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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

In re DENNIS GARCIA GUZMAN, on Habeas Corpus.	2d Crim. No. B264256 (Super. Ct. Nos. 1312678, 1453254) (Santa Barbara County)

Petitioner Dennis Garcia Guzman seeks habeas relief from his conviction for first degree murder based on instructional error following the Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). We grant the petition and relief requested. We reduce petitioner's conviction to second degree murder and afford the People the option of retrying him on the first degree murder charge. (See *id.* at p. 168.)

PROCEDURAL AND FACTUAL BACKGROUND[1]

Hector Perez was fatally shot in an alleyway in Santa Maria, California. Minutes before the shooting, Alexis Guzman ("Alexis") saw Perez in the alleyway. The two got into a verbal argument over the volume of Perez's car stereo. Alexis was a member of the West Park street gang, and the alley was claimed as West Park gang territory. When the argument was not resolved to Alexis's satisfaction, he sent off a flurry of text messages.

Alexis texted one gang member, Javier Mendez, to bring him a knife. When Mendez could not, Alexis sent him a message stating: "Come by fool we going to do something right now." At the same time, Alexis told his brother, petitioner Dennis Guzman ("Dennis"), who is also a West Park gang member, that a member of a rival gang was in the alley, even though Perez was not a gang member. Alexis also informed his girlfriend that he was "about to beat some fool right now." Dennis did not rush to Alexis's aid; instead, he took the time to borrow a gun from another gang member (Luis Ruiz) before coming to the alley. Within minutes, the alley was full of West Park gang members and friends Perez had summoned.

A fist fight ensued. Eyewitness accounts of the fight differed, but a few facts were undisputed: Perez was unarmed and did not throw the first punch. The fight ended when Perez was shot twice at point blank range. Eyewitness accounts of the

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[1] We have taken judicial notice of the record and this court's opinion in petitioner's prior direct appeal in *People v. Guzman et al.* (July 24, 2013, B232497) [nonpub. opn.].) (Evid. Code, §§ 452, subd. (d), 459, subd. (a).) The facts are taken from our prior opinion. We refer to petitioner and his codefendant (Alexis Guzman) by their first names for ease of reference.

shooter's identity also varied; the gunman was identified as Dennis, Alexis, or an unknown third person. Dennis had the gun immediately after the shooting, however, and bragged to others that he had shot Perez.

The People charged both Dennis and Alexis with first degree murder (Pen. Code, §§ 189, 187).[2] The People added special allegations that the murder was committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)), and that a principal personally and intentionally discharged a firearm, proximately causing great bodily injury or death (§ 12022.53, subd. (d) & (e)(1)). The People further alleged that Dennis personally used a firearm (§ 12022.5, subd. (a)). The two brothers were tried jointly.

The trial court instructed the jury that it could find defendants guilty of first degree murder under four possible theories: (1) as the direct perpetrator of the crime of first degree murder (CALCRIM Nos. 520, 521); (2) aiding and abetting the other in perpetrating a first degree murder (CALCRIM Nos. 400, 401); (3) aiding and abetting the other in committing one of four predicate offenses of assault, battery, assault with force likely to cause great bodily injury, or assault with a deadly weapon, if "murder" by a coparticipant was a natural and probable consequence of one of those predicate offenses (CALCRIM No. 403); or (4) conspiring with others to commit any of the above four predicate offenses if murder furthered the conspiracy and was a natural and probable consequence of the conspiracy's common design (CALCRIM. Nos. 416, 417).

During the jury's deliberations, the foreman sent a note to the trial judge inquiring: "Does an impass[e] on the

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[2] All statutory references are to the Penal Code.

personal discharge of a firearm allegation impact verdicts on other charges? Will a deadlock on that charge result in no decision on the murder charges?" The trial judge responded that each count and allegation was to be decided separately and referred the jury to the instructions advising them how to complete the verdict forms.

Following the trial court's response, the jury found Dennis and Alexis guilty of first degree murder, with findings that they had committed the murder for the benefit of a gang and a principal had personally used a firearm causing great bodily injury or death. The jury was unable to reach a verdict, however, on the special allegation that Dennis had personally used a firearm in the commission of the murder. (§ 12022.5, subd. (a).) The trial court sentenced Dennis and Alexis to 50 years to life in state prison (25 years to life on the murder charge, plus a consecutive 25 years to life for the firearm enhancement).

