial court committed further error by failing to include instructions in CALJIC No. 3.02, as requested by the defense, on the lesser target offenses of misdemeanor assault, battery, or fighting in a public place (Pen. Code, §§ 240, 242, 415) as a basis for a verdict of involuntary manslaughter under the natural and probable consequences doctrine. The jury was given instructions on involuntary or misdemeanor manslaughter, defined as a killing without malice committed during an unlawful act not amounting to a felony which is dangerous to human life (CALJIC Nos. 8.45, 8.51). [14] But appellants complain that "without any instructions explaining the operation of the natural and probable consequences doctrine in the context of a possible verdict of involuntary manslaughter, and without any idea whether misdemeanor assault or battery could form the basis for misdemeanor manslaughter," the jury was given no guidance in individually assessing guilt to reach "a more appropriate determination" of the culpability of each defendant at trial, and "essentially had no choice" other than to reach a verdict of second degree murder.

Our high court has underscored the importance of identification of target offenses for the jury as part of the necessary instructions on the natural and probable consequences doctrine of aiding and abetting liability. In Prettyman, supra, 14 Cal.4th 248, 268, the court held that "when the prosecution relies on the `natural and probable consequences' doctrine to hold a defendant liable as an aider and abettor, the trial court must . . . identify and describe for the jury any target offense allegedly aided and abetted by the defendant." (See also People v. Williams (1997) 16 Cal.4th 635, 674.) "[I]dentification of the target crime will facilitate the jury's task of determining whether the charged

crime allegedly committed by the aider and abettor's confederate was indeed a natural and probable consequence of any uncharged target crime that, the prosecution contends, the defendant knowingly and intentionally aided and abetted." (Prettyman, supra, at p. 267; People v. Culuko, supra, 78 Cal.App.4th 307, 327.) The instructional obligation to define target offenses is limited to those offenses supported by the evidence and identified by the prosecution as subject to consideration by the jury. (Prettyman, supra, at p. 269; People v. Huynh (2002) 99 Cal.App.4th 662, 677; People v. Gonzalez (2002) 99 Cal.App.4th 475, 484-485.)

Superimposed in this case upon the obligation to define the target offenses of the natural and probable consequences doctrine, is the trial court's recognized duty in criminal cases to "instruct on general principles of law relevant to the issues raised by the evidence. [Citation.] This obligation includes giving instructions on lesser included offenses when the evidence raises a question whether all the elements of the charged offense were present, but not when there is no evidence the offense was less than that charged." (People v. Koontz (2002) 27 Cal.4th 1041, 1085; see also People v. Kraft (2000) 23 Cal.4th 978, 1063.) "The trial court must instruct on lesser included offenses when there is substantial evidence to support the instruction, regardless of the theories of the case proffered by the parties." (People v. Barton (1995) 12 Cal.4th 186, 203.) "In the interests of justice, this rule demands that when the evidence suggests the defendant may not be guilty of the charged offense, but only of some lesser included offense, the jury must be allowed to `consider the full range of possible verdicts-not limited by the strategy, ignorance, or mistakes of the parties,' so as to `ensure that the verdict is no harsher or more lenient than the evidence merits.' [Citation.]" (People v. Breverman (1998) 19 Cal.4th 142, 160.)

"Manslaughter is `the unlawful killing of a human being without malice.' [Citation.] Involuntary manslaughter is a killing committed `in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.' [Citation.] Generally, involuntary manslaughter is a lesser offense included within the crime of murder." (Prettyman, supra, 14 Cal.4th 248, 274; see also People v. Rios (2000) 23 Cal.4th 450, 460; People v. Blakeley (2000) 23 Cal.4th 82, 87.)

The Attorney General maintains that instructions on lesser included misdemeanor target offenses were unnecessary, "since the evidence did not support the commission or the aiding and abetting of misdemeanor assault or battery." The Attorney General takes the position that, "Whether these defendants participated as perpetrators or as aiders and abettors, there was no evidence to suggest that what they participated in was anything less than felony conduct . . . ."

"Only if the theory is supported by substantial evidence is the refusal to give a requested instruction erroneous." (People v. Randolph (1993) 20 Cal.App.4th 1836, 1841; see also People v. Barrick (1982) 33 Cal.3d 115, 132.) Substantial evidence necessary to support a requested jury instruction is "evidence sufficient to deserve jury consideration." (People v. Marshall (1997) 15 Cal.4th 1, 39; see also People v. Barrick, supra, at p. 132.) Substantial evidence in the context of a lesser included offense instruction "

`is " `evidence from which a jury composed of reasonable [persons] could . . . conclude[]' " that the lesser offense, but not the greater, was committed.' [Citation.]" (People v. Ochoa (1998) 19 Cal.4th 353, 422; see also People v. Ceja (1994) 26 Cal.App.4th 78, 85.)

We find substantial evidence in the record to support the requested instructions on the lesser target offenses of misdemeanor assault and battery. The testimony on the acts committed by each of the co-defendants was conflicting and wide-ranging. The jury was presented with a host of verdict options, and evidence to support findings that extended from aiding and abetting a simple assault to perpetrating a second degree murder. For at least some of the defendants, particularly Neitz and Schwind, the record contains substantial evidence to conclude that they may have intended merely to commit or to aid and abet a misdemeanor assault of Siebert. Absent an instruction on misdemeanor target offenses to support a verdict of involuntary manslaughter under the natural and probable consequences theory, the jury was left without the choice of lesser alternative verdicts to discriminate between co-defendants with various levels of culpability.

