Filed 10/30/17 In re Richardson CA2/2

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

In re LARRY RICHARDSON, JR., on Habeas Corpus.	B280705 (Los Angeles County Super. Ct. No. BA196991)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Jacqueline A. Connor, Judge. Petition denied.

Jonathan B. Steiner, Executive Director, Jennifer Hansen, Staff Attorney, California Appellate Project, under appointment by the Court of Appeal, for Petitioner.

No appearance for Respondent

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle, Supervising Deputy Attorney General, and Timothy L. O'Hair, Deputy Attorney General, for Real Party in Interest.

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Petitioner Larry Richardson, Jr. (defendant) filed a petition for a writ of habeas corpus seeking to vacate his sentence of life without the possibility of parole because, in his view, the evidence presented to the jury was insufficient to meet the evidentiary minimum required by Penal Code section 190.2,[1] subdivision (d), as construed by *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*). We summarily denied his petition, and our Supreme Court granted review and directed us to vacate our denial and issue an order to show cause why defendant was not entitled to relief. We have received the parties' subsequent filings and conclude that defendant's petition is without merit; accordingly, we deny it.

FACTS AND PROCEDURAL BACKGROUND

I. Facts

On June 9, 1999, three men walked into Classic Wholesale Jewelers, a store in the jewelry district of downtown Los Angeles; one of them put a gun to the back of the store owner's head and said, "Don't move, motherfucker" while another vaulted the counter to reach the store's safe; the robber who was armed then pulled the trigger, killing the owner; all of the men then fled without taking any jewelry.

Moments before the robbery began, five or six men had pulled up in two cars just across the street from Classic Wholesale Jewelers. Defendant was one of those men. The evidence is conflicting as to whether defendant was one of the three men who entered the jewelry store: One bystander, who had seen defendant previously, repeatedly testified at trial that

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

defendant had gone inside, but had previously testified at the preliminary hearing that defendant had remained outside near one of the cars. The store owner's wife, who was inside the store, did not identify defendant as one of three robbers, but acknowledged that she was behind the counter and could not see what was happening for part of the time. Minutes after the robbery ended, defendant was pulled over driving one of the two cars; the man identified as the shooter was a passenger.

This was not the first time defendant and the others had participated in armed robberies. Just seven weeks earlier, on April 20, 1999, defendant and two others walked into the Guadalajara Jewelry shop, and one of the robbers pointed a gun at two people inside while the other two robbers stuffed their shirts with jewelry. That same day, two bystanders saw defendant and two others enter a different jewelry store; a few minutes later, the bystanders saw defendant run by with a gun in his hand and jewelry stuffed under his shirt. Nine days later, on April 29, 1999, defendant and four others congregated near Sarah Jewelers in the same area. Three of those men (but not defendant) went inside, and one of them (different from the shooter at Classic Wholesale Jewelers in June 1999) held a gun to the owner's head while the other two took jewelry.

II. Procedural History

As pertinent to this petition, the People charged defendant with murder in the commission of the June 1999 attempted robbery and burglary (§§ 187 & 190.2, subd. (a)(17)). The jury was instructed that it could impose a sentence of life without the possibility of parole under section 190.2 only if it found that defendant acted as a "major participant" in the attempted robbery and burglary, and only if he acted "with reckless

indifference to human life." A jury so found, and we affirmed his conviction and sentence after rejecting a challenge to the sufficiency of the evidence underlying the jury's section 190.2 finding.

On February 15, 2017, defendant filed this petition for a writ of habeas corpus, his second such petition, asking this Court to vacate the section 190.2 finding for insufficient evidence in light of our Supreme Court's refining of section 190.2's requirements in *Banks* and *Clark*. We summarily denied the petition. On May 10, 2017, our Supreme Court granted review and directed us to vacate our denial and issue an order to show cause why defendant was not entitled to relief.

