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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

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| THE PEOPLE,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>EDDIE BETANCOURT et al.,<br><br>Defendants and Appellants. | B237204<br><br>(Los Angeles County<br>Super. Ct. No. NA079324) |

APPEAL from a judgment of the Superior Court of Los Angeles County. Joan Cassini, Judge. Affirmed as modified.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Eddie Betancourt.

Brett Harding Duxbury, under appointment by the Court of Appeal, for Defendant and Appellant Said Riley.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., and Stephanie A. Miyoshi, Deputy Attorneys General, for Plaintiff and Respondent.

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Appellants Eddie Betancourt and Said Riley were convicted, following a jury trial, of one count of first degree murder and one count of second murder, both in violation of Penal Code section 187, subdivision (a),[1] and one count of second degree robbery in violation of section 211. The jury convicted Riley of an additional count of second degree robbery. The jury found true the special circumstance allegation that appellants were convicted of more than one offense of murder in the current proceeding within the meaning of section 190.2, subdivision (a)(3). The jury also found true the allegations that Betancourt personally and intentionally discharged a firearm, causing great bodily injury and death within the meaning of section 12022.53, subdivisions (b), (c) and (d) in the commission of the first degree murder and personally and intentionally used and discharged a firearm within the meaning of section 12022.53, subdivisions (b) and (c) in the commission of the second degree murder. The jury found the section 12022.53 allegations not true as to Riley. The jury found true as to both appellants the allegations that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1) in the commission of the murders. The jury found the section 12022, subdivision (a)(1) allegations not true for the robberies. Riley admitted that he had suffered a prior serious felony conviction within the meaning of section 667, subdivision (a)(1) and the "Three Strikes" law, and had served a prior prison term within the meaning of section 667.5, subdivision (b).

The trial court sentenced Betancourt to life without the possibility of parole for the first degree murder pursuant to section 190.2, plus an enhancement term of 25 years to life pursuant to section 12022.53, subdivision (d), plus one year for the robbery conviction. The court sentenced Betancourt to a concurrent term of life without the possibility of parole for the second degree murder pursuant to section 190.2, plus a 20-year enhancement term pursuant to section 12022.53, subdivision (c). All remaining enhancements were stayed.

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

The trial court sentenced Riley to life without the possibility of parole for the first degree murder, doubled pursuant to the Three Strikes law, plus a one-year enhancement term pursuant to section 12022, subdivision (a)(1). The court sentenced Riley to a concurrent term of life without the possibility of parole, doubled pursuant to the Three Strikes law for the second degree murder conviction. The court imposed a consecutive sentence of nine years in state prison for the robbery convictions, consisting of the midterm of one year for each robbery, doubled to two years pursuant to the Three Strikes law, plus one five-year enhancement term for the section 667, subdivision (a) enhancement. All remaining enhancements were stayed.

Appellants appeal from the judgment of conviction. Betancourt contends that the evidence is legally insufficient to support his second degree murder conviction, the trial court erred in instructing the jury on felony murder and the special circumstances allegation and in failing to instruct the jury on aiding and abetting under the natural and probable consequences doctrine. Riley contends that the murder special circumstance allegation must be reversed because he was convicted of second degree murder under an implied malice fetal murder theory, and further contends that the trial court erred in instructing the jury on felony murder and the special circumstances allegation. Riley additionally makes a number of claims of sentencing error by the trial court.

We make various corrections to appellants' sentences, as set forth in more detail in the disposition. We affirm the judgment of conviction in all other respects.

## Facts

### 1. Robberies

On April 11, 2008, Joshua Lozano lived in an apartment in San Pedro with Riley and Robert Camacho. At some point, Lozano, Riley, and Camacho got into a car and drove towards the area of Mesa and Ninth Street. There, Riley and Camacho got out of the car, while Lozano waited in his car. Lozano knew that a robbery was planned. Riley typically "called the shots of what went on." Riley and Camacho approached Calixto Delfino who was selling ice cream from a cart. Delfino saw an object that might have

been a gun in Riley's waistband, and ran away. After awhile, Delfino turned around and saw Riley running away with Delfino's ice cream cart. There was approximately $30 in the cart.