Dennis and Alexis appealed their judgments of conviction, contending in part that the jury was erroneously instructed it could find them guilty of first degree murder as aiders and abettors under the natural and probable consequences doctrine. We affirmed their first degree murder convictions and they sought review in the California Supreme Court. The Supreme Court denied the petitions for review "without prejudice to any relief to which defendants might be entitled after this court decides *People v. Chiu*." (*People v. Guzman et al.*, *supra*, B232497, review den. Nov. 13, 2013, No. S212981.) One year later, the Supreme Court issued its opinion in *Chiu*, holding that an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable

consequences doctrine, but may be convicted of second degree murder. *(Chiu*, *supra*, 59 Cal.4th at p. 166.)

Following *Chiu*, Dennis and Alexis filed motions in this court to recall the remittitur in their direct appeal. We elected to treat the motions as petitions for writs of habeas corpus and issued an order to show cause returnable in the superior court for the purposes of determining: (1) whether the jury instructions regarding the natural and probable consequences doctrine were harmless error beyond a reasonable doubt in light of the evidence and arguments presented at trial; and (2) the appropriate remedy if the court found the instructional error was not harmless. Following a hearing, the superior court granted the petition as to Alexis. The People accepted a reduction of his conviction to second degree murder in lieu of a retrial, and Alexis was resentenced to state prison for a term of 40 years to life. The superior court denied the petition as to Dennis, concluding that the instructional error was harmless.[3]

Dennis renews his habeas petition in this court, disputing that the instructional error was harmless as to him.

DISCUSSION

Dennis contends his conviction for first degree murder must be reduced to second degree murder because the jury instructions permitted the jury to find him guilty of first degree premeditated murder under two invalid legal theories based on the natural and probable consequences doctrine, and the instructional error was prejudicial. (*Chiu*, *supra*, 59 Cal.4th at p. 166.)

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[3] Due to the death of the trial judge, the habeas petitions were heard before a different superior court judge.

A defendant who knowingly aids and abets another in the commission of a crime may be found guilty of a crime other than the target offense, if the second offense is a "natural and probable consequence" of the intended crime. (*People v. Medina* (2009) 46 Cal.4th 913, 920.)

In *Chiu*, the Supreme Court held that "an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine." (*Chiu*, *supra*, 59 Cal.4th at pp. 158-159.) This is because the "mental state [of first degree murder] is uniquely subjective and personal." (*Id.* at p. 166.) While all murder requires malice aforethought, "[f]irst degree murder . . . has the additional elements of willfulness, premeditation, and deliberation, which trigger a heightened penalty." (*Ibid.*) The court held that punishment for second degree murder is commensurate with the aider and abettor's culpability where the defendant does not share the actual perpetrator's intent to kill. (*Ibid.*) The court explained that "the connection between the defendant's culpability and the perpetrator's premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the . . . public policy concern of deterrence." (*Ibid.*)

The Supreme Court held, however, that aiders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles. (*Chiu*, *supra*, 59 Cal.4th at p. 166.) "Under those principles, the prosecution must show that the defendant aided or encouraged the commission of the murder with knowledge of the unlawful purpose of the perpetrator and with the intent or purpose of

committing, encouraging, or facilitating its commission. . . . An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the mens rea required for first degree murder." (*Id.* at p. 167.)

Chiu further held that when a trial court instructs a jury on two theories of guilt, one legally correct and one legally incorrect, the conviction must be reversed unless the reviewing court can conclude "beyond a reasonable doubt" that the jury based its verdict on the legally valid theory. (*Chiu*, *supra*, 59 Cal.4th at p. 167; *People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69-71.)

Although *Chiu* did not consider whether a coconspirator may be convicted of first degree premeditated murder under the natural and probable consequences doctrine, appellate courts have since clarified that *Chiu* applies equally to uncharged conspiracy liability because "the operation of the natural and probable consequences doctrines is analogous." (*People v. Rivera* (2015) 234 Cal.App.4th 1350, 1356; *In re Lopez* (2016) 246 Cal.App.4th 350, 357.)