DISCUSSION

Defendant argues that the jury's section 190.2 finding is not supported by sufficient evidence. The People argue that defendant is procedurally barred from raising this issue in this habeas proceeding. We first address the threshold procedural question.

I. Procedural Bar

The People argue that we may not reach the merits of defendant's sufficiency-of-the-evidence challenge because (1) it was raised and rejected on appeal, and is thus barred by *In re Waltreus* (1965) 62 Cal.2d 218, 225 (*Waltreus*), and (2) such challenges are specifically not permitted on habeas under *In re Lindley* (1947) 29 Cal.2d 709, 723 (*Lindley*).

Both of these arguments were recently considered, and rejected, in *In re Miller* (2017) 14 Cal.App.5th 960, 977-980. We agree with *Miller*. The so-called *Waltreus* bar does not apply—and does not preclude consideration of an issue on habeas notwithstanding its prior consideration during a direct appeal—

in a case such as this one, where a court has subsequently "confirmed a substantive definition of [a] crime [or enhancement] duly promulgated by the Legislature" that alters the analysis of the previously addressed issue. (*People v. Mutch* (1971) 4 Cal.3d 389, 395-399.) That is the situation here. And the so-called *Lindley* bar is designed to preclude relitigation on habeas of "routine claims that the evidence presented at trial was insufficient." (*In re Reno* (2012) 55 Cal.4th 428, 505.) Evaluating the sufficiency of the evidence under a newly refined statutory standard is not a "routine" sufficiency claim, and thus falls outside of *Lindley*'s reach.

II. Merits

A person who is convicted of first degree murder on the theory that he aided and abetted a robbery that resulted in a death (rather than being the actual killer) may only be sentenced to life without the possibility of parole if he (1) acted with the intent to kill (§ 190.2, subd. (c)); or (2) (a) was "a major participant" in the underlying robbery, and (b) acted "with reckless indifference to human life" (§ 190.2, subd. (d)). The elements of section 190.2, subdivision (d) are drawn from—and designed to incorporate—the holdings of two United States Supreme Court cases—*Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*) and *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*). (*Banks*, *supra*, 61 Cal.4th at p. 794.) *Tison* and *Enmund* demarcate the end points of a "continuum" that describe the degree of an aider and abettor's "*personal* role in the crimes leading to the victim's death." (*Banks*, at pp. 801-802; *In re Loza* (2017) 10 Cal.App.5th 38, 41.) Only if the aider and abettor "'substantial[ly] participat[es] in a violent felony under circumstances likely to result in the loss of innocent human

life'"—that is, only if he is a major participant who acts with reckless indifference to human life—may a court impose a sentence of life without the possibility of parole. (*Banks*, at p. 801, quoting *Tison*, at p. 154.)

Our Supreme Court in *Banks* and *Clark* explained how courts and juries are to assess whether an aider and abettor is a "major participant" and when that person has acted "with reckless indifference to human life."

A "major participant" in a robbery is someone whose "personal involvement" is "substantial"; such a participant "need not be the ringleader," but his involvement must be "greater than the actions of an ordinary aider and abettor." (*Banks*, *supra*, 61 Cal.4th at pp. 801-802; *People v. Williams* (2015) 61 Cal.4th 1244, 1281.) Courts are to examine the totality of the circumstances when evaluating the extent of participation, including several factors our Supreme Court identified in *Banks* as relevant but not dispositive on the issue: (1) the defendant/aider and abettor's role in planning the robbery; (2) his role in supplying or using lethal weapons; (3) his awareness of the "particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants"; (4) his presence at the scene of the killing and thus whether he was "in a position to facilitate or prevent the actual murder"; and (5) his actions after the use of lethal force. (*Banks*, 61 Cal.4th at p. 803; *Clark*, *supra*, 63 Cal.4th at p. 611 [noting relevance of these factors to the "major participant" element].)