Riley and Camacho returned to Lozano's car with an ice cream cart. They attempted to place the cart in the back of Lozano's Explorer. When they could not get the cart in, they got into the Explorer. Lozano drove away.

On April 22, 2008, Sean Richards was driving around San Pedro when he saw Riley and Alberto Fernandez, whom he had known since the sixth grade. He also saw Fernandez's cousin, Betancourt, whom he had known since the summer of 2008. Richards pulled over and volunteered to give the men a ride. After the men got into the car, Riley stated that he wanted to rob somebody. He displayed a .22 caliber revolver. Richards was frightened and drove the men around.

At one point, Riley directed Richards to stop the car; appellants and Fernandez then exited the vehicle. Riley told Richards to wait for them up the street. Appellants and Fernandez approached Leonel Jiminez, a delivery man for the Jolly Burrito restaurant. Riley grabbed Jimenez by the neck, hit Jiminez in the mid-torso area, and kneed Jiminez. One of the men lifted up his shirt and displayed something that placed Jimenez in fear. The men took Jiminez's money, his cellular telephone, and some food.

Appellants and Fernandez eventually ran back to Richards's car and got inside. Riley asked Richards to take them to Riley's house. Richards drove the men to an address near Eighth Street and Pacific in San Pedro and stopped in a nearby alley. Appellants and Fernandez got out of the car and went into the apartment complex.

Los Angeles Police Detectives Antonio Zamora and Patricia Guerra were in an unmarked police car in the alley. Guerra had been working on a string of robberies against street vendors and restaurant delivery workers in the area. Richards's vehicle caught Zamora's attention because it had four males who appeared to be in a hurry to get inside the residence and because they "kind of fit the general description" of the persons who had committed robberies in the area.

On April 24, 2008, the police stopped Richards as he was driving. Richards was transported to the police station, where he was interviewed by the police. He told the police about what had happened on April 22, 2008. Richards also told the police that Riley had a .22 caliber gun and had pointed it at him.

2. The Murder Of Lauri Gilbert And Baby Girl Gilbert

In April 2008, Lauri Gilbert was living in an apartment complex on South Pacific Avenue in San Pedro. Riley lived in the apartment next door.

About three days before Gilbert's April 24 murder, Riley or Betancourt told Redonia Smith that Gilbert owed him money. Riley told Smith that if Gilbert did not pay him, he would "pop her in the mouth." Smith told Riley and his companions that Gilbert was pregnant and they should leave her alone. Smith was using crack cocaine at the time.

Late in the evening of April 23, 2008, James Davis was having beers in Lauri Gilbert's apartment. At some point, someone knocked on Gilbert's door. After Gilbert spoke with the person, she asked Davis if he could give her a ride. Davis agreed.

Smith, who was on the stairs of the apartment complex when Gilbert left, told Gilbert that Riley wanted his money and that Gilbert needed to pay him. Smith heard Gilbert telling some guys she knew where to get some drugs. Gilbert had problems with drugs. Smith told Gilbert not to get involved with the guys.

Davis, Gilbert, and appellants walked to Davis's gold two-door Acura Legend, which was parked in the alley. Davis drove to an alley behind a library and parked the car. Gilbert got out of the vehicle and went down the alley. Davis and Betancourt got out of the car and smoked a cigarette.

Gilbert returned and everyone got back into the car. Betancourt took out a scale and weighed something. Someone said, "it was short." Riley told Gilbert to call the person she had obtained the drugs from and to tell him that "it was short." Appellants appeared to be upset. Gilbert made a call. She said that the seller was at a Jack-in-the-Box and would "make up the difference or bring some more or something." Riley told

Davis to drive to the Jack-in-the-Box. There, they waited but nothing happened. Riley appeared to be upset.

