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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

In re

JASON ROMERO,

on Habeas Corpus.

B288243

(Los Angeles County  
Super. Ct. No. BA362787)

ORIGINAL PROCEEDING. Petition for writ of habeas corpus. Anne H. Egerton, Judge. Petition denied.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Petitioner.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Steven E. Mercer and Zee Rodriguez, Deputy Attorneys General, for Plaintiff and Respondent.

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In 2012, we affirmed a judgment against Jason Romero which sentenced him to 50 years to life for first degree murder under an aiding and abetting theory.<sup>1</sup> In 2014, the California Supreme Court held in *People v. Chiu* (2014) 59 Cal.4th 155, 158–159 (*Chiu*), that an aider and abettor may not be convicted of first degree murder under the natural and probable consequences doctrine. In 2016, Romero filed a petition for writ of habeas corpus seeking reversal of his conviction under *Chiu*. In 2017, the court held in *In re Martinez* (2017) 3 Cal.5th 1216 (*Martinez*) that *Chiu* error requires reversal unless the reviewing court concludes beyond a reasonable doubt that the jury actually relied on a legally valid theory in convicting the defendant of first degree murder. The high court returned the matter for us to reconsider Romero’s conviction in light of *Chiu* and *Martinez*. We find the trial court instructed the jury in error under *Chiu*, but the error was harmless beyond a reasonable doubt because the record shows the jury relied on a direct aiding and abetting theory, which remains a legally valid theory on which to base a first degree murder conviction. We thus deny the petition for writ of habeas corpus.

#### **FACTUAL AND PROCEDURAL BACKGROUND**

On August 7, 2009, Romero, who was a member of the Laguna Park Vikings gang, and Christian Venegas, who was a known associate of that gang, had an altercation with members of the 18th Street gang. Romero and Venegas fled after Romero was knocked to the ground by Jose R. Romero then enlisted his friend, Hernaldo Ramos, who was not a gang member, to give him a ride. They picked up Venegas on the way. When they

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<sup>1</sup> *People v. Venegas et al.* (Nov. 5, 2012, B233131) [nonpub. Opn.].

passed the 18th Street gang members, they told Ramos to slow down, and Venegas shot and killed Jose.

Romero, Venegas, and Ramos were tried jointly. Ramos testified on his own behalf. He denied knowing Venegas had a gun or intended to shoot anyone. When Romero woke him to ask him for a ride, he told Ramos about the fight, but did not tell him anything else. The jury acquitted Ramos of all charges, but found Venegas and Romero guilty of the first degree murder of Jose. The jury also found true firearm and gang enhancement allegations. Romero and Venegas were each sentenced to indeterminate terms of 50 years to life.

On appeal, Romero asserted the trial court committed instructional error, including that the instruction on natural and probable consequences was incomplete or misleading because it allowed the jury to conclude murder, rather than first degree murder, was a natural and probable consequence of the target crime of assault. We rejected Romero's argument, noting that "the record indicates the natural and probable consequences theory was only argued as to Ramos, not Romero. The prosecutor contended Romero was guilty of directly aiding and abetting murder." (*People v. Venegas, supra*, B233131, at pp. 10–11.) Alternatively, we concluded, "even if the trial court should have explicitly instructed the jury that first degree murder, not just murder, must have been a reasonably foreseeable consequence of the assault, . . . any error was harmless beyond a reasonable doubt" because "[t]he evidence was overwhelming that if Romero was guilty at all, he was guilty of a deliberate, premeditated murder." (*Id.* at pp. 12–13.) We affirmed the judgment and Romero's petition for review was denied.

Thereafter, the Supreme Court issued its opinion in *Chiu*, *supra*, 59 Cal.4th 155. Romero filed a petition for writ of habeas corpus in the Supreme Court on December 2, 2016, arguing he was entitled to a new trial in light of *Chiu*. Although he conceded the prosecution rested on a theory of “straight aiding and abetting,” he argued the jurors were nevertheless provided a second theory for conviction because the trial court instructed them on a natural and probable consequences theory of aiding and abetting a planned assault. According to Romero, the jury could have applied the natural and probable consequences instruction to him as well as to Ramos, despite the prosecution’s argument.

After Romero’s habeas petition was filed, the Supreme Court issued its opinion in *Martinez*, *supra*, 3 Cal.5th 1216. After *Martinez*, the Supreme Court ordered the Secretary of the Department of Corrections and Rehabilitation to show cause, returnable in this court, why Romero was not entitled to relief under *Chiu* and *Martinez*. In its return, the Attorney General argued the record showed the prosecution did not argue the natural and probable consequences theory in its case against Romero. A traverse was timely filed by Romero pursuant to California Rules of Court, rule 8.386(d).

