Filed 4/13/18 In re Arrue CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

In re ANDREW ARRUE on Habeas Corpus.	No. B285938 (Los Angeles County Super. Ct. No. PA049070)

ORIGINAL PROCEEDING; petition for writ of habeas corpus. Robert Schuit, Judge. Petition granted.

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

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Ryan M. Smith, Deputy Attorney General.

I. INTRODUCTION

Petitioner Andrew Arrue (defendant) was sentenced to life without the possibility of parole in 2006, after a jury convicted him of first degree murder with a felony-murder special-circumstance finding (Pen. Code, § 190.2, subds. (a)(17), (d)).[1] Years later, the Supreme Court decided *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*), which explains when section 190.2 authorizes a special circumstance finding for a felony murder defendant convicted as an aider and abettor. In 2017, defendant filed a petition for writ of habeas corpus, arguing the jury's special circumstances finding must be vacated because it could have been based on either of two alternate theories, only one of which is valid under *Banks*. We agree.

II. FACTUAL BACKGROUND

The murder victim was 24-year-old Christopher Wageman. He and a roommate, Anthony Ramirez, lived in a single-family home in Granada Hills. His father, Steven Wageman,[2] lived in a trailer in the driveway of the house. Wageman kept what looked like rolls of coins in a five-gallon paint bucket on his counter. He smoked marijuana and sometimes sold small amounts to friends. A friend described him as a strong guy who liked to work out.

---

1 All statutory references are to the Penal Code.

2 To avoid confusion with Christopher Wageman, we refer to Steven Wageman as "Steven".

On the evening of December 22, 2003, Wageman and some friends were wrapping presents, hanging out, and smoking marijuana at his home. Wageman's friends Carlee Kuhn and Will Argueta were present. Four Hispanic men were also present. Kuhn and Argueta identified two of them as Rudy Peralta and Rudy Salazar. Salazar was a friend of Wageman's and Peralta sometimes visited with Salazar. Neither Kuhn nor Argueta knew the other two Hispanic men. Defendant was not one of them. When Argueta left Wageman's house that evening, Kuhn and the four Hispanic men had already left. Both Kuhn and Argueta remembered seeing a white Xterra or Pathfinder parked across the street from the house.

After Argueta left, Wageman and his roommate Ramirez watched some television in the living room. Both were falling asleep as they watched. Ramirez awoke to a commotion at the front door and saw someone run at him with a gun. The man had a mustache and wore dark clothes and a beanie pulled down to his eyebrows. He pointed a small automatic pistol at Ramirez and ordered him to the ground. As Ramirez went to the ground, he saw a second man with Wageman, who had his hands up in the air. Ramirez did not see a gun in the hands of the second man, but he figured the second man must have had a gun if Wageman was complying with his demands. He thought the second man had a beanie on his head as well, but he was not certain. Neither of the two men was Salazar or Peralta.

Ramirez heard running in the house, followed by Wageman calling his and Steven's name and yelling, "[c]all 911[!]" When Ramirez looked up, no one was in the house. He ran out the back door and was trying to climb a gate when he heard a lot of scuffling on gravel and then gunshots. By the time Ramirez got

back to the house, Wageman was in the bathroom and bleeding from his head.

Ramirez could not identify the man who had pointed a gun at him. In court, he was given a chance to see defendant wearing a beanie pulled down to his eyebrows. He was not sure, but he thought defendant looked familiar. He also thought defendant matched the size and build of the armed man. He believed the two men who broke into Wageman's home were Hispanic.

Wageman's father Steven testified he heard a ruckus around 12:30 or 1:00 a.m. He heard his son calling loudly to Ramirez, so he went to the front door of the house. The door came open and he saw Wageman holding onto a man's wrists in spread eagle fashion. The man had a gun in his hand, which was pointed at Steven's face. Wageman told Steven to call the police. Steven ran back to his trailer and called 911. He described the man as wearing dark clothing, a black hat, and a dark mustache.

After calling 911, Steven heard two gunshots. He ran back to the house, which was locked. Wageman opened the door for him and Steven saw he had been shot and was bleeding from his head and stomach. Wageman died of cardiac arrest at the hospital. He never identified his assailants.