Eventually, Riley said they should return to the apartment. Davis drove back to Gilbert's apartment complex and parked in the alley. Davis and appellants got out of the car. Gilbert remained in the car, in the front passenger seat. Davis walked to the rear of the vehicle. Davis could not remember Riley's exact location. Betancourt pulled out a gun and pointed it at Gilbert, who was sitting in the car approximately two feet or three feet away. Davis heard the sound of a gunshot and ran away.

As Davis ran, he heard two additional shots close together. Davis ran to his house. Once there, he called 911 and told them what had happened.

Peggy Skaggs, who lived in apartment 212, was awakened by her dog and then heard the sound of three gunshots. There was a pause between the first and second gunshot, but not between the second and third. Skaggs heard the back gate to the apartment complex open and then close. She then heard footsteps running down the hallway and up the steps near her apartment. Skaggs looked through her peephole or her open door and saw Betancourt and another male from apartment 202 going down the hallway and around a corner towards their apartment. Later, Skaggs looked out her window and saw one man go down the stairs leading to the back alley.

Smith was on the front stairs of the apartment complex smoking crack cocaine when Gilbert was killed. He heard one shot, followed a few seconds later by two or three shots. Smith left through the front gate and went home.

On April 24, 2008, about 3:30 a.m., Los Angeles Police Officer Chris Panozzo responded to a report of shots fired in the area of Pacific and Eighth Street. Panozzo was eventually directed to a nearby alley. There, Sergeant Caswell was standing near a gold two-door Acura in the alley. Gilbert was in the right front passenger seat of the car, with one leg sticking out of the open passenger door. She appeared to have gunshot wounds to the head.

Brenda Shafer, an investigator from the coroner's office, arrived at the murder scene at 7:30 a.m. At that time, Gilbert was seated in the passenger seat of an Acura.

The seat was in a reclined position, the passenger door was open, and the passenger window was up and still intact. Gilbert was face-down on the seat, her right foot was on the pavement, and her left foot was inside the vehicle. Shafer did a preliminary examination of Gilbert's body at the scene and noticed what appeared to be gunshot wounds to the head, but no other obvious signs of trauma.

The police searched the area and did not find any shell casings. There did not appear to be any kind of damage to nearby walls from any expended bullets. After Gilbert's body was removed from the Acura, Los Angeles Police Detective Antonio Batres looked inside the vehicle and noticed a set of keys on the floorboard. Batres used the keys to enter Gilbert's apartment on South Pacific.

Batres had received information that possible suspects had entered the apartment next to Gilbert's. The police eventually received consent to search apartment 202. Los Angeles Police Detective David Alvarez found a .22 caliber casing on a landing outside an open window.

At some point, the police came and interviewed Davis. During the interview, Davis mentioned that Betancourt had smoked a menthol cigarette at another location, and took police to that location. Los Angeles Police Detective David Cortez searched the location and found a menthol cigarette butt and a regular cigarette butt at the location. He collected the butts. The cigarettes were analyzed for DNA. The DNA from one of the cigarettes matched Betancourt's DNA.

On April 24, 2008, Los Angeles Police Detective David Alvarez examined the Acura, which had been impounded. Alvarez did not find any bullet holes in the car, expended bullets, or any bullet casings. None of the windows of the car were shattered.

James Davis was later brought to inspect the car. Davis pointed to a purple or maroon hat that was on the floor of the car and said it belonged to Gilbert. The hat had a bullet hole in it and a bullet fragment.