Here, the jury was instructed it could find Dennis guilty of first degree premeditated murder under four possible theories, two of which were legally invalid under *Chiu*, i.e., aiding and abetting or conspiring to commit an assault or battery, the natural and probable consequences of which was murder. Because the jury was unable to reach a verdict as to whether Dennis personally discharged a firearm (§ 12022.5, subd. (a)), he argues the jury must have found him guilty of first degree murder on a theory of vicarious liability, and the record sheds no

light on whether the verdict was based on direct aiding and abetting principles or the natural and probable consequences doctrine. In his view, it cannot be determined *beyond a reasonable doubt* that the jury based its verdict on a legally valid theory, and therefore his conviction must be reduced to second degree murder.

The Attorney General (hereafter "respondent") admits the jury was misinstructed on the natural and probable consequences doctrine, but contends the instructional error was harmless beyond a reasonable doubt because: (1) the prosecution did not rely on the natural and probable consequences doctrine as to Dennis; (2) the evidence was overwhelming that Dennis, who brought the gun and assaulted the victim, was the shooter and intended to murder him, either as the direct perpetrator or a direct aider and abettor; and (3) in light of the uncontradicted evidence that Dennis assaulted the victim, the jury could not have based its verdict on the natural and probable consequences of Dennis having aided *another's* assault or battery, or on a conspiracy to commit an assault or battery. Respondent contends these theories applied only to Alexis, who texted Dennis to come to the alley to fight someone from a rival gang, only to have Dennis arrive with a gun and challenge the victim to a fight himself. Respondent's contentions are without merit.

First, contrary to respondent's contention, the prosecution did rely on the natural and probable consequences doctrine as to Dennis. The jury was instructed it could find Dennis and Alexis guilty of first degree murder under all four legal theories, and the jury instructions did not differentiate between the two defendants. Additionally, the jury was specifically instructed under CALCRIM No. 417 that it could find

Dennis guilty of the crime charged in *count 1* -- first degree murder -- based on his participation in a conspiracy to commit assault, battery, assault with a deadly weapon, or assault by means likely to cause great bodily injury, if a member of the conspiracy committed murder *and murder was a natural and probable consequence of the crime defendant conspired to commit*.

Second, the prosecutor repeatedly emphasized all four legal theories in her closing arguments, and incorrectly advised the jury that neither Dennis nor Alexis had to have the intent to aid and abet a murder to be found guilty of first degree murder. The prosecutor argued:

"[T]he defendants are guilty under multiple theories. . . . [A]nd it's the People's position that they are guilty under each and every theory . . . . They're guilty not only under an aiding and abetting theory, but they're also guilty under a conspiracy theory. Dennis is guilty because he actually committed the crime of murder by shooting the victim. Now, both defense [counsel] suggested that the defendants had . . . to have had the intent to aid and abet a murder. Well, that's not true, because they don't have to intend to aid a shooting.

"You heard that all they have to do is either abet one of those four target crimes, just one of them. They could aid and abet an assault. They could aid and abet a battery, they could aid and abet assault with force likely to commit great bodily injury or they could aid and abet assault with a deadly weapon. Any one of those is fine. They don't have to be the shooter, neither of them has to be the shooter.

"[Defense] counsel argued that you have to decide that one of them is the shooter. That's not true. . . . None of the elements say that either of them [has] to be the shooter. All it

says is they have to aid and abet one of the target crimes, and there is overwhelming evidence that's what they did. . . ."

The prosecutor continued that it was clear beyond a reasonable doubt that defendants knew what the natural, probable consequences were in this case, intertwining aiding and abetting theories of liability with the conspiracy theory. The prosecutor argued, "[A]iding and abetting is one way to get there. Conspiracy is a totally different way to get there." She argued:

"So, you have to understand that there are three ways to get there. One, Dennis is the shooter and he's guilty because he committed the crime. Two, Dennis is an aider and abettor because he intended to commit a murder. He's an aider and abettor because he intended to aid and abet a fight, whether it be an assault, a battery, assault with a deadly weapon, assault with great bodily injury, any of those. Any one of those makes him liable under an aiding and abetting theory or conspiracy.

