

THE PEOPLE, Plaintiff and Respondent,
v.
KENDEN M. IGE, Defendant and Appellant.

No. D055893.

Court of Appeals of California, Fourth District, Division One.

Filed September 10, 2010.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

HUFFMAN, J.

A jury convicted Kenden M. Ige of two counts of first degree murder (Pen. Code,^[1] § 187, subd. (a)) and found true the special circumstances as to each count that the crimes involved multiple murders (§ 190.2, subd. (a)(3)) and they were committed by means of lying in wait (§ 190.2, subd. (a)(15)). The trial court sentenced Ige to prison for two consecutive terms of life without the possibility of parole.

Ige appeals, contending the trial court prejudicially erred when it instructed the jury on aiding and abetting under CALCRIM No. 400 and when it admitted mitochondrial DNA evidence that dog hairs found on evidence relevant to the murders matched hairs from three dogs at Ige's mother's home where he lived. We find no prejudicial error and affirm.

BACKGROUND SUMMARY

Because Ige does not challenge the sufficiency of the evidence to support his convictions for murdering Cheuk Lun Cheung (known as Alan) and Haang Fung Chin (known as Edward),^[2] we merely summarize the facts to provide background for our discussion of Ige's contentions on appeal.

On the morning of October 3, 2003, Wayne Mix and Ron Perry, employees of a Christian youth camp in Newberry Springs, California, saw a column of smoke about a half mile away coming from the edge of their property where a campfire ring was located and went to investigate, driving Mix's truck up the dirt road toward the area of the smoke. As they did so, proceeding cross-country around a hill, they saw a small dark blue four-door Toyota, followed by a white two-door Toyota approaching them from the direction of the fire. Mix parked his truck in the middle of the road so the approaching cars could not get around him. When the two cars stopped, Mix was able to clearly see from his truck the driver of the blue car and his passenger, as well as a driver in the white car. After Mix informed the occupants of the cars that they were on private property and asked them what they were doing there, the driver of the blue car responded that they had gotten "stuck down there" and had started a fire because of the cold. When Mix asked if the fire was out, the same driver, who appeared anxious and in a hurry, replied it was. Mix then pulled to the side of the road, and the two cars took off "quickly." As the cars passed them, Mix and Perry noticed that the white Toyota had a "TRD" decal on its hood.

Mix and Perry proceeded to the campfire ring, which was still blazing, and extinguished the flames. After doing so, they noticed some burnt items in the fire pit, including pieces of clothing, a cell phone, a necklace, and a carpeted car or trunk mat. In a hole in the ground near the fire pit, they found a sock, a CD, and a cigarette butt, and on a barbed wire fence close by they found a plastic bag that appeared to have blood on it. Thinking there might have been some criminal activity involving the occupants of the two Toyotas, the camp employees called the sheriff's department to report the matter.

Mix told the responding deputy sheriff that the two occupants of the blue Toyota appeared to be Asian based on their skin tone and hair color. Perry said the occupants of that car appeared to be either Hispanic or Asian, and of mixed race. Both employees thought the driver appeared to be between 21-23 years of age. After the deputy talked further with the employees and collected various items found by them at the campsite, as well as a broken CD from the hole in the ground that appeared to have a picture of an Asian person on it with Asian wording, he left the area.

Subsequently Perry, who had continued sifting through the fire pit, discovered a burnt wallet that contained a California driver's license and a printed check and called the sheriff's department again to report his find. When another deputy eventually returned to the campsite that evening, he determined the name on the burnt driver's license was Alan's and that Alan and his friend Edward had just been recently reported as missing from Monterey Park, California. The deputy then collected many items from the fire pit area he believed might have evidentiary value, including five cigarette butts (one with the words "Turkish Royal" and a blue camel visible on it found near the fire pit), two Gatorade bottles (one described as Cool Blue flavor), a drinking straw, a plastic bag with what appeared to be blood on it, and remnants of a burnt white t-shirt. The following day, several homicide detectives processed the fire pit area as a crime scene, taking numerous photographs, some of which included tire tracks found near the fire pit that looked as if a vehicle had backed up and stopped.

During the subsequent investigation, it was determined that Alan's girlfriend Elaine Zhao, with whom he had just moved into a condominium (condo), had attempted to reach him on both of his cell phones after 5:00 p.m. on October 2, 2003, but to no avail. Elaine had earlier talked with Alan twice by phone that day, the last time around 3:00 p.m., when she heard in the background Edward talking and a beeping sound that Alan's other phone made. Elaine had also attempted to locate Alan by calling several of his friends and family members, including his friend Jeff Katayama, whom she viewed as an enemy because he owed Alan money. She even drove to Jeff's house in San Gabriel, California, and attempted to call him again when she saw his car present, but he did not answer.

Although Elaine then went to work, she continued making phone calls in an attempt to locate Alan because it was very unusual for him not to pick up his cell phone calls from her. Jeff eventually answered Elaine's call around 11:30 p.m., telling her he had met with Alan earlier in the day at Ige's house and that he had given Alan back some money. When she finished work, she drove to a restaurant where Edward worked to inquire as to Alan's whereabouts, but learned that Edward had not come to work as scheduled and had not responded to calls to his cell phone regarding his absence. When she returned home and Alan was still not there, Elaine reported him missing at the Monterey Park Police Department.

The police learned through interviews with Elaine and others that both Alan and Edward were very close friends who worked at different restaurants, but who frequently had lunch or dinner together and talked over the phone. Jeff, while a close friend of Alan's, was also very close to Ige who he had previously roomed with before living in a rental home with Alan for several months before Alan moved into the condo with Elaine. Jeff had moved in with Alan, in part, to ease tensions between Alan and Ige created by a money debt Ige owed Alan due to a failed project they had with Ige's younger brother Garrett to cultivate hallucinogenic mushrooms, and also to help alleviate Alan's "money problems." At the time they lived together, Jeff and Alan had grown marijuana and Jeff had also used and sold Ecstasy pills and marijuana that he purchased from Alan at a discount, often running up a tab. Besides the drugs, Alan had also attempted to get Jeff to join him in a fraudulent credit card scheme, but Jeff declined. Although Jeff never used any controlled substances with Alan, he would occasionally use them with Ige in Ige's garage that contained furniture and was considered a "hangout" or "party place." The two Ige brothers lived at the house with their mother, Debra Ige, who was half Okinawan (Japanese) and half Caucasian.

Jeff last saw Alan at around noon on October 2, 2003, when he paid him \$1,400 cash at Ige's house for a prior drug purchase. Edward was there with Alan at the time, as were Ige, Garrett, and Lawrence Hughes, who lived next door to the Iges. Jeff was at Ige's house for less than an hour that day and believed that Alan and Edward left before he did. Later, after talking with Elaine, Jeff repeatedly tried to call Alan's cell phone but was unable to reach him.