Deputy Medical Examiner Yulai Wang conducted the autopsy of Gilbert and her female fetus. Gilbert died from three gunshot wounds to the head. Wang recovered three bullets from Gilbert's head. One bullet hit the right side of Gilbert's head, close to the top

of the head, and was lodged in the skull. Because the bullet did not penetrate the skull, a person might still be able to move or talk if that was the only gunshot wound she sustained; however the wound might also render a person unconscious. Although a person might survive such a gunshot wound, the person might also not survive. A second bullet entered the left side of Gilbert's head, exited the right side of the skull, and lodged under the skin or muscle. The third bullet entered behind the left ear and lodged in the base of the skull. There was stippling around the gunshot wound near the earlobe, which indicated that the muzzle of the gun was within two to three feet of the wound when it was fired. There were no bullet holes in any of the clothing that Gilbert was wearing.

Gilbert's fetus was approximately six months old and had no abnormalities or diseases. The fetus died due to the death of Gilbert. The fetus "could" have been viable.

The bullets that were recovered from Gilbert's body were analyzed. One of the recovered projectiles was made of lead and was consistent with being a fragment of a bullet. The second projectile was a fired bullet that had rifling with a right twist. This bullet was consistent with a .22 caliber bullet. The third projectile was also consistent with a .22 caliber bullet and had rifling with a right twist.

On June 3, 2008, Detective Alvarez interviewed Betancourt, following his arrest in Las Vegas. Betancourt stated that he, Davis, and Gilbert had been trying to buy crack cocaine on the night Gilbert was killed. The group went to several locations, and Gilbert was trying to negotiate a deal for the crack cocaine. In an alley near a library, Gilbert got out and walked away to meet the narcotics seller. When she returned, Betancourt saw that the amount of crack cocaine was shy of the amount they had purchased. He told her so. She called the seller on her cell phone.

The group then drove to a Jack-in-the-Box and waited for the seller, but no one came. The group eventually drove back to the apartment complex on Pacific, and parked in an alley. Betancourt got out of the car with a gun in his hand. The driver ran away. After the shooting, Betancourt walked upstairs, then drove to his cousin Yamara's house in Long Beach.

Betancourt testified in his own behalf at trial. In April 2008, he was 18 years old, an A student in high school, worked at Food-4-Less, and had signed up for the Marines. He did not have any convictions for misdemeanors or felonies. He had only known Riley for about three months. Riley was a good friend of one of Betancourt's cousins.

Riley had a revolver that had brown grips. Betancourt had been in Riley's apartment and had "mess[ed] with" the gun on several occasions.

Betancourt admitted that he took part in a robbery on April 22, 2008, with Riley, Albert Fernandez, and Sean Richards. Riley had a gun, but did not pull it out during the robbery. During the robbery, Betancourt reached into a man's pocket and removed money while Riley held and punched the man.

Betancourt had seen Gilbert a few times, but did not know her. He had no idea she was pregnant.

On April 23, 2008, Betancourt was in Riley's apartment on South Pacific. Betancourt's cousin Albert Fernandez was also there. At some point, Gilbert knocked on the door of the apartment. Riley went outside to talk to her. She told him she knew where to buy some drugs. Riley came back into the apartment and asked Betancourt or Fernandez to accompany him and Gilbert. Betancourt agreed to accompany Riley, but was not himself interested in the drugs.

Betancourt went downstairs with Riley and Gilbert. Davis was downstairs. Everyone got into Davis's car. Riley placed his gun, a .22 caliber revolver with brown handles, in Betancourt's lap. Both men were in the back seat. Betancourt placed the gun inside the hoodie he was wearing.

The group drove to an alley. Nothing happened. The group then drove to an area near a library. Gilbert got out and walked down the alley. Betancourt was scared because they were in a bad area, but got out of the car to smoke a cigarette.

As Gilbert was walking back to the vehicle, Riley said that he thought Gilbert was "messing with the baggie." Gilbert appeared to be "kind of high" when she returned to the vehicle because she was "real fidgety." She handed something to Riley, who said that it "wasn't all of it." Gilbert insisted she had given Riley everything. Riley took the gun

from Betancourt's lap, pointed it at Gilbert, and directed her to give up the rest of the drugs. Betancourt was scared.