"And I submit to you that he's all, but let's look at a conspiracy. Again, conspiracy is very similar to an aiding and abetting theory in that you don't have to conspire to commit murder. . . . The conspiracy is to do one of those four target crimes as well. Just happens to be very similar, but it's an independent theory. . . .

"[W]e established beyond a reasonable doubt that both defendants are guilty of the aiding and abetting theory and the conspiracy theory . . . ."

Respondent maintains the instructional error here was harmless because "overwhelming evidence was presented that Dennis personally intended to kill the victim, either as the shooter or as a direct aider and abettor." Respondent points to the evidence that Dennis brought the gun to the scene, told Ruiz

he might have to shoot somebody when he borrowed the gun, threw the first punch, had a motive to kill the victim because of an earlier fight between the two, disposed of the weapon, and bragged about the shooting. There was conflicting evidence, however, as to the identity of the shooter and whether Dennis was the only gang member assaulting the victim.[4]

Although the evidence was sufficient to support the prosecution's theory that Dennis was guilty of first degree murder as a direct perpetrator or a direct aider and abettor, this does not compel the conclusion that the jury's verdict was *necessarily based* on one of these legal theories. Because the jury was told it could find Dennis guilty under any one of four theories, the jury could have concluded that Dennis aided and abetted another gang member's assault with a deadly weapon, with murder being the natural and probable consequences of that

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[4] For example, evidence was presented that Alexis fought with the victim and that either he or another gang member shot the victim. The victim's cousin (Nabor Clemente) testified that Dennis fought with the victim, but a third unidentified person shot the victim. Debra Garcia, an eyewitness unconnected with the parties or any gang, observed more than three people fighting with the victim. She corroborated Clemente's testimony that an unidentified person shot the victim. Jose Jarquin testified that Dennis handed something to Alexis before he started fighting and then Alexis shot the victim. Gunshot residue particles were found on the back of Alexis's hands. No particles were found on the back of Dennis's right hand and only a few particles were found on the back of his left hand. In contrast, two other witnesses who received favorable plea agreements (Pedro Pozos and Luis Ruiz) testified that Dennis shot the victim or admitted doing so. Ultimately, the jury could not reach a verdict on the personal use allegation as to Dennis.

assault, or that he conspired to do the same. In light of the jury instructions and the prosecutor's closing arguments, the jury did not have to wrestle with the issue of Dennis's intent. (See, e.g., *People v. Sanchez* (2001) 86 Cal.App.4th 970, 980 [despite overwhelming evidence defendant was guilty of second degree murder based on legally correct theory of implied malice, reversal compelled where jury was also instructed on invalid second theory].)

Finally, it is impossible to tell from the jury's verdict on what theory the jury relied in finding Dennis guilty of first degree murder. None of the jury's other findings, i.e., its true findings as to the criminal street gang or the firearm enhancement, necessarily embrace an implied finding that Dennis directly aided and abetted a premeditated murder or are inconsistent with reliance on the natural and probable consequences doctrine. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1203-1205; *id.* at p. 1204 [reversal for instructional error not proper "'if the jury verdict on other points effectively embraces this one or if it is impossible, upon the evidence, to have found what the verdict *did* find without finding this point as well'"].) Because we cannot determine beyond a reasonable doubt that the jury relied on a legally correct theory, the finding of first degree murder must be reversed.

DISPOSITION

We grant the petition for a writ of habeas corpus insofar as it seeks relief from the conviction for first degree murder. The conviction on count 1 for first degree murder is vacated. In accordance with *Chiu*, *supra*, 59 Cal.4th 155, this matter is remanded to the trial court with directions to allow the People, within 30 days of the finality of this opinion, to accept a

reduction of the conviction on count 1 to second degree murder, or to elect to retry petitioner Dennis Guzman for first degree murder under a theory or theories other than natural and probable consequences. If the People accept the reduction of the conviction on count 1 to second degree murder, then the true findings on the enhancements are affirmed, and petitioner shall be resentenced.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

John F. McGregor, Judge

Superior Court County of Santa Barbara

Leslie Conrad for Petitioner Dennis Guzman.

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