The Attorney General also suggests that the trial court's failure to specify "some possible target offenses" worked to appellants' "benefit not harm," and hence was not prejudicial error. We instead agree with appellants that the court erred to the detriment of the defense in failing to specify and identify the lesser target offenses. (See People v. Mouton (1993) 15 Cal.App.4th 1313, 1318-1319.) "[A]n aider and abettor may be found guilty of crimes committed by the perpetrator which are less serious than the gravest offense the perpetrator commits, i.e., the aider and abettor and the perpetrator may have differing degrees of guilt based on the same conduct depending on which of the perpetrator's criminal acts were reasonably foreseeable under the circumstances and which were not." (People v. Woods, supra, 8 Cal.App.4th 1570, 1586-1587; see also Prettyman, supra, 14 Cal.4th 248, 275-276.) Although "the perpetrator cannot be found guilty of both a greater and a necessarily included offense," an aider and abettor may be "found guilty of an uncharged, necessarily included offense when the lesser, but not the greater, offense is a reasonably foreseeable consequence of the crime originally aided and abetted." (People v. Woods, supra, at pp. 1587-1588.) "[A] fact finder can convict the perpetrator of one crime and find the aider and abettor guilty of a necessarily included offense where the evidence establishes that only the lesser offense was a reasonably foreseeable consequence of the crime originally contemplated." (Id. at p. 1588.) "Therefore, in determining aider and abettor liability for crimes of the perpetrator beyond the act originally contemplated, the jury must be permitted to consider uncharged, necessarily included offenses where the facts would support a determination that the greater crime was not a reasonably foreseeable consequence but the lesser offense was such a consequence. Otherwise, . . . the jury would be given an unwarranted, all-or-nothing choice for aider and abettor liability. (See People v. Wickersham (1982) 32 Cal.3d 307, 324 [185 Cal.Rptr. 436, 650 P.2d 311], and discussion, post.)" (Ibid.)

"Either result (acquittal of the aider and abettor although the evidence establishes guilt of a lesser offense, or conviction for the greater offense because the jury has no option of finding the defendant liable for the lesser crime) is unjust and unacceptable. As the California Supreme Court has observed,

`the People have no legitimate interest in obtaining a conviction on a greater offense than that established by the evidence, [and] a defendant has no right to an acquittal when the evidence is sufficient to establish a lesser included offense.' [Citations.]" (People v. Woods, supra, 8 Cal.App.4th 1570, 1589.) "If the evidence raises a question whether the offense charged against the aider and abettor is a reasonably foreseeable consequence of the criminal act originally aided and abetted but would support a finding that a necessarily included offense committed by the perpetrator was such a consequence, the trial court has a duty to instruct sua sponte on the necessarily included offense as part of the jury instructions on aider and abettor liability." (Id. at p. 1593.) We accordingly conclude that the trial court erred by failing to specify and define the lesser, misdemeanor target offenses as part of the duty to fully instruct the jury on the offense of involuntary manslaughter. (People v. Mouton, supra, 15 Cal.App.4th 1313, 1318-1319.) The California Supreme Court has "confirmed that the duty to instruct sua sponte on lesser included offenses is not satisfied by instructing on only one theory of an offense if other theories are supported by the evidence." (People v. Lee (1999) 20 Cal.4th 47, 61, citing People v. Breverman, supra, 19 Cal.4th 142, 160.)

The error, however, is "not subject to reversal unless an examination of the entire record establishes a reasonable probability that the error affected the outcome." (People v. Breverman, supra, 19 Cal.4th 142, 165.) Alone, the absence of instructions on the lesser, misdemeanor target offenses may not be considered prejudicial error under the Watson standard, at least not for all appellants. The evidence establishes that Bongard, and perhaps Rath, if found guilty at all, committed or aided and abetted nothing less than the charged felonious assault that resulted in the death of the victim. We must, however, examine the instructional omission in the context of the cumulative impact of all of the errors that occurred during trial.

V. The Voluntary Manslaughter Instruction (All Appellants).

Next, we confront appellants' argument that the involuntary manslaughter instruction was defective. They complain that the trial court committed yet another error of law by instructing the jury that voluntary manslaughter is the unlawful killing of "another human being without malice aforethought, but with an intent to kill." (Italics added.) The court also advised the jury that "a necessary element" of either murder or the lesser crime of voluntary manslaughter "is the existence in the mind of the defendants or a defendant the specific intent to kill." (Italics added.) Appellants maintain that the inclusion of an intent to kill element in the voluntary manslaughter instruction is contrary to the California Supreme Court decisions in People v. Lasko (2000) 23 Cal.4th 101, and People v. Blakeley, supra, 23 Cal.4th 82. [15] The Attorney General acknowledges "the Lasko error," but protests "that the error was harmless."

" ` "A defendant who commits an intentional and unlawful killing but who lacks malice is guilty of . . . voluntary manslaughter. [Citation.]" [Citation.] Generally, the intent to unlawfully kill constitutes malice. [Citations.] "But a defendant who intentionally and unlawfully kills lacks malice . . . in limited, explicitly defined circumstances: either when the defendant acts in a `sudden quarrel or heat

of passion' [citation], or when the defendant kills in `unreasonable self-defense'-the unreasonable but good faith belief in having to act in self-defense [citations]." [Citation.] Because heat of passion and unreasonable self-defense reduce an intentional, unlawful killing from murder to voluntary manslaughter by negating the element of malice that otherwise inheres in such a homicide [citation], voluntary manslaughter of these two forms is considered a lesser necessarily included offense of intentional murder [citation].' [Citation.]" (People v. Lujan (2001) 92 Cal.App.4th 1389, 1410-1411; see also People v. Rios, supra, 23 Cal.4th 450, 460; People v. Lee, supra, 20 Cal.4th 47, 58-59.)