Investigating officers also determined during the investigation that Alan usually drove a very clean white Toyota Celica with a red "TRD" decal on it. They also learned that Ige, who did not own a car, occasionally drove his mother's blue Toyota Corolla and that he and his brother Garrett had learned to drive a car when they were younger on the dirt roads of their stepmother's relatives' 80-acre ranch in the Newberry Springs area near the Christian camp where the campsite fire had occurred.

Subsequently, on the evening of October 26, 2003, 24 days after the reported disappearance of Alan and Edward, a man walking his dog in the desert near Lenwood Road, west of Interstate 15 in the Barstow area, found two extensively charred bodies next to each other. When Detective Leo Griego and other officers from the Barstow Police Department responded to the area, they found a large can of charcoal lighter fluid near the burnt bodies and tire tracks within 15 feet of them. Both bodies, one found face up and the other face down, were completely unclothed, appeared mummified and had flesh missing from some of the bones. Due to the bodies' loss of muscle and tissue, it was determined that they had been out in the open and subjected to animal and insect activity for several weeks.

Testing based on dental records and deoxyribonucleic-acid (DNA) analysis indicated a high probability that the body found face up was that of Alan. A gold chain and medallion with Chinese characters on it that Alan wore daily was found around his neck as well as a wire ligature, which had created an indentation in the skin around his neck. An autopsy revealed that Alan had died from strangulation by the wire around his neck.

Although a DNA sample from the other body could not be used to determine its identity due to contamination, a unique gold necklace with a cylinder-like pendant attached containing a tiny scroll inside with Chinese characters around that body's neck was identified by Edward's father as the one Edward always wore. Because a melted plastic bag was found stuck to the top and sides of Edward's head, his cause of death was determined to have been from suffocation, which likely occurred before his body was burned.

At some point, the Barstow officers were informed of the earlier crime scene in Newberry Springs and the investigations proceeded as being related. Additional testing revealed that Alan's DNA profile was found on a bloody sock, a cardboard tube, a plastic bag, and a straw at the Newberry Springs site.

On November 4, 2003, Griego recovered Alan's white Toyota Celica, which had been located in a tow yard in Tijuana, B.C. Mexico for stolen U.S. vehicles that are taken into that country. The car still had the "TRD" decal on it and subsequent testing of the interior indicated the presence of blood in the trunk. DNA testing on a blood stain in the center of the trunk's floor mat was determined to come from a single male donor and contained a combination of alleles that matched a possible biological child of Edward's parents.

Because Alan's car matched the description of the white car involved in the fire pit incident on November 17, 2003, Griego showed each of the Christian camp employees a series of four photographic lineups, two of which depicted Ige as one of the six photos. Perry picked Ige from one of the lineups, saying he was very similar looking to the driver of the Toyota Corolla in Newberry Springs, if he had shorter hair and a thinner face. Mix also tentatively identified Ige from one of the lineups, noting if his hair were shorter and his forehead higher, he would look like the driver of the Toyota Corolla.

On November 28, 2003, Griego participated in an audio recorded interview with Ige, who told him that he found out about Alan's and Edward's murder through a newspaper. According to Ige, he had last seen Alan "a couple of months" earlier when Alan, along with Edward, dropped off a video game for Jeff at his house around noontime. They left Ige's house about half an hour to an hour later and Ige did not know if any money was exchanged at that time. Ige later received a call telling him that Alan and Edward were missing. When asked if he had ever been to the Barstow area, Ige said he had been "through there" on trips to Las Vegas, the last time being when he drove with Jeff and a girlfriend to Las Vegas in Jeff's car to celebrate Jeff's birthday. On that trip, an officer had stopped him near Barstow.^[2]

Griego participated in another interview with Ige on May 13, 2004, this one videotaped. During this second interview, Ige drank a Gatorade drink and gave general background regarding his relationship with Alan who he attended high school with and considered a good friend for at least five years. Ige again referred to seeing Alan and Edward the last time the day before they disappeared, but this time said they stopped by his house for a few hours "somewhere about dusk probably." Ige denied knowing what Alan and Edward were talking with Jeff about or whether Jeff gave money to Alan because they went into Garrett's room with Garrett and Hughes while he was busy working in the bathroom doing carpentry and tile work. Although Ige denied owing any money to Alan or Edward, he later said that in the past he had owed Alan, "[m]aybe a couple of hundred bucks."

Asked again about Barstow, Ige said he had always just passed through the city on his way to Las Vegas except for going there once to take care of the traffic citation he had received on the trip to Las Vegas for Jeff's birthday. When asked if he knew where Newberry Springs was, Ige said "no," but added that he had been to a ranch house about 45 minutes outside of Calico when he was nine or ten years old. After Griego explained where Newberry Springs was located and asked Ige if he had ever been to a Christian camp in that town about 25 miles from Barstow, Ige responded, "No, never been there."

When Griego then commented on the cigarette butts found outside Ige's house and asked him if he smoked, Ige replied that he smoked a variety of Camel brand cigarettes, but was trying to quit. Further testing revealed that five cigarette butts found at the Newberry Springs fire pit site contained DNA that matched Ige's profile and that Hughes and Garrett were possible contributors to DNA found on one cigarette and the Cool Blue Gatorade bottle found near the hole there.

On May 22, 2004, Griego executed a search warrant on the Iges' residence, collecting a pair of channel lock pliers and hair samples from each of the three resident dogs, Sadie, Buck and Sherlock. In a search of Ige's mother's blue Toyota Corolla pursuant to the warrant, it was discovered that a floor mat was missing from its trunk. Dog hairs that had been taken from the car mat found in the Newberry Springs fire pit were subsequently DNA tested and matched certain sequencing types with the three dogs who lived in the Iges' home. In addition, testing revealed that tire tread impressions recovered from the Newberry Springs crime scene either matched or shared pattern designs with the tires on Ige's mother's car, as well as with Alan's white Toyota Celica.

After further investigation, in December 2004, Ige was finally arrested and charged in this case with Alan's and Edward's murders. The above evidence was presented in much greater length in the prosecution case through a multitude of witnesses as well as experts who testified about the physical evidence and various DNA procedures and results. Although neither Perry nor Mix were able to make in-court identifications, they identified a photograph of Ige's mother's car as the blue Toyota they saw and a photograph of Alan's white Toyota Celica as the white car they saw leaving the campgrounds. The recordings of Ige's two interviews were played for the jury.