Steven could not identify anyone from photographs shown to him by the police. At trial, he was asked whether he had identified someone at the preliminary hearing. He said "[y]es . . . that gentleman there[]" and pointed to defendant. When confronted with a transcript showing he had actually identified Peralta at the preliminary hearing, he said he did not know about any names. All he knew was the man in court, defendant, was the man he identified at the earlier hearing and that was the man with the gun. The parties stipulated there was no evidence

defendant had a mustache or any other facial hair on the date of the crime.

Leticia Kugler lived at the Good-Nite Inn with defendant in December 2003. To her recollection, defendant did not have facial hair at the time. Kugler's brother-in-law, Rudy Peralta, visited her on December 22, 2003. Kugler made a number of statements to the police she could not recall making while testifying at trial. Kugler did not recall earlier telling the police that: on December 22, 2003, Peralta drove defendant somewhere to get marijuana, and when defendant returned he had a gun with him and said, "Leticia, it's bad. I just killed somebody."

The jury heard a recording of Kugler's interview with investigators. In it, Kugler identified photographs of defendant, Peralta, and Salazar. She said defendant went with Peralta to get weed that evening. Defendant told her he went inside and "just snapped." The next day, defendant received a phone call and he was "spooked." He said: "Leticia, it's bad. I just killed somebody yesterday." Kugler said Peralta did not go inside and was not involved. Kugler believed Victor Corona was with defendant and Peralta at the time. Kugler admitted she had been "holding" the gun used by defendant.

The homicide detective who responded to the scene found Wageman's wallet on the bar counter, with about $1,900 in it. There was another $700 in the coin bucket. As far as he knew, nothing was taken from the house.

Defendant was interviewed five times by Los Angeles Police Department Homicide Detective Orlando Martinez. The jury heard a recording of the first interview, which occurred on January 14, 2004. Defendant identified himself as Christopher Malave. He said he had heard about a shooting between two

rival gangs from someone named "Casper." Defendant said Casper had come to his room at the Good-Night Inn dressed like a ninja or sniper in dark clothing, beanie, and shoes. Defendant said: "Yeah like he'd seen a ghost like he was really scared you know what I mean?" Casper told him: "'[M]e and my homie man we went to go do this jack move.' . . . 'for some money man some bud they have some good bud I heard they have some good bud.'"

According to defendant, Casper said: "[T]hey told us that two white boys that live in this fucking house they were weanies all we had to do was just point guns at them and they would run and leave and then leave and then the house would be ours to search OK and then so what happened? Well half of it was right he goes and what happened well as soon as we walked in the house with the guns [h]e said that one of the white guys charged at us man and I was like what[.] He's like I don't know what else did he tell me? Yeah he said one of the guys charged and then uh uh one of the guys held his homeboy and that I guess had a gun too but he held him like got him in a like you know in uh one of those wrestling type things where they . . ."

Defendant related that Casper said: "[T]his guy starts fighting back well that became a problem he said and when we started hitting him, and hitting him, with the guns and he wouldn't let . . . his Dad even walked in and he said, and his Dad . . . he even had the, you know he still had the strength to say, Dad call the cops, and he said while that shit um, he said started um like from the living room he goes, it ended up all the way in the driveway . . . [¶] outside, outside of the driveway and um he said that the only way he could get him off his homeboy, that his homeboy went up to him and told him, hey shoot him he's not letting him go and he said he shot him. [¶] . . . [¶] Casper said he

shot the dude[.]" Defendant said the incident occurred in Granada Hills. Detective Martinez later learned the individual known as Casper was in custody at the time of the murder.

Defendant was interviewed again by Detective Martinez on January 19, 2004. He admitted he provided false names during the first interview. This time, he claimed he learned of the killing from Rick and Rico. He said they told him the plan was for one of them to approach the door while the other stood behind him or knelt down, so it would look like only one person was at the door.

At a third interview on July 16, 2004, defendant changed his story again and said someone named "Victor" [Corona] told him about the murders. Corona told him he walked up to the door, knocked, and demanded money owed to one of his friends. The victim "swung on" Corona, starting a fight in the doorway. After the victim's father walked in on the fight and ran out to call the police, the fight moved from the house to the driveway. Corona said the victim would not let him go so he had to shoot him. According to defendant, Peralta was present when Corona told him about the killing.