However, in companion opinions rendered after trial in this case, the California Supreme Court held that a defendant who, with conscious disregard for life and the knowledge that such conduct endangers the life of another, unintentionally but unlawfully kills in a sudden quarrel or the heat of passion or while having an unreasonable but good faith belief in the need to act in self defense, is guilty only of voluntary manslaughter rather than murder. (People v. Lasko, supra, 23 Cal.4th 101, 111; People v. Blakeley, supra, 23 Cal.4th 82, 85; People v. Jaspar (2002) 98 Cal.App.4th 99, 112, fn. 7.) In such cases, concluded the court, "intent to kill is not an element of voluntary manslaughter," (People v. Crowe (2001) 87 Cal.App.4th 86, 89) and "it is error to so instruct the jury." (Id. at p. 93.)

Where, as here, the offenses occurred prior to the date the opinions were issued on June 2, 2000, the Court gave divergent commands on the retroactivity of the new statement of the law, dependent upon the nature of the voluntary manslaughter defense. Where the defendant claims the killing was done in the heat of passion or a sudden quarrel, error is found even if the offense predated the Lasko opinion, which did not redefine the law. (People v. Lasko, supra, 23 Cal.4th 101, 111; People v. Crowe, supra, 87 Cal.App.4th 86, 95.) In contrast, the court declared that its decision in Blakeley, "that one who, acting with conscious disregard for life, unintentionally kills in unreasonable self-defense is guilty of voluntary manslaughter rather than the less serious crime of involuntary manslaughter-is an unforeseen judicial enlargement of the crime of voluntary manslaughter, and thus may not be applied retroactively" to either the defendant before it or to others whose offense occurred prior to the June 2, 2000, defendant. (People v. Blakeley, supra, 23 Cal.4th 82, 92; People v. Johnson (2002) 98 Cal.App.4th 566, 577.) [16]

Thus, the trial court's voluntary manslaughter instruction erroneously told the jury that intent to kill is an element of the lesser offense of voluntary manslaughter based upon a killing committed in the heat of passion or a sudden quarrel. " `A conviction of the charged offense [of murder] may be reversed in consequence of this form of error only if, "after an examination of the entire cause, including the evidence" (Cal. Const., art. VI, § 13), it appears "reasonably probable" the defendant would have obtained a more favorable outcome [conviction of voluntary manslaughter instead of murder] had the error not occurred [citation].' [Citation.]" (People v. Lasko, supra, 23 Cal.4th 101, 111; see also People v. Crowe, supra, 87 Cal.App.4th 86, 96.)

The Attorney General's position that the error was harmless is based upon the standard instruction given pursuant to CALJIC No. 8.50, as was done in Lasko, which advised the jury that the burden is

on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the actual, but unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury. [17] Thus, according to the Attorney General, the trial court's explanation to the jury of the distinction between murder and manslaughter effectively precluded a conviction of second degree murder, whether the killing was intentional or unintentional, unless the prosecution proved beyond a reasonable doubt that, at the time of the killing, appellants were not unreasonably acting in exercise of the privilege of self-defense or in the heat of passion. (See People v. Crowe, supra, 87 Cal.App.4th 86, 96.) The Attorney General postulates that if the jury found appellants lacked the intent to kill, the likely verdict was involuntary manslaughter, a lesser offense within the crime of murder upon which it was also instructed. (See People v. Lasko, supra, 23 Cal.4th 101, 114; People v. Johnson, supra, 98 Cal.App.4th 566, 578; People v. Crowe, supra, at p. 96.) Therefore, the harmless error argument concludes, the second degree murder convictions suggest the jury found beyond a reasonable doubt that appellants did not kill Siebert in the heat of passion or act in imperfect self-defense, the predicates to a voluntary manslaughter verdict.

We perceive numerous flaws and weaknesses in the Attorney General's harmless error argument. First, the evidence does not strongly suggest intent to kill, at least as to certain appellants. (Cf., People v. Lasko, supra, 23 Cal.4th 101, 114; People v. Crowe, supra, 87 Cal.App.4th 86, 96.) Second, the felony murder and aiding and abetting theories presented to the jury, along with the natural and probable consequences instructions, complicate any inference we may be able to draw from the second degree murder verdicts, and makes it more difficult for us to decide that the jury would not have reached different verdicts in the event the law of voluntary manslaughter had been correctly conveyed. Third, the prosecutor emphasized in his closing argument that appellants did not have the intent to kill the victim, and hence the jury could not "even consider voluntary manslaughter. It doesn't apply." And finally, we do not assess in isolation the flawed voluntary manslaughter instruction, but rather proceed to our cumulative impact analysis of the errors.