Defense Case

Monterey Park Police Detective Ron Lee testified in Ige's defense regarding several pieces of evidence provided him during the investigation of the murders. One witness had given Lee a voice mail recording dated October 7, 2003, which the witness believed contained Alan's voice. Lee had also received information from an informant, in late 2005 or the first part of 2006, that a person named James Cai was in Barstow bragging about the murders involving Alan and Edward. Lee, however, was unsuccessful in contacting Cai or his wife, who worked at the same restaurant as Edward, and had been informed that Cai had gone back to China.

DISCUSSION

I

CHALLENGE TO CALCRIM NO. 400 (AIDING AND ABETTING)

During jury instruction discussions, defense counsel requested the court read CALCRIM No. 440 defining the crime of accessory to a felony, arguing the jury could possibly find that the victims were dead at the point Ige became involved in the activities on October 3, 2003, thereby finding him only guilty of being an accessory after the fact of the murders. After expressing that it was "leery about giving this instruction because . . . it might be confusing to the jury . . . when a crime hasn't been charged," the trial court "tabled" the matter to allow the parties to further research whether the instruction would be appropriate. In the meantime, the court read the agreed upon instructions to the jury, which included CALCRIM Nos. 400 and 401 regarding aiding and abetting as well as those instructions defining the elements of murder, the requirements for the separate findings of premeditation and deliberation as to the degree of murder, and the special circumstances of multiple murder and lying in wait (CALCRIM Nos. 520, 521, 700, 702, 704, 721, 728). After doing so, the court conferred again with counsel to express its concern that CALCRIM No. 440 might be necessary in this case to clarify that a person could be an accessory after the fact if he only assisted in dumping and burning a body after the person was killed by someone else, asking counsel to address such concern to give it guidance for its ultimate decision.

The next day defense counsel presented the court with two special instructions. The first proposed instruction defined an accessory as:

"A person who, after a felony has been committed, harbors, conceals, or aids a principal in such felony with the intent that said principal may avoid or escape from arrest, trial, conviction, or punishment, having knowledge that said principal has committed said felony. [¶] A person may aid and abet a murder after the fatal blow is struck as long as the aiding and abetting occurs before the victim dies. [¶] After the victim dies, what would be aiding and abetting legally turns into being an accessory after a felony has been committed."

The second special instruction provided that:

"The crime of accessory is separate and distinct from the underlying felony. The state of mind required for being an accessory after the fact excludes that intent and state of mind required to be a principal. [¶] The crime of accessory after the fact is complete when the accused assists the principal in escaping apprehension knowing that person has committed a felony."

Ige's counsel argued that these two instructions should be given because they were consistent with the facts and defense theory that there was insufficient evidence to show Ige harbored the intent required for the charged murders and only became involved with destroying the evidence at the fire pit after the victims were dead.

The prosecutor opposed the giving of the two special instructions because they were not in accordance with the CALCRIM instructions on accessory after the fact, there were no other crimes charged than the two murders, and the question of Ige's intent for those murders would necessarily be resolved by the instructions given on aiding and abetting.

Referring the parties to the instructions on the law of homicide and the second element of CALCRIM No. 401 on aiding and abetting regarding a defendant having to know that the perpetrator intended to commit the crime,^[4] the court concluded it would not read the special instructions, but that defense counsel could certainly argue to the jury that Ige was not an aider and abettor to murder but only an accessory after the

fact. The court noted that counsel could "explain how [CALCRIM No.] 401 would basically help them distinguish somebody who came in before or after the person had died."

When defense counsel continued to argue that the jury might be misled or confused by his argument and bootstrap an accessory after the fact with the aiding and abetting theory to murder, the court acknowledged that the second paragraph of CALCRIM No. 400 regarding the natural and probable consequences theory that had already been read to the jury was a concern in this case because no other crimes were alleged and decided to reread the instruction without that paragraph. Ige's counsel did not object to the modification of CALCRIM No. 400, saying he wanted such modified "at a minimum," but still wanted his requested instructions. The court again denied the request for the additional instructions.

Before closing arguments, the court reread CALCRIM No. 400⁵¹ to the jurors, telling them that there had originally been another paragraph that did not apply and was too confusing so it was deleted. During the defense closing, Ige's counsel reread the modified aiding and abetting instructions and argued there was no evidence, only speculation, that Ige aided another person in any action in this case. Counsel then explained the crime of accessory after the fact and argued that although that crime had not been charged in this case, even if there was evidence that Ige may have been at the fire pit and had possibly assisted in destroying evidence, there was still no evidence of any specific intent on his part to murder the victims or to aid in killing them.

In the prosecutor's rebuttal argument, he asserted defense counsel only talked about accessory after the fact to limit Ige's involvement by saying he did not do anything until the victims were already dead because all the evidence pointed to Ige being involved in the murders. Because there was evidence placing the victims in Ige's presence before their deaths and placing Ige, despite his denials, at the scene of the Newberry Springs fire pit the day after the victims went missing, the prosecutor argued that Ige, together with two other people, had committed the murders. As already noted above, the jury found Ige guilty of first degree murder with regard to both victims.

On appeal, Ige contends the trial court prejudicially erred when it instructed on aiding and abetting under CALCRIM No. 400 because that instruction states an aider and abettor is "equally guilty" of the crime committed by the direct perpetrator even though an aider and abettor can also be guilty of a crime that is a lesser offense of the direct perpetrator's crime. Relying on People v. McCoy (2001) 25 Cal.4th 1111 (McCoy), People v. Samaniego (2009) 172 Cal.App.4th 1148 (Samaniego), and People v. Nero (2010) 181 Cal.App.4th 504 (Nero), Ige essentially argues the court had a sua sponte duty to correctly instruct the jury regarding applicable legal principles by clarifying that the jurors could find him guilty of a lesser offense than murder if they found he had a less culpable state of mind than the actual perpetrator. Because the court did not do so, Ige asserts it committed federal constitutional error. We find no prejudicial instructional error.

Preliminarily we note that Ige neither objected nor complained about the wording of CALCRIM No. 400 as given and there was no discussion at all regarding the "equally guilty" language of CALCRIM No. 400 below. In fact, as mentioned above, Ige's counsel repeated the instruction during his closing argument. As such, Ige, like the defendant in Samaniego, supra, 172 Cal.App.4th 1148, has forfeited this claim on appeal.⁶¹ (*Id.* at p. 1163.) Generally, "[a] party may not complain on appeal that an instruction correct in law and responsive to the evidence was too general or incomplete unless the party has requested appropriate clarifying or amplifying language." (People v. Hart (1999) 20 Cal.4th 546, 622.)