Riley told Gilbert to call the drug seller. She did so. Gilbert appeared to be "agitated" and was having a "heated discussion" with the person on the phone. Riley then directed Davis to drive to the Jack-in-the-Box because that is where the drug seller told Gilbert to go. Davis did so.

Betancourt said that he wanted to get his cousin and go to Long Beach. Riley refused, stating "No; no; no. We need to get the stuff, dude." Betancourt took the gun from Riley because Riley was pointing it at Gilbert's head and was "agitated." Riley said that "he had to take care of it because he needed to get his dope back." Betancourt understood the remark to mean that Riley would try to hurt Gilbert.

No one showed up at the Jack-in-the-Box. Riley became even angrier and Betancourt even more afraid. Eventually, Riley told Davis to drive back to the apartment complex. Davis did so.

When the group got back to the apartment, everyone got out of the vehicle except Gilbert. Davis, Riley and Betancourt all stood on the same side of the car. Betancourt had the gun in his hand and was "holding it" towards Gilbert's "general direction." Riley was behind Betancourt, who was about three feet away from the open passenger door where Gilbert sat. Riley said, "Do it." Betancourt believed that Riley would "rough . . . up" Gilbert or attempt to shoot her.

Betancourt, who had the gun "slightly raised a little bit," pulled the trigger. He was not trying to kill Gilbert, was not looking in her direction, and thought he was shooting "slightly above the car or just in that general direction." Betancourt fired the weapon to "circumvent the situation," to "[s]top it from getting any further," and to "appease" Riley. Betancourt did not believe he had shot Gilbert, because she said loudly, "I'm okay. I'm just going to lay here." Gilbert also stated, "I'm just going to play dead now."

Betancourt tried to leave, but Riley stopped him and told him to "go and shoot her" because Gilbert was still moving and was alive. When Betancourt refused, Riley

"snatched" the gun from him and fired into the car three times. Riley fired the weapon three times while leaning towards the car near the driver's door.

Appellants ran into apartment 202. Betancourt told his cousin that "something bad had happened" and that they needed to leave. Riley stated that he "popped her." Appellants and Fernandez drove to Long Beach and stayed with Betancourt's cousin, Yamara. There, Riley said that Gilbert had been pregnant.

The next day, Betancourt and his girlfriend went to Knott's Berry Farm. Two or three days after the shootings, Betancourt went to Las Vegas, where he was arrested.

Betancourt also offered the testimony of Detective Alvarez who was present when Davis was interviewed. Alvarez was also present with his partner, Panozzo, during the interview of Riley. Alvarez noticed there were discrepancies between Davis's and Riley's version of events.

Riley denied shooting Gilbert. Riley stated that he was in a second car, along with his girlfriend Camille, a person named David, and Fernandez, and that this car followed the car containing Betancourt, to protect Betancourt. Riley also stated that the driver of the Acura was not supposed to know he was being followed. Alvarez had not received information from any other source confirming that Fernandez was in a car with Riley and that such a car was following another car. While at the library, Riley heard Gilbert and Davis arguing. Riley approached their vehicle and stated, "Somebody give us some money." Riley also stated that he, his girlfriend, and Fernandez had arrived back at the apartment complex before Davis and Gilbert. Riley heard arguing, approached the vehicle, and stated, "Like what's up?" Riley went with Fernandez back into the apartment and then heard gunshots. However, Davis said there had been no argument before the initial shot was fired.

Alvarez falsely told Riley that his fingerprints had been found in the Acura. Riley admitted that he had touched the inside of the Acura while asking Betancourt if he needed anything. Riley stated that this occurred before they left the alley and while the car was not moving.

Although the gun was never recovered in the case, Alvarez told Riley that they had found the weapon and that Riley's fingerprints were on the gun. Riley admitted he had touched the weapon, but claimed he never shot Gilbert. Riley stated that they had not received the amount of narcotics that was supposed to be purchased. Riley blamed Gilbert and Davis.