VI. The Cumulative Impact of the Errors.

Where, as here, multiple errors occurred at trial, we must consider together the cumulative prejudicial effect of these errors upon appellants. (People v. Koontz, supra, 27 Cal.4th 1041, 1094.) " `[A] series of trial errors, though independently harmless, may in some circumstances rise by accretion to the level of reversible and prejudicial error.' [Citation.]" (People v. Cunningham (2001) 25 Cal.4th 926, 1009.) We must examine as a whole, both individually and collectively, the effect of errors to determine whether appellants were deprived of the constitutional right to a fair trial. (In re Jones (1996) 13 Cal.4th 552, 583.) Moreover, the sheer number and magnitude of legal errors "raises the strong possibility the aggregate prejudicial effect of such errors was greater than the sum of the prejudice of each error standing alone." (People v. Hill (1998) 17 Cal.4th 800, 845.)

The impact of the numerous errors in the homicide instructions and the restrictions placed on the

cross-examination of a principal prosecution witness was pervasive and damaging to appellants. In this complicated, consolidated trial of four co-defendants in which multiple homicide theories were proposed by the prosecution, different or inconsistent defenses were presented, and diverse and even contradictory evidence of the acts perpetrated by each defendant was offered, the most important element to a fair trial was to ensure an individualized assessment by the jury of each appellant's particular culpability for the beating death of Siebert. The breakdown of any discrete, individual determination of guilt began with the infringement of the right of appellants to effectively cross-examine Romero with evidence of his bias and motive to fabricate. Romero's testimony, more than that of any other witness, provided a comprehensive portrayal of the roles of the various appellants in the beating. But his account of the incident was inconsistent, at times confusing, and in conflict with other eyewitness testimony and some of the physical evidence presented. Denial of the right to impeach Romero with his probationary status and prior offenses created a distorted impression of the witness, and thoroughly impaired a primary assignment of the jury to accurately determine the guilt of each appellant on an individual basis.

The instructional errors then so compounded the harm caused by exclusion of impeachment evidence as to undermine confidence in the fairness of the verdicts. The legally erroneous felony murder instruction permitted the jury to convict appellants of second degree murder on a theory that does not exist and without a finding that any of them had the requisite malice aforethought for first degree murder. It thus requires reversal, even standing alone as error, unless it appears from the record beyond a reasonable doubt the jury did not rely on the erroneous instruction. (People v. Baker, supra, 74 Cal.App.4th 243, 253.) The presentation of other homicide theories to the jury along with instructions on the lesser offenses of voluntary and involuntary manslaughter precludes a determination that the felony murder instruction was ignored. The second degree murder verdicts may have been based on felony murder, aiding and abetting, or implied malice; all three theories were presented to the jury and vigorously argued by the prosecution. Given the state of the evidence and argument in the case, it is impossible for us to tell which of three second degree murder theories proposed by the prosecution served as a foundation for the jury's verdicts, and we cannot "take the `one out of three ain't bad' approach. Consequently, People v. Green, [supra, 27 Cal.3d 1,] even as modified by People v. Harris, [supra, 9 Cal.4th 407,] requires reversal." (People v. Wooten, supra, 44 Cal.App.4th 1834, 1853.) "Since the prosecution argued three different theories to support a second degree murder conviction, including the erroneous theory of felony murder, and we cannot discern from the record which theory provided the basis for the jury's determination of guilt, the conviction[s] cannot stand." (People v. Smith, supra, 62 Cal.App.4th 1233, 1239.)

The alternative aiding and abetting theory was itself infected with error in the definition of the natural and probable consequences doctrine. Assault rather than murder was specified as the actual offense committed by a coprincipal. The jury was effectively told that all of the co-defendants were responsible for the murder of Siebert if it was a natural and probable consequence of assault committed by any one of them. The aiding and abetting instruction thus reinforced the concept expressed in presentation of the invalid felony murder theory that commission of an assault

subjected all of the defendants to liability for murder without any finding of express or implied malice on the part of even one principal.

Further, the prosecutor embraced and exacerbated the damage from the instructional errors by repeatedly arguing to the jury that according to the instructions the assault of Siebert by one defendant rendered all of the defendants responsible for murder without any necessity "to prove that the defendant intended that the act would result in the death of a human being." The prosecutor stressed: "The defendants aided and abetted the crime. Think of it, ladies and gentlemen. We don't even have to show that any particular defendant threw a blow, landed a blow. It is sufficient, ladies and gentlemen, if you find, . . . if by their presence there and what they were saying, what they were doing, lent support for the person who threw the first blow, they are equally as guilty; and they must be equally as guilty."

The jury was also prevented from fairly determining whether to convict some or all of the defendants of lesser homicide offenses. The prosecutor indicated that the defendants did not intend to kill the victim, and consequently voluntary manslaughter was removed from consideration as a lesser offense verdict pursuant to the court's erroneous instruction. The failure of the court to give instructions on lesser, misdemeanor target offenses dissuaded the jury from considering verdicts of involuntary manslaughter for the less culpable appellants, at least under an aiding and abetting theory. Even if the jurors felt that some or all of the appellants were guilty of less than second degree murder, the errors in the lesser offense instructions in conjunction with defective instructions on aiding and abetting and felony murder left the jury without guidance to properly compartmentalize the verdicts in accordance with proportional responsibility. (See People v. Mouton, supra, 15 Cal.App.4th 1313, 1318-1319.) The apparent result of the errors was that the jury improperly threw a second degree murder net over all of the appellants regardless of perceived degree of blame.