As the court in Samaniego explained, CALCRIM No. 400 is generally an accurate statement of law regarding an aider and abettor's liability, but should be modified in those "exceptional cases" where the jury could be misled because various codefendants may have acted with different mental states in committing the charged crimes. (Samaniego, supra, 172 Cal.App.4th at pp. 1163-1165.) In Samaniego, where two victims were killed in a gang-related shooting and there was no evidence as to who fired the fatal shots, the court held it would potentially be misleading under those particular facts to give the jury CALCRIM No. 400 without modification or clarification of the words "equally guilty" to properly assess each defendant's individual mental state. (*Id.* at pp. 1164-1165.) In so holding, the court reviewed McCoy, supra, 25 Cal.4th

1111, which made clear that in cases involving accomplices charged with specific intent offenses, the jury must separately determine each codefendant's mental state and may convict an accomplice of a greater offense than the actual perpetrator under an aiding and abetting liability. (*Id.* at pp. 1116-1117.) By parity of reasoning, the court in *Samaniego* determined an accomplice may be convicted of a lesser offense than the perpetrator as well, "if the aider and abettor has a less culpable mental state."¹⁷¹ (*Samaniego, supra*, 172 Cal.App.4th at p. 1164.)

We agree with the reasoning in *Samaniego*, and find that the language of CALCRIM No. 400, although essentially a correct statement of law, was potentially misleading in this case because it suggested to the jury that an aider and abettor must be found "equally" guilty of the same crime as the perpetrator even though there was no evidence as to whether Ige was a direct perpetrator of the murders and his counsel argued he was guilty at most of being an accessory after the fact of death of the two victims. (See *Samaniego, supra*, 172 Cal.App.4th at pp. 1164-1165.) However, as already noted, Ige was required to object to or request a modification of the standard instruction at trial to preserve the issue for appeal. (*Id.* at p. 1163.)

Moreover, even if Ige had properly preserved the issue for review, no prejudicial error is shown on this record. To the extent the instructional error effected Ige's constitutional rights, we examine its effect under the *Chapman v. California* (1967) 386 U.S. 18, 24, harmless error test, which provides we may find the error harmless "only if [we] determine[] beyond a reasonable doubt that the jury verdict would have been the same absent the error." (*Samaniego, supra*, 172 Cal.App.4th at p. 1165.) Although CALCRIM No. 400 as given in this case may have misdescribed "the prosecution's burden in proving the aider and abettor's guilt of first degree murder by eliminating its need to prove the aider and abettor's (1) intent, (2) willfulness, (3) premeditation and (4) deliberation, the mental states for murder," the error was harmless beyond a reasonable doubt "because the jury necessarily resolved these issues against [Ige] under other instructions." (*Samaniego, supra*, at p. 1165.)

Contrary to Ige's focus solely on the "equally guilty" language of CALCRIM No. 400, the jury was not given such instruction in a vacuum. Rather, the court also read other instructions that correctly and adequately described the mental state required to find Ige guilty of first degree murder. These instructions included, among others, the multiple murder and lying-in-wait special circumstances under CALCRIM No. 702, which required the prosecutor prove beyond a reasonable doubt that Ige acted with intent to kill even if he were found not to be the actual killer before finding that special circumstance true; CALCRIM No. 521, regarding the necessity of finding Ige acted willfully, deliberately and with premeditation if he intended to kill; and CALCRIM No. 401, which by its plain language advised the jurors that Ige could not be found guilty of aiding and abetting a crime unless the direct perpetrator committed that crime, Ige knew of the direct perpetrator's intent to commit the crime, Ige shared the same intent as the direct perpetrator, and before or during the commission of the crime, Ige did in fact aid and abet the perpetrator in committing the crime. By finding Ige guilty of first degree murder and the special circumstances true, the jury necessarily found that Ige had acted willfully and with the intent to kill. Thus, although it was unknown whether he was an actual perpetrator or an aider and abettor regarding any particular act committed upon the victims, the court's instructions on the general principles of aiding and abetting under CALCRIM No. 400 did not relieve the jury, under the court's other instructions,¹⁸¹ of finding that Ige had the intent to kill at the time of the double murders in this case.

Moreover, the record provides no support for the possibility the jury relied on CALCRIM No. 400 separately to impute a finding of first degree murder to Ige as an aider and abettor rather than making a separate determination of his mental state in this case. At no time did the prosecutor argue the "equally guilty" language could be used to impute another person's mental state to Ige. Nor did the prosecutor mention the natural and probable consequences doctrine by which the jury could have found merely a shared intent to commit some lesser crime than murder. Because that option had been deleted by the court from CALCRIM No. 400 based on Ige's counsel's earlier objection, counsel's argument that Ige was only an accessory after the death of the victims necessarily went to the jury's decision of whether he personally had the proper mental state for first degree murder in light of all the instructions. No question showing

confusion by the jurors regarding those instructions or Ige's liability as in *Nero, supra*, 181 Cal.App.4th 504 was presented to the court.

Similar to the situation in *Samaniego, supra*, 172 Cal.App.4th 1148, where the jury was also instructed under CALCRIM No. 401 in addition to the appropriate homicide instructions, on this record there is no way Ige could have been guilty of anything less than the actual killer because it would have been "virtually impossible" for Ige, if not an actual perpetrator, to know of the killer's intent to murder and "decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required." (*Samaniego, supra*, at pp. 1165-1166.) This is particularly true in view of the manner in which the two victims were killed, i.e., by strangulation with a wire ligature and suffocation with a plastic bag before their bodies were burned beyond recognition and dumped in a remote area, which provided overwhelming evidence that the killer and those who aided him in this matter acted with premeditation and deliberation. No prejudicial instructional error is shown.¹⁹¹

II

ADMISSION OF DNA EVIDENCE REGARDING DOG HAIRS

In limine, Ige's counsel requested an Evidence Code section 402 hearing regarding the admissibility of the testimony of the prosecution's animal DNA expert, Dr. Joy Halverson. When she later appeared for the hearing with over 80 pages of raw notes and various scientific articles regarding the protocols she had used during her analysis of the dog DNA on the hairs she tested that were taken from the floor mat found in the fire pit, the court granted a defense motion to continue in the interests of due process so counsel could prepare for the hearing based on all the material not provided before in discovery.

Subsequently during opening statements, the prosecutor told the jury the evidence would show that in the investigation some hair had been found on the burnt floor mat retrieved from the Newberry Springs site, that a similar mat was missing from one of the car's trunks searched at Ige's mother's house, that hair from the three dogs at the home were also taken as samples, and that those samples and the hairs on the mat were sent to Halverson, an animal DNA expert. The prosecutor opined Halverson would testify that after a comparison of the hairs, she concluded that all three of the dogs' hairs matched some of the hairs taken from the floor mat.