A defendant acts with a "'reckless indifference to human life'" when he "'"knowingly engag[es] in criminal activities known to carry a grave risk of death."'" (*Banks*, *supra*, 61 Cal.4th at pp. 800-801, quoting *People v. Estrada* (1995) 11 Cal.4th 568,

577, quoting *Tison*, *supra*, 481 U.S. at pp. 157-158.) The defendant must "'subjectively appreciate[]'" that his acts "'were likely to result in the taking of innocent life'" (*Banks*, at pp. 801-802, quoting *Tison*, at p. 152), although jurors may infer that subjective awareness from the nature of the criminal activity itself (e.g., *People v. Mora* (1995) 39 Cal.App.4th 607, 616-617). Whether a defendant/aider and abettor has such a subjective awareness is to be evaluated in the totality of the circumstances, including several factors our Supreme Court in *Clark* identified as relevant but not dispositive on the issue: (1) the defendant/aider and abettor's awareness that a gun will be used and/or his personal use of a gun during the robbery; (2) the defendant's "[p]roximity to the murder and the events leading up to it"; (3) the length of time the victims were restrained by the defendant and his cohorts; (4) whether the defendant had "advance notice" that his cohorts might use lethal force; and (5) whether the defendant "engaged in efforts to minimize the risk of violence." (*Clark*, *supra*, 63 Cal.4th at pp. 618-622.)

Defendant argues there was insufficient evidence to support the jury's findings that he was a major participant in the June 9, 1999 robbery or that he acted with reckless indifference to human life. In examining the sufficiency of the evidence, we must ask whether the record contains "substantial evidence—evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Hubbard* (2016) 63 Cal.4th 378, 392.) In undertaking this inquiry, we must view the record "in the light most favorable" to the verdict. (*Ibid.*) We may not reweigh the evidence (*People v. Covarrubias* (2016) 1 Cal.5th 838, 890); as long as the jury's resolution of any conflict

in the evidence is "reasonable," we cannot reverse just because the jury could have reasonably resolved the conflict the other way (*Hubbard*, at p. 392).

The jury's finding that defendant was a "major participant" in the June 1999 robbery is supported by substantial evidence. Although the evidence does not show that defendant was the sole "mastermind" who single-handedly planned the June 1999 robbery, it does show that he was an integral part of a team of robbers who closely adhered to a specific plan: Three men would enter a jewelry store, one man would hold the store owner and other witnesses at gunpoint, the other two men would grab as much jewelry as they could. This was the plan followed during the two robberies on April 20, the robbery on April 29, and the charged robbery on June 9. What is more, the men rotated their roles: Defendant was the gunman for one and ostensibly both of the robberies on April 20; the jury could reasonably have concluded he was one of the two who grabbed jewelry during the June 9 robbery; and he stayed outside during the April 29 robbery. Given this level of coordination, the jury could reasonably infer that defendant—as a major player in this rotating team of robbers—was also one of the robbery team's planners. And although there was no evidence indicating that defendant supplied the guns used in the robberies, he certainly carried and used a gun during one (and possibly two) of the robberies. Further, defendant's extensive involvement in the robberies evinces an awareness of the "particular dangers posed by the nature of the crime [and] weapons used" because he was present during several of the prior robberies. Although the evidence on this point is conflicting, there was evidence—namely, the bystander's testimony at trial—that reasonably supports a

finding that defendant was inside Classic Wholesale Jewelers. Accepting this testimony, as we must under a substantial evidence review standard, defendant was present at the scene of the shooting and did nothing to prevent it and, instead, fled with the others.