We conclude that in light of the multitude and gravity of the instructional errors committed, along with the serious infringement on the right to impeach the principal prosecution witness, we have no choice but to reverse the convictions of all four appellants. (People v. Baker, supra, 74 Cal.App.4th 243, 254.) [18]

VII. The Denial of Bongard's Motion for Acquittal (Bongard Only).

Appellant Bongard claims that the trial court erred by denying his motion for acquittal made at the conclusion of the prosecution's case. He argues that "the prosecution presented no other evidence linking Bongard to the case other than testimony by Pratt," who was an accomplice and therefore his testimony demanded corroboration. Bongard maintains that "[n]o evidence corroborates Pratt's identification" of him as a participant in the beating, so denial of the motion for acquittal pursuant to Penal Code section 1118 was error.

"Section 1118 (like its companion provision, § 1118.1) establishes a procedure for summary acquittal

when the prosecution presents insufficient evidence of a criminal charge during its case-in-chief. It provides in relevant part, `In a case tried by the court without a jury . . . the court on motion of the defendant or on its own motion shall order the entry of a judgment of acquittal of one or more of the offenses charged in the accusatory pleading after the evidence of the prosecution has been closed if the court, upon weighing the evidence then before it, finds the defendant not guilty of such offense or offenses.' " (People v. Norris (2002) 95 Cal.App.4th 475, 478.) "Section 1118.1 requires the trial court in a jury trial on its own motion or the motion of the defense to acquit the defendant if at the close of the case of either party the evidence is insufficient to sustain conviction on appeal. When reviewing the denial of a motion to acquit for insufficient evidence made at the close of the prosecution's case, we consider only the evidence then in the record." (People v. Smith (1998) 64 Cal.App.4th 1458, 1464, fn. omitted.)

"The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, `whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.' [Citations.]" (People v. Crittenden (1994) 9 Cal.4th 83, 139, fn. 13.) "In applying the substantial evidence rule to a motion under Penal Code section 1118.1, we must, where the trial court has denied the motion, assume in favor of its order the existence of every fact from which the jury could have reasonably deduced from the evidence whether the offense charged was committed and if it was perpetrated by the person or persons accused of the offense. [Citations.] Accordingly, we may not set aside the trial court's denial of the motion on the ground of the insufficiency of the evidence unless it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below." (People v. Wong (1973) 35 Cal.App.3d 812, 828.)

Pratt's testimony, without any corroboration, provides substantial evidence to support the conviction of Bongard. Only if Pratt is found to be an accomplice to the murder of Siebert does his testimony require corroboration under Penal Code section 1111, which "provides: `A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. [¶] An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.' " (People v. Tobias (2001) 25 Cal.4th 327, 331; see also People v. Arias (1996) 13 Cal.4th 92, 142-143.) "Consequently, a conviction cannot stand on the uncorroborated testimony of an accomplice (see § 1111) . . . ." (People v. Verlinde (2002) 100 Cal.App.4th 1146, 1157.) "The statute is designed to prevent lay jurors from arriving at a verdict of conviction as to a defendant, based solely upon evidence which is possibly tainted by an accomplice's desire to secure leniency through implicating others." (People v. McGavock (1999) 69 Cal.App.4th 332, 335.)

" `In order to be an accomplice, the witness must be chargeable with the crime as a principal (§ 31) and not merely as an accessory after the fact (§§ 32, 33).' (People v. Sully (1991) 53 Cal.3d 1195, 1227 [283 Cal.Rptr. 144, 812 P.2d 163].) Aiders and abettors are included in the category of principals. (§ 31.)" (People v. Verlinde, supra, 100 Cal.App.4th 1146, 1158.) Section 31 "defines principals to include `[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . .' [Citations.] A mere accessory, however, is not liable to prosecution for the identical offense, and therefore is not an accomplice." (People v. Horton (1995) 11 Cal.4th 1068, 1113-1114.) "To be an accomplice, a witness must have ` " `guilty knowledge and intent with regard to the commission of the crime. . . .' " ' [Citations.] The definition of an accomplice `encompasses all principals to the crime including aiders and abettors and coconspirators.' [Citation.] To be an accomplice, one 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. DeJesus (1995) 38 Cal.App.4th 1, 23.) The defendant has the burden of proving the witness's status as an accomplice by a preponderance of the evidence. (People v. Fauber, supra, 2 Cal.4th 792, 834; People v. Sully, supra, 53 Cal.3d 1195, 1228.) "However, when the prosecution introduces evidence during its case in chief which establishes the accomplice status by a preponderance of the evidence, defendant's burden is satisfied." (People v. Martinez (1982) 132 Cal.App.3d 119, 130.)

Bongard maintains that Pratt was established as an "aider and abettor of the assault," and thus an accomplice, by his own testimony and that of Romero. "A person is . . . guilty as an aider and abettor if, with the requisite state of mind, that person in any way, directly or indirectly, aided the actual perpetrator by acts or encouraged the perpetrator by words or gestures." (People v. Nguyen (1993) 21 Cal.App.4th 518, 529.) " `A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime.' [Citations.]" (People v. Campbell (1994) 25 Cal.App.4th 402, 409; see also People v. Dyer, supra, 45 Cal.3d 26, 60; People v. Gibson (2001) 90 Cal.App.4th 371, 386.) Presence at the scene of the crime and failure to prevent it, while not sufficient alone to establish aiding and abetting, are pertinent factors to be considered along with companionship with the perpetrators, and conduct before and after the offense, including flight. (People v. Campbell, supra, at p. 409; In re Jose T. (1991) 230 Cal.App.3d 1455, 1460; People v. Mitchell (1986) 183 Cal.App.3d 325, 330; People v. Chagolla (1983) 144 Cal.App.3d 422, 429.)