Later, after a series of witnesses had testified in the prosecution case, the prosecutor alerted the court to the fact his witness the next day would be Halverson, "assuming . . . her testimony is admissible." The next morning, the prosecutor proceeded with the continued evidentiary hearing regarding Halverson's testimony.

In response to questions, Halverson explained that she was a forensic scientist who owned QuestGen Forensics in Davis, California; that she had a bachelor's degree in biology, a doctorate of veterinary medicine and a master's degree in etiology; and that in 1990 she had founded "a DNA testing company called 'Zoogen' that does routine DNA testing applications for animals," including dogs and cats. Halverson testified she has been conducting forensic analyses on suspected animal DNA since 1997, estimating she had done so in 30 to 40 criminal investigations, and had also done DNA analysis in noncriminal cases, primarily for parentage testing in both animal and human cases.

At the time of the trial, Halverson had testified as an animal DNA expert in approximately 10 trials throughout the United States, five of which were as a mitochondrial DNA (mtDNA) expert. Halverson had also published a paper in the *Journal of Forensic Science* pertaining to nuclear DNA testing on dogs, and had been a contributing author for an article on bird gender determination through routine DNA testing. She had also given numerous talks about the subject of bird gender determination, which had not been peer reviewed. Halverson clarified that she had presented several of her works for a body of other scientists on

the subject of animal DNA that were peer reviewed, had given a talk on mtDNA testing at a meeting of the Academy of Forensic Science, and had also presented a talk in Europe, which included submission of a paper and a discussion of canine mtDNA testing that was also peer reviewed.

Halverson then described the two major types of DNA testing, nuclear or STR (short tandem repeats) of the cell nucleus and mtDNA testing, pointing out that, unlike nuclear DNA testing, mtDNA analysis is not a method for identifying individuals, only family groups, as it cannot distinguish between close relatives. She explained that because mitochondria (the energy source of a cell) is passed on from mother to offspring unchanged, mtDNA analysis can only identify individuals from a particular maternal lineage. The different maternal lineages are distinguished by variations occurring through occasional mutations. Halverson had been conducting mtDNA analysis with canine and feline DNA since the late 90's after it became the cutting edge testing in human forensics. Although she had never published anything regarding her mtDNA work with canines in the United States, she reiterated that she had presented her work in talks to the Academy of Forensic Science and had presented it for peer review in Europe. Halverson also read off her "CV" several other symposiums and meetings where she had presented mtDNA canine or feline testing in 2002, 2003 and 2004.

Halverson then discussed the actual process of mtDNA testing for canines, which was essentially the same as that for humans, noting she produced the same reagents for the testing as other scientists who do human mtDNA testing. If she were given hair samples that contained hair roots, Halverson would first attempt to extract nuclear DNA from them. If she obtained no results from that process, she would then "do a DNA extraction of the shaft or the other part of the root end of the hair . . . called a Keylex extraction of DNA," a technique generally accepted in the scientific community. This process was monitored through the use of both positive and negative controls to insure that the extractions were being conducted properly. Once she had an extraction, Halverson would use the accepted PCR (polymerase chain reaction) amplification technique.

Halverson clarified that in doing the mtDNA analysis, she would amplify that hair "using seven amplifications producing PCR products that overlap each other" and match to verify that the positive and negative controls were properly working. Halverson would take the PCR products from the amplification process to produce DNA sequencing reaction and data, which were then loaded onto an instrument that reads the DNA sequence. She would then compare the DNA sequences she had obtained in the above process to sequences from other known samples from the animals to see if they matched.

Halverson testified that the process she just described was generally accepted in the scientific community and she had been doing the process for "[a] decade or more now." Although she did not have the luxury of peer review for her work because she operated a one person laboratory, she maintained the integrity of her work through the positive and negative controls. In a number of cases for which Halverson had done animal mtDNA testing, the other side had employed another DNA scientist "to oversee the entire process" and she never encountered disagreement with any of her methods by those opposing experts. Halverson had testified about this process in the San Diego case involving David Westerfield.

With regard to the use of population databases to determine the random probability of an occurrence of a marker or type at a specific location, Halverson testified she had developed a mtDNA database of blood samples from 348 dogs sent to her from veterinarians in northern California, southern Oregon, and western Nevada, which included 96 of the approximately 150 breeds of dogs recognized by the American Kennel Club. Halverson believed her database was generally accepted in the scientific community for determining the random probability of a DNA type and was in sync with the databases from two other laboratories. Her canine database included 60 DNA types, and those types were found at approximately the same frequency as the other databases. Her database had been reviewed by other experts in the animal mtDNA field.

With specific regard to this case, Halverson testified she had received a reference sample for testing for canine mtDNA, had performed the process she described above to first six hairs, but was unsuccessful in obtaining sufficient matter to conduct STR testing, so she extracted 11 more hairs on which she conducted the seven overlapping sections as mentioned earlier to get PCR product for most and then DNA sequenced

them to determine their DNA sequence. Once she achieved a mtDNA type for the samples, she then compared them with the database and determined the type for each one.

Halverson did the same process for a second set of samples sent to her by Detective Griego in this case. When she compared these with the earlier samples, she found that one hair from the tan cocker spaniel named Sherlock at the Ige's home matched a hair on the mat, one hair from the chihuahua mix named Sadie matched a hair on the mat, and one hair from a brown and white husky mix named Buck matched all the other samples.

Halverson then discussed "something called a product rule in which the frequency of each marker or each variant of the marker [or type] is given an estimate of frequency in the population." She explained that the product rule was essentially "a likelihood ratio" from which one could say that the samples matched because they came from the same animal or person, or just matched by chance. Halverson proposed to just multiply the frequency results in this case to determine the random probability of having the samples all come from the same place from this trio of dogs. Doing so, she believed the probability would be "one out of a hundred thousand." Halverson was not sure whether this latter formula regarding combined probabilities had ever been proposed in the scientific community for approval.

On cross-examination, Halverson conceded her laboratory is not accredited, but explained the normal accreditation process was very expensive, that even many human DNA laboratories were not accredited for monetary reasons, and there was no separate accrediting body for canine mtDNA. Although she also acknowledged that no agency reviews her protocols, she explained that her protocols were based on her training, experience and published literature in the field, and had been scrutinized without disagreement numerous times by experts hired by the opposing side.

In response to questions by the court, Halverson explained that mtDNA testing in animals was much the same as with humans with a slightly different DNA sequence, but "plays the same role, follows the same inheritance, is subject to the same forces [as such testing on humans] that cause variation." Such testing had been done by a broad group of people, including those who work in academic laboratories in universities and other forensic laboratories. Halverson had first testified about the mtDNA testing of canines in the *Westerfield* case after a lengthy "Kelly-Fry[e]"⁽¹⁰⁾ hearing.