Defendant asserts that the evidence shows him to be nothing more than the getaway driver, just like the getaway drivers in *Banks* and *Enmund* who were found not to warrant sentences of life without the possibility of parole (in *Banks*) or death (in *Enmund*). (*Banks*, *supra*, 61 Cal.4th at p. 805; *Enmund*, *supra*, 458 U.S. at pp. 784-787; *Tison*, *supra*, 481 U.S. at p. 147.) He points to the evidence from witnesses putting him outside of Classic Wholesale Jewelers on the date of the shooting, and to the prosecutor's statement, in closing argument, that "it appears more likely from the testimony that [defendant] stayed by the car. And, in addition, [defendant] is not identified by people inside the business." But, as noted above, the bystander repeatedly testified at trial that defendant entered the store, and because a prosecutor's argument is not evidence, the theories argued in closing do not bind the jury. (*People v. Perez* (1992) 2 Cal.4th 1117, 1125-1126; cf. *People v. Smith* (2005) 37 Cal.4th 733, 740, fn. 2 [in a case not involving substantial evidence review or purporting to define a standard for such review, deferring to prosecutor's treatment of the case as "a 'single bullet' case" solely for purposes of deciding whether a defendant may be convicted of two counts of attempted murder when firing a single shot, despite "some evidence" that two bullets were fired, because "the evidence clearly established that only one bullet entered the vehicle"].) At bottom, defendant is asking us to reweigh the

conflicting evidence and come to a different conclusion than the jury; this, we cannot do.

The jury's finding that defendant acted with reckless indifference to human life is also supported by substantial evidence. Here, there was ample evidence from which a jury could reasonably infer that he was subjectively aware that his acts were likely to result in the taking of an innocent life. (*Banks*, *supra*, 61 Cal.4th at pp. 801-802.) Although a defendant's awareness that his cohorts are "armed" or that a gun will be used is not enough, "without more," to establish an awareness of a grave risk of death (*id.* at p. 809, fn. 8), "[a] defendant's *use* of a firearm, even if [he] does not kill the victim . . . , [is] significant to the analysis of reckless indifference to human life" (*Clark*, *supra*, 63 Cal.4th at p. 618). Here, defendant held a gun to the victim's head in one, and potentially both, of the jewelry store robberies on April 20. He was part of the team that regularly held guns to their victims' heads. Moreover, as explained above, the jury could reasonably find that defendant was inside Classic Wholesale Jewelers on June 9, so he had close proximity to the charged murder as well as the events leading up to it. Although the robbery lasted only a matter of minutes, and defendant had no advance notice that anyone would pull the trigger, defendant—unlike the mastermind in *Clark* who told his cohorts only to use unloaded weapons—did not take steps to minimize the likelihood that someone might fire the weapon or to otherwise minimize the risk of violence.

Defendant asserts that there was no plan to shoot the owner of Classic Wholesale Jewelers, and that the victim's death by shooting that day was spontaneous and unplanned—as evidenced by the fact that the robbers fled without taking any

jewelry. Further, defendant notes, there was no evidence that any of defendant's cohorts had ever fired the guns they had previously held to their victims' heads. To be sure, defendant is correct that there was no *plan* to kill the jewelry store owner and hence insufficient evidence of an intent to kill, but such an intent is irrelevant to the inquiry under section 190.2, subdivision (d). And while the absence of prior shootings precludes a finding that the shooting on June 9 was a certainty, a jury need only find that defendant subjectively appreciated that his acts "were *likely* to result in the taking of innocent life." (*Banks*, *supra*, 61 Cal.4th at pp. 801-802, italics added.) Given defendant's involvement with prior robberies where he witnessed others holding a gun to the jewelry store victims' heads and sometimes held the gun himself, given the evidence supporting a reasonable jury's finding that he was inside Classic Wholesale Jewelers on June 9, when the gun was loaded, and given the reasonable inference that the robbery team was using a loaded gun for all of its robberies, the jury had substantial evidence upon which to conclude that he was subjectively aware that his acts were "likely to result in the taking of [an] innocent life."

DISPOSITION

The petition for writ of habeas corpus is denied.

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_____, J.
HOFFSTADT

We concur:

_____, Acting P. J.
ASHMANN-GERST

_____, J.
CHAVEZ