### **DISCUSSION**

Romero contends the jury instructions allowed the jurors to convict him of first degree murder under the natural and probable consequences theory of aiding and abetting, notwithstanding the prosecution’s argument that he was liable under a direct aiding and abetting theory. We find beyond a reasonable doubt that the jury based Romero’s conviction on the theory that he directly aided and abetted the murder, not on a

natural and probable consequences theory. The record supports our conclusion, including the prosecutor's arguments, the jury's question, and the trial court's answer.

## **I. Governing Law**

A person who aids and abets an offense may be found guilty as a principal. (Pen. Code, § 31.) There exists two distinct forms of culpability for aiders and abettors: "First, an aider and abettor with the necessary mental state is guilty of the intended crime. Second, under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also 'for any other offense that was a "natural and probable consequence" of the crime aided and abetted.'" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

In *Chiu*, the California Supreme Court held "that an aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles." (*Chiu, supra*, 59 Cal.4th at pp. 158–159.) 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 above stated public policy concern of deterrence." (*Id.* at p. 166.)

The court was careful to confirm that "[a]iders and abettors may still be convicted of first degree premeditated murder based on direct aiding and abetting principles. [Citation.] Under those principles, the prosecution must show that the defendant aided and 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.” (*Chiu, supra*, 59 Cal.4th at pp. 166–167.)

In *Chiu*, the court reversed the defendant’s conviction, finding the instructions erroneously allowed the jury to convict him of first degree murder under the natural and probable consequences doctrine. The court noted the jury complained about a holdout juror who appeared to prevent a unanimous verdict on first degree premeditated murder based on the doctrine of natural and probable consequences; the jury reached a verdict only after the holdout juror was replaced. (*Chiu, supra*, 59 Cal.4th at p. 168.) On that record, the court could not conclude beyond a reasonable doubt that the jury based its verdict on the theory that defendant directly aided and abetted the murder. (*Ibid.*)

The court held, “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. [Citations.] Defendant’s first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.” (*Chiu, supra*, 59 Cal.4th at p. 167.)

The Supreme Court applied its reasoning in *Chiu* to a habeas proceeding in *Martinez, supra*, 3 Cal.5th at page 1226. There, the high court held that a petitioner alleging the jury was improperly instructed does not carry the burden of demonstrating his conviction was based on insufficient evidence. (*Id.* at pp. 1224–1225.) The court concluded, “a habeas corpus petitioner is in the same position as a defendant raising this type of [*Chiu*]

error on direct appeal, and the same rule should apply: The ‘first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder.’” (*Ibid.*) Reasonable doubt in *Martinez* was raised by the fact that the prosecutor argued the natural and probable consequences theory to the jury at length during closing argument and rebuttal, and that no other aspects of the verdict indicated the jury had relied on a valid legal theory. Further, the jury’s question suggested it was considering a natural and probable consequences theory. (*Id.* at pp. 1226–1227.)

## **II. The Jury Found Romero Guilty on a Direct Aiding and Abetting Theory**

The record in this matter discloses beyond a reasonable doubt that the jury relied on a valid legal theory to reach its verdict. Therefore, reversal is not required, despite the instructional error under *Chiu*.

Romero, Venegas, and Ramos were jointly tried in this case. Throughout the trial, it was clear the prosecution had assigned different theories of culpability to each defendant: Venegas was the perpetrator who shot Jose; Romero directly aided and abetted by procuring a car and a driver to accomplish the drive-by shooting; Ramos was the driver, and thus aided and abetted either directly (if he knew about the gun), or under a natural and probable consequences theory (if he did not). Indeed, Romero concedes, “the prosecution argued to the jurors that natural and probable consequences did not apply to petitioner. The prosecution instead argued that petitioner was liable as a direct aider and abettor.”

The trial court provided instructions consistent with multiple theories of culpability, including first and second degree murder, felony-murder, and both aiding and abetting theories. The trial court did not specify, however, which theory of culpability was to be applied to which defendant when it gave its standard instructions at closing.

As a result, Romero contends it is possible the trial court's instructions allowed the jury to convict him of aiding and abetting based on a natural and probable consequences theory, notwithstanding the People's arguments that only direct aiding and abetting applied. Romero argues the trial court's instructions trump the parties' arguments. We do not disagree with Romero's assertion that the court's instructions are statements of law and the jury is entitled to disregard a party's arguments. However, Romero fails to account for the trial court's subsequent instruction in response to a jury question.

The record shows the trial court instructed the jury to only consider a direct aiding and abetting theory as to Romero when it responded to a jury question. During deliberations, the jury asked whether it could find Romero guilty of first degree murder as an aider and abettor, even if it concluded Venegas was not the perpetrator. The court answered the question as follows: "In order to convict Mr. Romero under an aiding and abetting theory, the People must prove that he aided and abetted a perpetrator. That perpetrator may be any other person. An aider and abettor may be convicted of murder in the 1st or 2nd degree. For the elements of aiding and abetting, please refer to instructions 400 and 401."