After hearing argument, the court overruled Ige's counsel's objection that Halverson's canine mtDNA process had not been sufficiently subject to the testing of the scientific community. After stating that it did not think *Kelly* applied because mtDNA processing was not a new or novel procedure, the court noted that even if *Kelly* did apply, it found "ample evidence to support that the process of identifying [mtDNA] in canines is generally accepted in the scientific community" satisfying *Kelly*. It also found the evidence from the hearing sufficient to support a finding that Halverson was qualified to testify about the process and that the procedures were properly applied in this case. Based on Halverson's testimony regarding her protocols and the internal controls she used in her laboratory for her testing, the court found she could testify as to her test results regarding hairs found on the car mat and the known hairs from the Iges' dogs. The court, however, found that Halverson would not be permitted to testify about using the product rule analysis involving the multiplication of the sequences to estimate the frequencies of all three dogs being in the same place. The court also granted Ige's Evidence Code section 352 arguments to preclude Halverson from mentioning the *Westerfield* case or that other defense attorneys and experts had reviewed and found no objection to her work.

Halverson then testified before the jury consistent with her testimony at the evidentiary hearing regarding her qualifications, her background and experience regarding canine DNA in general, her publications, her company, the differences between nuclear DNA and mtDNA and the related procedures and results. She also described the manner in which she assembled her database and the way in which she calculates the population frequency of a particular profile.

Halverson then testified specifically about the testing process she used in typing the unknown hairs from the burnt Newberry Springs car mat and the known hairs from the Iges' family dogs. She had performed mtDNA analyses on 11 unknown hairs found on that car mat and on hairs taken from each of the Iges' dogs, using her controls to check the integrity of her work. She then compared the results regarding the unknown hairs with those from the three Ige dogs. Six of the unknown hairs contained a haplotype that matched with Buck at a population frequency of nine percent or one in 11 dogs, one matched a haplotype with Sherlock at a population frequency of 1.2 percent or one in 90 dogs, and one matched a haplotype with Sadie at a population frequency of .9 percent or one in 110 dogs. Halverson believed that the frequencies in her database were similar to a database in Great Britain and a database funded by the U.S. Department of Justice in Washington D.C.

Relying on *Kelly, supra*, 17 Cal.3d 24, Ige contends on appeal that the trial court erred in admitting evidence of the processing, matching and statistical population frequency calculations of canine mtDNA analysis that linked hairs found on a car's floor mat recovered from the Newberry Springs fire pit to the three dogs in the Iges' home. Citing *Leahy, supra*, 8 Cal.4th 587, Ige specifically argues that the prosecution failed to show at the evidentiary hearing that the process used for such testing by Halverson and that the population frequency statistics developed and used by her to give meaning to the mtDNA results had gained general acceptance in the relevant scientific community because her testimony alone was insufficient to meet the first prong of the *Kelly* test for the admission of scientific evidence. We conclude the trial court did not err in ruling Halverson's testimony admissible.

The Applicable Law

As our Supreme Court has stated, "under the [*Kelly*] rule the proponent of evidence derived from a new scientific methodology must satisfy *three* prongs, by showing, first, that the reliability of the new technique has gained general acceptance in the relevant scientific community, second, that the expert testifying to that effect is qualified to do so, and, third, that "correct scientific procedures were used in the particular case." (*People v. Roybal* (1998) 19 Cal.4th 481, 505 (*Roybal*.) The party offering the evidence has the burden of proving its admissibility by a preponderance of the evidence. (*People v. Ashmus* (1991) 54 Cal.3d 932, 970 (*Ashmus*); disapproved on another point in *People v. Yeoman* (2003) 31 Cal.4th 93, 117.)

Under *Kelly*, "reliability" means the new technique "must be sufficiently established to have gained general acceptance in the particular field in which it belongs." (*Kelly, supra*, 17 Cal.3d at p. 30, italics omitted.) However, general acceptance does not require absolute unanimity of views, but rather a consensus of the relevant, qualified scientific community. (*Leahy, supra*, 8 Cal.4th at p. 612.) In resolving this matter, "[t]he goal is not to decide the actual reliability of the new technique, but simply to determine whether the technique is generally accepted in the relevant scientific community." (*People v. Barney* (1992) 8 Cal.App.4th 798, 810, distinguished on another point in *People v. Soto* (1999) 21 Cal.4th 512, 538.) To do so, the trial court considers the quality, as well as the quantity, of the evidence supporting or opposing the new technique and, in doing so, may consider published appellate decisions and scientific literature relating to the matter. (*Leahy, supra*, at pp. 611-612; *Kelly, supra*, at p. 32.)

Further, "[w]hen, as in DNA testing, the reliability of the technique employed is not readily apparent to lay observation or experience, *Kelly-Frye* requires determination 'whether a laboratory has adopted correct, scientifically accepted procedures' for conducting the test. [Citation.] 'Consideration and affirmative resolution of these questions constitutes a prerequisite to admissibility under the third prong of *Kelly*.' [Citation.]" (*Roybal, supra*, 19 Cal.4th at p. 505.) Thus the third prong is not merely a question of evidentiary weight, but an element of the initial admissibility determination. (See *People v. Axell* (1991) 235 Cal.App.3d 836, 862.)

Such prong involves "further scrutiny of a methodology or technique that has already passed muster under the central first prong of the [*Kelly*] test, in that general acceptance of its validity by the relevant scientific community has been established. The issue of the inquiry is whether the procedures utilized in the case at hand complied with that technique. Proof of that compliance does not necessitate expert testimony anew

from a member of the relevant scientific community directed at evaluating the technique's validity of acceptance in that community. It does, however, require that the testifying expert understand the technique and its underlying theory, and be thoroughly familiar with the procedures that were in fact used in the case at bar to implement the technique." (*People v. Venegas* (1998) 18 Cal.4th 47, 81 (*Venegas*)). Where it is shown that the correct procedures were followed, objections to the techniques go to the weight of the evidence, not its admissibility. (*People v. Wright* (1998) 62 Cal.App.4th 31, 42.) Likewise, "[s]hortcomings such as mislabeling, mixing the wrong ingredients, or failing to follow routine precautions against contamination[, which] involve 'the degree of professionalism' with which otherwise scientifically accepted methodologies are applied in a given case, . . . amount only to '[c]areless testing affect[ing] the weight of the evidence and not its admissibility' [citations]." (*Venegas, supra*, at p. 81.)

As for the second prong of the *Kelly* test, "[t]he trial court is given considerable latitude in determining the qualifications of an expert and its ruling will not be disturbed on appeal unless a manifest abuse of discretion is shown." (*Kelly, supra*, 17 Cal.3d at p. 39.) This extends to "the expert who gives testimony on general acceptance—including the issues of his [or her] credentials and impartiality [citation]." (*Ashmus, supra*, 54 Cal.3d at p. 971.)