The tape of a fifth interview on August 18, 2004 was played at trial. During that interview, defendant initially denied any involvement in the murder. After lengthy questioning, defendant admitted he accompanied Corona, Peralta, and Salazar to a Granada Hills home in a white Pathfinder. He said Corona and Peralta came over earlier that night and told him they needed a gun. Defendant went to another room where he knew someone who sold guns, but that person did not have any. They needed a lookout, so he went along to look out. He was wearing a light beige shirt and one of the others tossed him a jacket and told him

to put it on. He refused because he was hot. When they got to the house, defendant and Salazar waited outside in the car. Salazar stayed outside because he knew the people in the house. Corona and Peralta went inside. Corona had a big gun, a Desert Eagle. Defendant asked Peralta, "You packing?" Peralta replied, "Yeah." Defendant said, "Why you guys come up to me saying you wanted a gun if you both—both guys got—carrying a gun?" Corona said, "Oh, that one was for Rudy [Salazar]."

According to defendant, he was waiting in the car when he heard two or three gunshots. Corona was the first one back to the car and he looked like he was bleeding badly. Corona asked, "Am I hit? Am I hit?" Defendant told him to take his shirt off. Peralta told them, "Do that later. Man, do that later." After they drove off, Corona took off his shirt and defendant said, "Man, what's this blood? Man, what happened? Where did all this blood come from, man?" Corona told him: "He wouldn't stop holding me, man. He wouldn't stop holding me." Defendant replied, "You're not hit, man. You're not hit at the all. Why? Did he have a gun? Did he fire back?" Corona responded, "No, no, man, it's just—I just starting shooting, man."

Defendant said he then got into an argument with Peralta, who was driving. He said, "How is he bleeding, and you look cool?" Peralta told him, "I was in the house. I was taking care of the one that was—that was—that was in the house. And he took care of the one that was the bigger dude cause he was just—just about his height." Defendant said the others had told him they had seen a Sparklett's bottle full of quarters at the home earlier. They intended to steal the money and marijuana.

The prosecutor argued the jury could find defendant guilty of felony murder in one of three ways: by finding (1) he was the

shooter, (2) he was in the house but not the shooter, or (3) he was sitting in the car as a lookout. The jury found defendant guilty of first degree murder. It found true the special circumstance allegation that he committed the murder while he was an active participant in the crime of robbery. It found not true the allegation that he personally discharged a handgun in the commission of the crime. It also found not true the allegation that he personally used a handgun. This court affirmed, with modifications to the fees assessed. (*People v. Arrue* (Dec. 21, 2007, B192064) [nonpub. opin.].)

On October 26, 2017, defendant filed a petition for writ of habeas corpus, arguing the special circumstances finding must be reversed because it could have been based on either of two alternate theories, only one of which is valid under the Supreme Court's decision in *Banks*, *supra*, 61 Cal.4th at p. 788.[3] We issued an order to show cause and now grant the petition.

III. DISCUSSION

A. *Banks*

Section 190.2, subdivision (d) provides for a sentence of death or life imprisonment without the possibility of parole where a defendant, "with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of [an enumerated

---

[3] Petitioner's request for leave to file a supplemental petition raising an additional related claim is denied. (Cal. Rules of Court, rule 8.50(b).)

felony, including robbery] which results in the death of some person or persons."

In *Banks*, *supra*, 61 Cal.4th at p. 788, the Supreme Court discussed the circumstances where an accomplice may qualify as a "major participant" who "acted with reckless indifference to life." The defendant in *Banks* was the getaway driver in an armed robbery of a marijuana dispensary that resulted in the death of a security officer. (*Id*. at p. 794.) The court found he was not a "major participant" within the meaning of section 190.2, subdivision (d). (*Id*. at p. 805.) There was no evidence he planned the robbery, obtained the guns used in it, knew his confederates had killed before, or was present at the scene of the robbery and murder. (*Ibid*.) The *Banks* court set forth a series of questions to ask in determining whether an accomplice is a major participant: "What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?" (*Id*. at p. 803, fn. omitted.) "No one of these considerations is necessary, nor is any one of them necessarily sufficient." (*Ibid*.)