CALCRIM No. 400 describes the general principles of aiding and abetting and was given to the jury as follows: “A person may be guilty of a crime in two ways: (1), he may have directly committed the crime. I will call that person the perpetrator; (2), he may have aided and abetted a perpetrator, who directly committed the crime. A person is guilty of the crime whether he committed it personally or aided and abetted the perpetrator who committed it. Under some specific circumstances, if the evidence establishes aiding and abetting of one crime, a person may also be found guilty of other crimes that occurred during the commission of the first crime.”

CALCRIM No. 401 is a companion to CALCRIM No. 400, and describes direct aiding and abetting. The trial court instructed the jury pursuant to CALCRIM No. 401 as follows: “To prove that [a] 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 the crime if he knows of the perpetrator’s unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator’s commission of that crime.”

Notably, the trial court did not refer the jury to CALCRIM Nos. 403 and 520, which explain the theory of natural and probable consequences.<sup>2</sup> The trial court's answer was a clear

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<sup>2</sup> CALCRIM 403 was given as follows: "Before you may decide whether the defendant is guilty of murder and attempted murder, you must decide whether he is guilty of simple assault. [¶] To prove that the defendant is guilty of murder (Count 1) and/or attempted murder (Counts 2 and 3), the People must prove that: 1. The defendant is guilty of simple assault; [¶] 2. During the commission of simple assault, a coparticipant in that assault committed the crime of murder (Count 1) or attempted murder (Counts 2 and 3); [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of murder (Count 1) or attempted murder (Counts 2 and 3) was a natural and probable consequence of the commission of the simple assault. [¶] A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. [¶] A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. . . . [¶] To decide whether the crimes of murder or attempted murder were committed, please refer to the separate instructions that I have given you on those crimes."

CALCRIM 520 was given as follows: "The defendant is charged in Count 1 with murder in violation of Penal Code section 187. [¶] To prove that the defendant is guilty of this crime, the People must prove that: [¶] 1. The defendant committed an act that caused the death of another person; [¶] AND [¶] 2. When the defendant acted, he had a state of mind called malice aforethought. [¶] There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

indication to the jury that it should base its verdict regarding Romero on direct aiding and abetting principles. Moreover, as we previously noted, the jury's question "suggested that while the jurors may have had some doubt that Venegas was the shooter, they had no doubt Romero was guilty of first degree murder." (*Venegas, supra*, B233131, at pp. 10–11.) By indicating it believed Romero was guilty of first degree murder, the jury's question runs contrary to a natural and probable consequences theory, which does not require a similar intent to kill.

These facts distinguish this matter from the cases relied upon by Romero, including *Chiu* and *Martinez*. In *Chiu* and *Martinez*, the record disclosed facts which affirmatively showed the jury relied on an improper theory of culpability. In *Chiu*, the court found facts that "indicate[d] that the jury may have been focusing on the natural and probable consequence theory of aiding and abetting and that the holdout juror prevented a unanimous verdict on first degree premeditated murder based on that theory." (*Chiu, supra*, 59 Cal.4th at p. 168.) In *Martinez*, the evidence supported a guilty verdict under either a direct aiding and abetting theory or a natural and probable

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[¶] The defendant acted with express malice if he unlawfully intended to kill. [¶] The defendant acted with implied malice if: [¶] 1. He intentionally committed an act; [¶] 2. The natural and probable consequences of the act were dangerous to human life; [¶] 3. At the time he acted, he knew his act was dangerous to human life; [¶] AND [¶] 4. He deliberately acted with conscious disregard for human life. [¶] Malice aforethought does not require hatred or ill will toward the victim. It is a mental state that must be formed before the act that causes death is committed. It does not require deliberation or the passage of any particular period of time."

consequences theory. In addition, the prosecutor argued the natural and probable consequences theory to the jury at length and the jury asked a question about it during its deliberations. (*Martinez, supra*, 3 Cal.5th at pp. 1226–1227.) Here, there are no facts in the record which affirmatively indicated the jury considered the natural and probable consequences theory.

In the remaining cases cited by Romero, there was simply no indication one way or the other which theory the jury relied upon. In each, the prosecutor’s arguments favored one theory of liability over another, but there was no other evidence that the jury was persuaded by the prosecutor’s arguments. (*People v. Guerra* (1985) 40 Cal.3d 377, 388–389; *People v. Morales* (2001) 25 Cal.4th 34, 47; see *People v. Barton* (1995) 12 Cal.4th 186, 203 [trial court’s duty to instruct on lesser included offense is not dependent on attorney arguments].) Here, the jury’s question and the trial court’s response show beyond a reasonable doubt the jury relied upon a direct aiding and abetting theory.

#### **DISPOSITION**

The petition for writ of habeas corpus is denied.

BIGELOW, P.J.

We concur:

RUBIN, J.

GRIMES, J.