"[I]n order to ensure that the purported aider and abettor has the mens rea consistent with criminal liability, case law has established that such a person 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. Cook (1998) 61 Cal.App.4th 1364, 1369.) " `[A]n aider and abettor will "share" the perpetrator's specific intent when he or she 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. . . .' [Citation.]" (In re Meagan R., supra, 42 Cal.App.4th 17, 22.) The mens rea of an accomplice " `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.]" (People v. Garrison (1989) 47 Cal.3d 746, 778, quoting People v. Croy (1985) 41 Cal.3d 1, 12, fn. 5; People v. Culuko, supra, 78 Cal.App.4th 307, 322-323.)

Pratt's testimony placed him at the scene of the assault, but nothing more. According to his own account of the incident, Pratt followed his friends Rath, Bongard and Schwind from Pliler's house to the scene of the assault after his observation that Neitz was "arguing with somebody" and "about to get into a fight." He stayed more than 50 feet to the rear of the defendants as they ran toward the victim. Except to point out the conflict between Neitz and an unknown third party that preceded the attack upon Siebert, Pratt did not speak with the defendants or even motion to them. He remained behind and physically apart from the defendants when they reached Siebert. As the assault unfolded, Pratt watched from the sidewalk without offering assistance to the defendants or attempting to stop the beating. Nor did he join the other defendants during their brief confrontation with the occupants of the pickup truck after the assault. He then separated from the defendants on the walk back to Pliler's house, and departed on his own.

"It is well settled that aiding and abetting the commission of a crime require some affirmative action. The mere knowledge or belief that a crime is being committed or likely to be committed, and the failure on the part of the one having such knowledge or belief to take some steps to prevent it, in no sense amounts to aiding and abetting." (People v. Weber (1948) 84 Cal.App.2d 126, 130.) Mere "presence at the scene and the failure to take steps to prevent a crime does not establish one as a principal by aiding and abetting." (People v. Vernon (1979) 89 Cal.App.3d 853, 862; see also People v. Joiner (2000) 84 Cal.App.4th 946, 967; People v. Villa (1957) 156 Cal.App.2d 128, 134.) "It is elementary that one who merely stands by, watching an assault and even approving of it is not aiding and abetting. [Citation.] Such a person is a mere bystander . . . ." (People v. Luna (1956) 140 Cal.App.2d 662, 664.) "The test is whether the accused, in any way, directly or indirectly, aided the perpetrator by acts or encouraged him by words or gestures [citations]." (Pinell v. Superior Court (1965) 232 Cal.App.2d 284, 287.) "[T]here must be some evidence to show that the alleged aider or abettor had some knowledge that a crime was to be committed [citations], and evidence to show that there was some affirmative action or an omission to act by the alleged confederate [citations]. [¶] On the other hand, while mere presence at the scene of an offense is not sufficient in itself to sustain a conviction, it is a circumstance which will tend to support a finding that an accused was a principal. [Citations.] It is a circumstance to consider together with the accused's companionship and his conduct before and after the offense." (People v. Laster (1971) 18 Cal.App.3d 381, 388.)

Nothing in Pratt's testimony demonstrates that he instigated, encouraged or advised the commission of the crime, or was present for the purpose of assisting in its commission, as is necessary to prove his status as an accomplice. (People v. Joiner, supra, 84 Cal.App.4th 946, 967.) He was friends with the defendants, and may have been aware that they were inclined to enter the fray to at least prevent any

harm to Neitz, but his conduct during and after the assault belies any intent to offer any assistance to the cause of assaulting the victim. (People v. Hayes (1999) 21 Cal.4th 1211, 1272; People v. Horton, supra, 11 Cal.4th 1068, 1115-1116.)

The additional testimony of Romero did not establish Pratt's status as an accomplice by a preponderance of the evidence. Romero ambiguously testified that a man he knew as Pratt was "possibly" the belated participant in the beating who kicked the victim a few times as the assault ended. Romero never identified the "fourth" assailant as Pratt, or anyone else. His only definitive description of Pratt's connection with the assault was that he was "at the scene" of the fight, but not "in the middle" of it.

We conclude from the evidence presented by the prosecution that Pratt was not an accomplice. [19] Therefore, his testimony did not require corroboration under Penal Code section 1111, and Bongard's motion for acquittal was properly denied.

VIII. The Sufficiency of the Evidence to Support the Verdict Against Appellant Neitz (Neitz Only).

Neitz argues that "there is insufficient evidence to support the judgment of guilty of second degree murder, based upon aiding and abetting." He insists that the eyewitness testimony of Romero and Butturini was "too unreliable, inconsistent and unbelievable" to support an identification of him as one of the assailants. Neitz also submits "there is absolutely no evidence that he intended to instigate the assault" upon Siebert.

We review the record in accordance with the familiar substantial evidence rule. " `When considering a challenge to the sufficiency of the evidence to support a criminal conviction, "the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence-that is, evidence which 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. Williams, supra, 16 Cal.4th 635, 678.)