The *Banks* court found the getaway driver did not act with "reckless indifference to life," as the evidence demonstrated defendants only intended to commit robbery and ended up shooting the security guard as "a spontaneous response to armed

resistance from the victim." (*Id.* at p. 807.) There was no evidence the driver knew the marijuana dispensary would be guarded or that the guard might be armed. (*Ibid.*) He "did not see the shooting happen, did not have reason to know it was going to happen, and could not do anything to stop the shooting or render assistance." (*Ibid.*) Evidence that he knew he was participating in an armed robbery was not sufficient to show he "*subjectively*" knew "his own actions would involve a grave risk of death." (*Ibid.*)

One year later, the Supreme Court decided *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*). The defendant in *Clark* planned, organized, and was essentially the mastermind of an after-hours robbery of a computer store. Nonetheless, there was insufficient evidence he acted with reckless indifference to life. (*Id.* at p. 611) "The mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life." (*Id.* at p. 618.) The defendant was not present at the time of the killing and there was no evidence he instructed his codefendant to use lethal force. (*Id.* at pp. 619-620.) The victim's appearance at the scene was unexpected, and the defendant did not have an opportunity to intervene to prevent her killing. (*Ibid.*) There was no evidence the defendant knew his codefendant had a propensity to violence. (*Id.* at p. 621.) The court noted the defendant made efforts to minimize violence by arranging for the robbery to happen after hours. The gun was also supposed to be unloaded, and only had one bullet loaded. (*Id.* at pp. 621-622.) In other words, there was nothing in the plan "that elevated the risk to human life beyond those risks inherent in any armed robbery." (*Id.* at p. 623.)

Banks is applicable to convictions that were final at the time the case was decided. (*In re Miller* (2017) 14 Cal.App.5th 960, 977-980.)

B. *The Special Circumstances Finding*

The prosecutor argued the jury could find defendant guilty of felony murder by finding (1) he was the shooter, (2) he was in the house but not the shooter, or (3) he was sitting in the car as a lookout. Because the jury found not true the allegation that defendant personally discharged a handgun, it necessarily found insufficient evidence to conclude, beyond a reasonable doubt, that he was the shooter.

Both of the remaining possibilities—he was in the house but not the shooter, or he was waiting in the car as a lookout—are supported by some evidence. As the prosecutor argued to the jury, Wageman knew Peralta and Salazar, so it made sense for them to stay in the car while defendant and Corona went inside. Ramirez testified that neither Peralta nor Salazar were present during the robbery. Ramirez's testimony and defendant's own statements suggested both assailants inside the house were armed with firearms. The prosecutor argued in closing that there were two guns and two gunmen in the house. Yet the jury found not true the allegation that defendant personally used a handgun. Moreover, although both Steven and Ramirez remembered someone with a mustache, the parties stipulated defendant did not have a mustache or any facial hair on the date of the crime. Finally, during defendant's final statement to the police, he claimed to have waited outside as the lookout. This

record makes it impossible to know whether the jury convicted defendant as the second person in the house or as the lookout.

Indeed, in affirming the special circumstances finding in 2007, this court implicitly recognized it was impossible to determine, from the jury's verdict and the evidence, whether defendant was in the house or waiting outside in the car that night. (See *People v. Arrue* (Dec. 21, 2007, B192064) [nonpub. opin.], p. 16 ["Regardless of whether defendant was merely a lookout or one of the assailants, this evidence demonstrates he knew that there was to be a robbery and that two of those involved were armed with guns"].) Under *Banks*, defendant argues, the special circumstance finding fails if he was the lookout in the car and not one of the assailants in the house. We agree.

The evidence establishes the perpetrators' intent was robbery, not murder. Kugler told police that Peralta and defendant went out to buy marijuana and that defendant was "spooked" when he came back, saying he had just "snapped" and killed someone. Defendant, in his various interviews with the police, referred to plans for an "easy" robbery. The perpetrators believed Wageman and Ramirez were "weanies" and all they had to do was "just point guns at them and they would run and leave."

What actually happened was an unexpected and protracted struggle with Wageman that began in the house and ended in the driveway. If the goal had been murder, the struggle would have been brief. Instead, the perpetrators shot Wageman only after Wageman told his father to "call 911." At that point, police were on the way and the shooter could not get Wageman off him. In an effort to get away, he shot Wageman. As in *Banks*, the

defendants intended to commit robbery and ended up shooting Wageman as "a spontaneous response" when Wageman unexpectedly put up a fight. (See *Banks*, *supra*, 61 Cal.4th at p. 807.)