Riley presented no evidence in his behalf.

Officer Christopher Panozzo testified in rebuttal that he had his firearm when he interviewed Redonia Smith, who stated that the guns he saw looked like the one in Panozzo's pocket. Panozzo showed his weapon, a .38 caliber handgun, to the jury. On the night of the murder, Panozzo also interviewed Davis. Davis told Panozzo that a male had shot the victim with a gun and then he heard three additional shots.

## Discussion

1. Legal sufficiency of the evidence – second degree murder

Betancourt contends that the jury convicted him as an aider and abettor to the murders and there is legally insufficient evidence to support a conviction for the second degree murder of baby girl Gilbert under any aiding and abetting theory. We do not agree that the jury convicted Betancourt as an aider and abettor.

Betancourt's argument that the jury found that he was an aider and abettor hinges on the section 12022.53, subdivision (d) allegation. During deliberations, the jury asked the court: "In regards to the murder charge where it says, 'cause great bodily injury and death,' what do we answer if we agree someone caused great bodily injury but did not cause death?" The court replied: "If you are referring to Penal Code section 12022.53(d), the word should be 'or' and not 'and.' If you find either element, then, your finding is true." Betancourt contends that the jury's question shows that the jury believed his account of events and convicted him as an aider and abettor.

Betancourt testified that he thought he shot over the car and did not injure Gilbert, and that his belief was reinforced because he saw her moving and heard her speak after the shot. According to Betancourt, Riley then took the gun and fired two shots at Gilbert.

The coroner testified that one of the three shots to Gilbert's head entered on the right side, was superficial and would not have caused death, and that she could have moved and spoken after this injury. The court also testified that the other two shots entered the left side of her head and were fatal. Thus, in Betancourt's view, the totality of the evidence shows that he fired the one non-fatal shot from the left and Riley fired the two fatal shots from the right. He contends that since he was convicted as an aider and abettor in Gilbert's murder he was necessarily also convicted as an aider and abettor in baby girl Gilbert's murder.

There is no way to know which murder count(s) the jury's question related to or which defendant. The jury continued to deliberate for several hours after asking this question, and asked other, unrelated questions.[2] Even assuming for the sake of argument that the jury was referring to Betancourt's role in Gilbert's murder, there is no way to know if the jury's agreement remained unchanged throughout the remainder of the deliberations. There is nothing in the verdict itself which shows that the jury believed that Betancourt caused great bodily injury but not death in the murder of Gilbert. The verdict form reads "great bodily injury and death," and the jury returned a true finding on the allegation without making any annotations on the form. The court read the finding as "great bodily injury and death." The jury agreed that this was its finding.

Another flaw with Betancourt's argument is that it fails to consider the jury's section 12022.53 findings as a whole. The jury found not true *all* the section 12022.53 allegations as to Riley for both murders. This includes allegations that Riley personally used a handgun, and personally discharged a handgun. At the same time, the jury found true these same allegations as to Betancourt for both murders, and also found true the discharge caused great bodily injury and death for the Gilbert murder. It is not

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[2] The jury deliberated for about 45 minutes after receiving the answer to this question, then asked an additional, unrelated question, then adjourned for the day. The jury asked an additional question the next morning, deliberated further and reached their verdicts at 11:55 a.m.

reasonable to understand the jury's findings as a whole as showing that they believed that Riley fired the fatal shots.

Betancourt points out that the jury found not true the allegation that he personally discharged a firearm causing great bodily injury or death in the second degree murder of baby girl Gilbert. To the extent that Betancourt contends that this finding is inconsistent with a verdict that he was guilty as the actual killer and requires reversal, we do not agree. There is no way to know the reason for this inconsistency. It could be the result of leniency, compromise or mistake. (See *People v. Abilez* (2007) 41 Cal.4th 472, 513.) For example, since no bullets hit the fetus, the jury may have mistakenly believed that a not true finding on section 12022.53, subdivision (d) allegation was required.