The evidence demonstrated that Neitz was not merely a detached figure at the scene of the crime. Moments before the attack upon Siebert, Neitz was positively identified, even by his friends, as the one who precipitated the entire incident by leaping from his car to angrily confront and threaten Butturini on the street for no apparent reason. His presence at the scene and affirmative conduct in connection with the crime is convincingly established. The evidence, considered as it must be in the light most favorable to the judgment, further discloses that both Romero and Butturini identified Neitz as an active participant in the subsequent beating of Siebert. Although Butturini did not see Neitz deliver any blows to the victim, he testified that Neitz was among the group of three or four people who tightly surrounded Siebert in the moments just before the beating began. Romero identified Neitz, along with Rath, as the two assailants who inflicted most of the punches and kicks to the head and chest of Siebert. Immediately after the fight, Romero also observed blood on Neitz's

torn shirt.

We disagree with appellant's argument that the testimony of Butturini and Romero was "so riddled with inconsistencies as to be unbelievable." " ` " `Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.]' . . . ." [Citation.]' [Citation.]" (People v. Harlan (1990) 222 Cal.App.3d 439, 453.) The testimony of a witness who was apparently believed by the trier of fact may be rejected on appeal only if that testimony was physically impossible of belief or inherently improbable without resort to inferences or deductions. (People v. Jackson (1992) 10 Cal.App.4th 13, 21; In re Andrew I. (1991) 230 Cal.App.3d 572, 578; People v. Breault (1990) 223 Cal.App.3d 125, 140-141.)

We cannot reweigh the evidence, and do not consider any of the testimony of the People's witnesses so inherently lacking in credibility as to be unworthy of consideration on appeal. We recognize that Romero's testimony generally suffered from scores of inconsistencies, and his identification of Neitz was no exception. Although Romero made a positive identification of Neitz at trial, he gave confusing testimony on the nature of the tattoos he viewed. To the police, Romero described the tattoo on one of the perpetrators as some type of "Chinese" design in a striped band around the arm. Photographs of Neitz's tattoos of a bulldog and wizard were shown to Romero at trial, and the witness agreed that they were not identical to those he saw on the person he identified as Neitz. As a reason for the discrepancy in the tattoo descriptions, Romero explained that the sleeves on Neitz's shirt covered part of the design of the tattoos. Romero additionally testified that upon scrutiny Neitz was not in fact the person he knew from school, as he believed, but he "looked almost like a spitting image. They could probably pass as brothers." When he was shown a lineup before trial, Romero did not select a photograph of Neitz as one of the assailants. Pratt and Schwind testified, to the contrary, that Neitz was nowhere to be seen when the attack on Siebert began. Butturini's identification of Neitz and the acts he committed was also not without some ambiguity, specifically in his testimony of the height of the man who first approached him on the street, and his description of how Neitz crossed the street to become involved in the encounter with Siebert.

Still, at most the record reveals inconsistencies and the presentation of contrary evidence by the defense witnesses, which does not subject the testimony of prosecution witnesses to repudiation. (People v. Cantrell (1992) 7 Cal.App.4th 523, 538.) The testimony of Romero and Butturini was not physically impossible of belief or so inherently improbable that we must discount it. Accordingly, we find in the record substantial evidence that Neitz encouraged commission of the assault upon Siebert with the requisite intent.

DISPOSITION

The judgments against all four appellants are reversed and the case is remanded to the trial court for

proceedings not inconsistent with the views expressed herein.

We concur:

Marchiano, P. J.

Stein, J.

1. The appeal by Bongard (A089581) has been designated as the "lead case."

2. At a photo lineup Butturini identified a man named Marcus Howard rather than Neitz as the person who exited the light colored car and first approached him on Bel Air Drive.

3. Romero told the police that he believed one of the people on the sidewalk who was later the victim of the beating was "a Black person," but he was mistaken in the dimly lit conditions.

4. Schwind was also friends with Rath, Neitz and Pratt, but had only known them for about a year.

5. Other items of clothing purportedly worn by the defendants were also sent to Cooksey by the Vacaville Police Department, but he was not requested to perform any analysis of them.

6. Appellants have raised some issues in common, and when they have we will so indicate. Where the contentions of the individual appellants differ, we will discuss and resolve them separately.

7. With the exception of Bongard.

8. Rath and Neitz did not expressly join in this aspect of the new trial motions in the trial court, which was presented in Schwind's revised motion after they were sentenced. Nevertheless, with the complete record of undisputed facts filed in these consolidated appeals we may review the entirety of this constitutional issue directly rather than upon a habeas corpus petition. (See People v. Blanco (1992) 10 Cal.App.4th 1167, 1173; People v. Allen (1974) 41 Cal.App.3d 196, 201, fn. 1; People v. Norwood (1972) 26 Cal.App.3d 148, 153.)

9. Prior to the hearing on the new trial motions, the trial judge recused himself from hearing Schwind's motion. He heard and denied the motions of Neitz, Bongard and Rath, based upon a finding that the information in Romero's criminal record was not admissible to impeach him. A different judge who subsequently heard Schwind's motion determined that nondisclosure and exclusion of the impeachment evidence against Romero was error, but not prejudicial to appellants.

10. Penal Code section 1054.1 reads: "The prosecuting attorney shall disclose to the defendant or his or her attorney all of the following materials and information, if it is in the possession of the prosecuting attorney or if the prosecuting attorney knows it to be in the possession of the investigating agencies: [¶] (a) The names and addresses of persons the prosecutor intends to call as witnesses at trial. [¶] (b) Statements of all defendants. [¶] (c) All relevant real evidence seized

or obtained as part of the investigation of the offenses charged. [¶] (d) The existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of the trial. [¶] (e) Any exculpatory evidence. [¶] (f) Relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at the trial, including any reports or statements of experts made in conjunction with the case, including the results of physical or mental examinations, scientific tests, experiments, or comparisons which the prosecutor intends to offer in evidence at the trial."