There is no evidence defendant planned the robbery, knew his cohorts were prone to murder, or supplied the guns used in the robbery. In fact, defendant's account is that he was surprised to see Corona and Peralta had guns with them when they arrived at Wageman's house. Even then, he thought the guns were to be props in what was supposed to be an "easy" robbery. "The mere fact of a defendant's awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to life." (*Clark*, *supra*, 63 Cal.4th at p. 618.)

According to defendant, he was still waiting in the car when he heard shots fired. Defendant did not know Wageman had been shot until they were driving away from the scene. He therefore would not have had the chance to prevent the shooting or to aid Wageman afterward. In all, the evidence indicates defendant, if he was the lookout, did not "'subjectively appreciate[] that [his] acts were likely to result in the taking of innocent life.'" (*Banks*, *supra*, 61 Cal.4th at p. 802; see also *Enmund v. Florida* (1982) 458 U.S. 782, 788 [getaway driver who was "in the car by the side of the road at the time of the killings, waiting to help the robbers escape," was not a major participant who acted with reckless indifference to life].)

If, however, defendant was the second person in the house but not the shooter, the special circumstances finding would stand under *Banks*. If he was in the house, he would have heard the struggle between his associate and Wageman. He would have heard Wageman yell for someone to "call 911." Indeed, in his

first interview with police investigators, defendant said the second man went up to the shooter (whom he identified as Casper at the time) as he was trying to get Wageman off him and said, "shoot him he's not letting go." In the final interview, when defendant admitted he was present at the robbery, he said the second person in the house (whom he identified as Peralta) told him he saw Wageman "go down." Thus, there is evidence the second person actually ordered the shooting, or at the very least, was aware the circumstances had turned desperate and failed to prevent the shooting or get help for Wageman after he was shot. Defendant's presence at the shooting, if he was the second person in the house, meant he was a major participant who was in a position to appreciate that someone might be killed.

C. *Alternate Theories of Guilt*

Typically, "[t]he standard of review for a sufficiency of the evidence claim as to a special circumstance is whether, when evidence that is reasonable, credible, and of solid value is viewed 'in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.' [Citations.]" *(Clark*, *supra,* 63 Cal.4th at p. 610.) But where, as here, it is impossible to determine whether the conviction was based on a legally valid or invalid theory of liability, we must remand for retrial.

In *People v. Chiu* (2014) 59 Cal.4th 155, 158-159 (*Chiu)*, the California Supreme Court held an aider and abettor may not be guilty of first degree premeditated murder under a natural and probable consequences theory. (*Id*. at pp. 158-159.) The Court also held that reversal is required unless it can be determined

from the record that the verdict was based on a valid ground. (See *id.* at p. 167 ["When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground"].)

The Supreme Court has drawn a distinction between cases where a jury may have premised its verdict on an alternate theory that is legally insufficient (which requires reversal) and one where its verdict may be premised on an alternate theory that is not factually supported (which does not require reversal). (See *People v. Guiton* (1993) 4 Cal.4th 1116, 1121-1131.)

The error in this case was legal. While a jury is capable of determining whether defendant had a gun with him and where he was at the time of the shooting, it is not expected to know, as it was instructed, whether a lookout sitting in a car qualifies as a "major participant" who "acted with reckless indifference to life" under the statute. As we cannot determine from the record that the jury's verdict was based on the legally valid theory—*i.e.*, defendant was the second person in the house but not the shooter, we must reverse this matter for retrial. (See *In re Martinez* (2017) 3 Cal.5th 1216, 1224-1227 [where People could not show beyond a reasonable doubt that jury relied on a legally valid theory, trial court ordered to vacate first degree murder conviction and, if People elect not to retry defendant, enter judgment for second degree murder and resentence defendant accordingly]; *Chiu, supra*, 59 Cal.4th at pp. 158-159, 168 [on remand, the People may accept a reduction of the conviction to second degree murder or retry the defendant under the legally valid theory].)

IV. DISPOSITION

The petition for writ of habeas corpus is granted. The special circumstance finding under section 190.2, subdivision (a)(17) is vacated. The People may elect to retry defendant on the special circumstance allegation. If the People do not elect to bring defendant to trial, the trial court shall enter judgment reflecting a conviction on count one, without the special circumstance finding, and sentence defendant accordingly.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

KIM, J.*

We concur:

KRIEGLER, Acting P. J.

BAKER, J.

---

* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.