Once a new scientific method of proof has been approved in a published appellate decision in California or out of state, the issue of general acceptance is resolved unless a showing is made that the attitude of the scientific community has changed. (*Kelly, supra*, 17 Cal.3d at p. 32.) However, because the third prong inquiry under *Kelly-Frye* is case specific, "it cannot be satisfied by relying on a published appellate decision." [Citation.]" (*Venegas, supra*, 18 Cal.4th at p. 78.)

On appeal, our standard of review of the "general acceptance" finding under the first prong of *Kelly-Frye* is "a mixed question of law and fact subject to limited de novo review." [Citation.] "[W]e review the trial court's determination with deference to any and all supportable findings of "historical" fact or credibility, and then decide as a matter of law, based on those assumptions, whether there has been general acceptance." [Citation.]" (*People v. Morganti* (1996) 43 Cal.App.4th 643, 663 (*Morganti*)). The resolution of each of the other *Kelly-Frye* prongs is reviewed under the abuse of discretion standard, giving great deference to the determinations of the trial court. (*Venegas, supra*, 18 Cal.4th at p. 91; *Ashmus, supra*, 54 Cal.3d at p. 971.)

Analysis

As to the trial court's actual ruling in this case, although it held a *Kelly* hearing on whether Halverson was qualified to testify about canine mtDNA, it ruled in the first instance that the hearing was not really required because it found the process of mtDNA comparisons, which is essentially hair comparison evidence that has long been used with humans, was not novel and was already accepted by the relevant scientific community. This initial ruling is supported by the law and evidence.

In *People v. Pride* (1992) 3 Cal.4th 195 (*Pride*), our Supreme Court noted that "[h]air comparison evidence that identifies a [person] as a possible donor has been routinely admitted in California for many years without any suggestion that it is unreliable under *Kelly-Frye*." (*Pride, supra*, at p. 239.) As Halverson's testimony pointed out, mtDNA testing on animals is very similar to such hair comparison testing on humans. While there is a slight difference in DNA sequencing, the science plays the same role with both, follows the same inheritance principles, and is subject to the same forces that cause variation. Halverson testified that mtDNA testing on canines is generally accepted in the scientific community.

Ige does not attack Halverson's qualifications as insufficient to permit her to give an opinion on general acceptance. On this record, we find no abuse of discretion in the trial court's explicit and implicit determinations she was sufficiently credentialed. "What is required here are 'academic and professional credentials which equip [the witness] to understand the scientific principles involved and any differences of view on their reliability.' [Citation.]" (*Ashmus, supra*, 54 Cal.3d at p. 972.) As the record reflects, Halverson had extensive professional achievements and experience. She had done significant scientific

work in the relevant field of canine mtDNA testing and had been a qualified testifying expert regarding such mtDNA in at least five trials.

With regard to Halverson's impartiality, even though the court did not explicitly rule on such matter, it could have reasonably found she was not "so personally invested in establishing the technique's acceptance that [s]he might not be objective about disagreements within the relevant scientific community." [Citation.] (*Ashmus, supra*, 54 Cal.3d at p. 972.) As the court in *Morganti* recognized, "'a certain degree of 'interest' must be tolerated if scientists familiar with the theory and practice of a . . . technique are to testify at all. [Citations.]" [Citation.]" (*Morganti, supra*, 43 Cal.App.4th at p. 667.) Although Halverson worked for her own laboratory, which conducted canine mtDNA research, we cannot say on this record that the trial court abused its discretion in concluding she qualified as an expert regarding mtDNA testing on canines.

Clearly, Halverson was in a position to render a credible opinion on the subject as she has been in the animal mtDNA testing business since 1990 with her DNA laboratory "Zoogen," had submitted papers on canine mtDNA testing in the *Journal of Forensic Science*, and her paper submitted on the subject in Europe was peer reviewed. Because the process was the same as that used with humans, which are part of the "animal kingdom of living things" (Merriam-Webster's Collegiate Dict. (11th ed. 2006) p. 49), the trial court reasonably concluded that the same science involving lesser animals than human beings was not novel.

However, relying on Halverson's testimony and the written materials she had submitted with her CV showing her qualifications, experience and writings with regard to working with canine mtDNA, the court alternatively found the first prong of *Kelly* established. Our review of the record confirms this finding. Although Ige's counsel argued against the admission of the evidence, he did not challenge its admissibility with any competent evidence. Nor is his reliance on *Leahy* on appeal to argue Halverson's testimony alone was insufficient to establish the general acceptance by the scientific community of her canine mtDNA testing particularly helpful to negate the court's finding on this point. (*Leahy, supra*, 8 Cal.4th at p. 611.) Although the court in *Leahy* suggested the testimony of a single witness might not be sufficient, especially in that case where a police officer was competent to administer an nystagmus (HGN) test, but found not to be competent to establish the general acceptance of HGN testing in the scientific community (*ibid.*), pointing out that under *Kelly*, general acceptance "means a consensus drawn from a typical cross-section of the relevant, qualified scientific community" (*Leahy, supra*, at p. 612), here Halverson testified not only as to her own views, but also as to the views of the scientific community. As a highly trained scientist who was very familiar with the views of the relevant scientific community, who had contributed regularly to the pertinent body of knowledge regarding canine mtDNA analysis, and who interacted with others in the field, including people in academic laboratories who were conducting canine mtDNA analysis and who were relying on the same databases that contained frequency representations similar to hers, Halverson was extremely competent to testify about the general consensus of the scientific community.

Because the testimony of a director or supervisor of a DNA forensic laboratory may alone establish general acceptance in the scientific community (*People v. Hill* (2001) 89 Cal.App.4th 48, 58, citing *People v. Allen* (1999) 72 Cal.App.4th 1093, 1099), we find Ige's arguments the protocols and testing procedures of the canine mtDNA comparisons used by Halverson have not been validated or generally accepted in the scientific community because of the lack of "peer review" research and publication due to her being a one person laboratory without merit. (See *Hill, supra*, 89 Cal.App.4th at p. 58.) We also find the trial court's credibility determination in favor of Halverson supported by the record and independently conclude such evidence supports the court's finding her testimony regarding the canine mtDNA testing and results is sufficient to show that it is generally accepted as a reliable technique by the relevant scientific community.