11. "Davis v. Alaska addressed trial rights, not pretrial disclosure of information . . . ." (People v. Gurule (2002) 28 Cal.4th 557, 593.) Our high court recognized in People v. Hammon (1997) 15 Cal.4th 1117, 1126, that "it is not at all clear `whether or to what extent the confrontation or compulsory process clauses of the Sixth Amendment grant pretrial discovery rights to the accused.' [Citations.]" In response to the defendant's request for extension of the due process and confrontation rights to discovery of privileged information "before trial," the court concluded: "We do not, however, see an adequate justification for taking such a long step in a direction the United States Supreme Court has not gone. Indeed, a persuasive reason exists not to do so. When a defendant proposes to impeach a critical prosecution witness with questions that call for privileged information, the trial court may be called upon, as in Davis, to balance the defendant's need for cross-examination and the state policies the privilege is intended to serve. (See Davis, supra, 415 U.S. at p. 319 [94 S.Ct. at p. 1112].) Before trial, the court typically will not have sufficient information to conduct this inquiry; hence, if pretrial disclosure is permitted, a serious risk arises that privileged material will be disclosed unnecessarily." (Id. at p. 1127.)

12. The trial court may have excluded the evidence based upon Evidence Code section 352, but the record is clear that the court did not exercise its discretionary powers under that section. We therefore do not consider the issues that such a ruling may have raised.

13. The entire instruction on the natural and probable consequences doctrine was as follows: "One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, but is also guilty of any other crime committed by a principal which is a natural and probable consequence of the crime originally aided and abetted. [¶] In order to find the defendant guilty of the crime of murder, as charged in count one, you must be satisfied beyond a reasonable doubt that: [¶] 1. The crime of assault by means of force likely to produce great bodily injury was committed; [¶] 2. That a defendant aided and abetted that crime; [¶] 3. That a co- principal in that crime committed the crime of assault by means of force likely to produce great bodily injury; and, [¶] 4. The crime of murder was a natural and probable consequence of the commission of the crime of assault by means of force likely to produce great bodily injury." (Italics added.)

14. The difference between implied malice murder and involuntary manslaughter is explained in the terms of CALJIC No. 8.51: " `There are many acts which are lawful but nevertheless endanger human life. If a person causes another's death by doing an act or engaging in conduct in a criminally negligent manner, without realizing the risk involved, he is guilty of involuntary manslaughter. If on the other hand, the person realized the risk and acted in total disregard of the danger to life involved, malice is implied, and the crime is murder.' " (People v. Brown (2001) 91 Cal.App.4th 256, 267- 268.)

15. We note that the trial court was instructing on then well-established principles of manslaughter and could not have predicted the Supreme Court's pronouncements on this issue.

16. Instead, the jury must be instructed that "unintentional killing in unreasonable self- defense is involuntary manslaughter." (People v. Blakeley, supra, 23 Cal.4th 82, 93; People v. Johnson, supra, 98 Cal.App.4th 566, 577.) "Any other conclusion would create the intolerable situation in which a defendant who kills unlawfully and with conscious disregard for life, but lacks malice because of imperfect self- defense, could be found guilty of both voluntary manslaughter and involuntary manslaughter-offenses with significantly different penalties -with no element differentiating the two crimes." (People v. Johnson, supra, at p. 577, fn. omitted.)

17. CALJIC No. 8.50, reads in pertinent part: "To establish that a killing is murder and not manslaughter, the burden is on the People to prove beyond a reasonable doubt each of the elements of murder and that the act which caused the death was not done in the heat of passion or upon a sudden quarrel or in the actual, even though unreasonable, belief in the necessity to defend against imminent peril to life or great bodily injury."

18. Our reversal of the judgments on the grounds we have specified makes it unnecessary for us to confront many of the other issues raised by appellants, both individually and in common: the separate claim of prosecutorial misconduct associated with the instructional errors; the denial of severance motions and the prejudice from consolidated trials; the admission of hearsay evidence of bloody shoes against appellant Rath; the claims of incompetence and conflict of interest of counsel; and the lack of the trial court's jurisdiction to hear appellants' new trial motions or impose sentence after recusal in the case. The only remaining contentions we must resolve despite the reversal of the verdicts are those that would, if found meritorious, prevent retrial under double jeopardy principles. Accordingly, we proceed to address the issues of the denial of Bongard's motion for acquittal and the sufficiency of the evidence to support the conviction of appellant Neitz on an aiding and abetting theory. (See People v. Hill, supra, 17 Cal.4th 800, 848; People v. Memro (1985) 38 Cal.3d 658, 690.)

19. Moreover, the law "requires only slight corroboration" of an accomplice's testimony, "and the evidence need not corroborate the testimony in every particular." (People v. Gurule, supra, 28 Cal.4th 557, 628.) We observe that Romero's identification of Bongard as one of the three active assailants, equivocal as it was, was still at least as persuasive as his testimony that Pratt was possibly the "fourth person" involved in the final moments of the beating. Thus, even if we determined that Pratt was an accomplice based on Romero's testimony, we would find in the same testimony adequate slight corroborating evidence of Bongard's guilt. (People v. Frye, supra, 18 Cal.4th 894, 966; In re Ricky B. (1978) 82 Cal.App.3d 106, 111- 112.)

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