Ige also contends that Halverson's "population frequency statistics" derived from her database are unreliable and were not shown to be generally accepted by the scientific community. In making this argument, Ige attacks numerous aspects of Halverson's operation, again noting her testing is not subject to "peer review." Although this is true, her procedures had received peer review on paper and she applied various positive and negative controls and seven overlapping amplifications of the mtDNA producing products to check the accuracy of her work. Moreover, Halverson's database was remarkably similar in its

percentage of frequencies with the two other canine databases, one in the United Kingdom and the other sponsored by the U.S. Department of Justice, with which she compared her work results.

In general, the complaints raised by Ige regarding Halverson's work on canine mtDNA and her "population frequency statistics" derived from her database, i.e., lack of accreditation, peer review, and monitoring of protocols, are complaints that go to the weight of her testimony as opposed to its admissibility, or to *Kelly's* third prong, which he concedes he is not challenging on appeal, and are factors that were properly attacked on cross-examination and left for the jury to weigh. (*People v. Wright* (1998) 62 Cal.App.4th 31, 41.)

As our Supreme Court noted in *People v. Cooper* (1991) 53 Cal.3d 771 (*Cooper*):

"[T]he *Kelly/Frye* rule tests the fundamental validity of a new scientific methodology, not the degree of professionalism with which it is applied. [Citation.] Careless testing affects the weight of the evidence and not its admissibility, and must be attacked on cross-examination or by other expert testimony.' [Citation.] 'Once the court acts within its discretion and finds the witness qualified, as it did in this case, the weight to be given the testimony is for the jury to decide.' [Citation.]" (*Cooper, supra*, at p. 814.)

Here, the trial court properly found based on Halverson's testimony that her work protocols for purposes of the canine mtDNA testing in this case and her "internal controls" upon such work comported with established scientific procedures and protocols used in human mtDNA testing. Ige was allowed to cross-examine Halverson fully about her qualifications and the manner in which she did her testing, and to present whatever additional evidence he desired. No contrary evidence was presented. Under all the circumstances, there was no error in the court's ruling Halverson's testimony admissible and it did not commit *Kelly/Frye* error. (See *Cooper, supra*, 53 Cal.3d at p. 814.)

Further, even assuming the court erred in ruling Halverson's testimony admissible, Ige cannot demonstrate any prejudice from such admission on this record. Not only was the canine DNA evidence of limited value to the prosecution because mtDNA analysis cannot identify individuals, or in this case dogs, with any specificity, but only establishes members of various maternal lineages, and allows percentages to be assigned to types of DNA within a population, there was stronger human DNA evidence found on the five cigarettes recovered at the Newberry Springs fire pit that matched Ige's DNA profile and clearly placed him at that site. Additionally, there was an abundance of other competent circumstantial evidence that supported a finding of Ige's presence at the fire pit. There was evidence provided by the employees of the Newberry Springs camp during the investigation that Ige, who often drove his mother's blue Toyota Corolla, matched the description of the driver of a blue Toyota Corolla seen driving away from the fire pit. Those employees also identified photographs of Ige's mother's car as being the same or similar to that blue car, and other experts testified that tire tracks found near the fire pit matched or shared patterns with the tires on Ige's mother's car. Because the complained of dog mtDNA evidence was merely a small part of the prosecution evidence presented to show Ige's presence at the Newberry Spring's fire pit on October 3, 2004, it was not reasonably probable he would have obtained a better result in the absence of Halverson's expert testimony. (*People v. Watson* (1956) 46 Cal.2d 818, 836.) No prejudicial evidentiary error is shown.

DISPOSITION

The judgment is affirmed.

WE CONCUR:

McCONNELL, P. J.

IRION, J.

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

[2] Consistent with the practice followed in the trial court, to avoid confusion due to many shared last names, we refer to the victims and most individuals in this matter by their first or adoptive names.

[3] Police records showed that Ige had been stopped August 16, 2003 on Interstate 15, one exit south of the Lenwood exit, which provided access to the area of the desert where the burned bodies were found.

[4] As read to the jury, CALCRIM No. 401 provided that: "To prove that the Defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that [1] the perpetrator committed the crime, (2) the Defendant knew that the perpetrator intended to commit the crime, (3) before or during the commission of the crime, the Defendant intended to aid and abet the perpetrator in committing the crime, and (4) the Defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. [¶] Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to and does in fact aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. If all these requirements are proved, the Defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. [¶] If you conclude the defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the Defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime, does not by itself make him or her [an] aider and abettor."

[5] As read to the jury, CALCRIM No. 400 provided that: "A person may be guilty of a crime in two ways: (1) He or she may have directly committed the crime. I will call that person the perpetrator. (2) He or she may have aided and abetted a perpetrator who directly committed the crime. A person is equally guilty of a crime whether he or she committed it personally or aided and abetted the perpetrator who committed it."

[6] Interestingly, Ige does not complain on appeal that the trial court erred in refusing his request to give the two special instructions regarding accessory after the fact.

[7] *Nero, supra*, 181 Cal.App.4th 504 essentially followed the holding of *Samaniego, supra*, 172 Cal.App.4th 1148, but expanded its application to even cases involving "unexceptional circumstances" where the facts showed jury confusion regarding the instructions on aider and abettor liability and lesser and greater mental states. (*Nero, supra*, at pp. 518-520.) The court in *Nero* reached the conclusion that the jury was misinstructed and misled by the "equally guilty" language of the precursor to CALCRIM No. 400 (CALJIC No. 3.00) based on the facts of that case, which showed the jury had asked several times whether it could convict the defendant's sister as an aider and abettor of a lesser crime than the charged murder committed by the defendant and the court merely reread CALJIC Nos. 3.00 and 3.01. (*Nero, supra*, at p. 517.)

[8] Based on the elements in CALCRIM No. 401, if Ige was found not to be an actual perpetrator, but found to be only involved in the killings while having a less culpable mental state than the actual killer as his counsel argued in closing, he could not have been held liable as an aider and abettor (*People v. Beeman* (1984) 35 Cal.3d 547, 560) because "[t]here must be proof that the accused not only aided the actor but at the same time *shared the criminal intent*" (*Pinel v. Superior Court* (1965) 232 Cal.App.2d 284, 287) for such liability.

[9] Subsequent to this trial and the decision in *Samaniego, supra*, 172 Cal.App.4th 1148, CALCRIM No. 400 was revised to delete the word "equally." (April 2010 CALCRIM Supp.)

[10] *People v. Kelly* (1976) 17 Cal.3d 24 (*Kelly*); *Frye v. United States* (D.C. 1923) 293 F. 1013 (*Frye*). Although the federal *Frye* analysis has been superseded by *Daubert v. Merrell Dow Pharmaceuticals, Inc.* (1993) 509 U.S. 579, the *Kelly-Frye* formulation continues to apply in California and is generally referred to now as the *Kelly* standard. (*People v. Leahy* (1994) 8 Cal.4th 587, 611-612 (*Leahy*).