To the extent that Betancourt contends that the evidence is legally insufficient to prove that he was guilty of the second degree murder of baby girl Gilbert even as the actual killer, we do not agree. There is no requirement that a defendant be aware that a victim is pregnant in order to be convicted of fetal murder. (*People v. Taylor* (2004) 32 Cal.4th 863, 867.) "When a defendant commits an act, the natural consequences of which are dangerous to human life, with a conscious disregard for life in general, he acts with implied malice towards those he ends up killing." (*Id.* at p. 868.) There is no requirement that the defendant specifically know of the existence of each victim. (*Ibid.*) Here, the evidence showed that Gilbert was shot in the head three times at close range. The natural consequences of firing at a person at close range are dangerous to human life and the act shows a conscious disregard for human life. The death of Gilbert resulted in the death of baby girl Gilbert. That is sufficient to support the second degree murder conviction.

2. Multiple special circumstance allegation

Riley contends that he was convicted of both murders as an aider and abettor and that his conviction for implied malice fetal second degree murder does not contain a

finding that he acted with the intent to kill.[3] He further contends that a true finding on the multiple murder special circumstance was legally precluded, since that special circumstance requires a finding that an aider and abettor have an intent to kill in at least two murders. We do not agree that the special circumstance was legally precluded.

Section 190.2, subdivision (a)(3) sets forth the following special circumstance: "The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree." This subdivision contains no requirement of an intent to kill. Our Supreme Court has made it clear that there is no intent to kill requirement for the actual killer under subdivision (a)(3). (*People v. Dennis* (1998) 17 Cal.4th 468, 516 [no intent for murders committed after June 5, 1990].)

The intent requirement for an aider and abettor is set forth in section 190.2, subdivision (c), which provides: "Every person, not the actual killer, who, with the intent to kill, aids, abets, . . . or assists any actor in the commission of murder in the first degree shall be punished by death or imprisonment in the state prison for life without the possibility of parole if one or more of the special circumstances enumerated in subdivision (a) has been found to be true under Section 190.4." Thus, subdivision (c) requires only that the aider and abettor have an intent to kill in one first degree murder. (See *People v. Dennis, supra,* 17 Cal.4th at p. 517, fn. 10 ["intent-to-kill requirement for aiders and abettors flow[s] from the statutory language"].)

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[3] The jury's not true findings on all the section 12022.53 personal gun use allegations for Riley and true findings on all but one of those allegations for Betancourt support Riley's contention that he was convicted as an aider and abettor. Riley is correct that the prosecutor in this case elected to try the murder of baby girl Gilbert as an implied malice fetal second degree murder. The court gave a special instruction on fetal murder which told the jurors that appellants could be guilty of second degree implied malice murder even if they were unaware that the mother was pregnant. The prosecutor did not argue that there was an intent to kill or deliberation in the killing of the fetus. The instruction on express malice was limited to the killing of a "human being" and made no mention of fetal life. Thus, there is merit to his argument that his conviction for second degree murder cannot be understood to contain an intent to kill finding.

The prosecutor's theory of the case met the requirements of subdivision (c). The prosecutor argued that Riley acted with an intent to kill in Gilbert's murder, and that murder was in the first degree. The jury convicted Riley of first degree murder in that killing. Nothing in the express language of subdivision (c) requires an intent to kill for a second degree murder.

Riley attempts to find an intent to kill requirement for two murders in case law. His attempt fails.

Riley is correct that the Supreme Court has "adopt[ed] the following reading of the relevant statutory provisions: intent to kill is not an element of the multiple-murder special circumstance; but when the defendant is an aider and abetter rather than the actual killer, intent must be proved." (*People v. Anderson* (1987) 43 Cal.3d 1104, 1149-1150.) Riley overlooks the fact that "[a]s *Anderson* made clear, the intent-to-kill requirement for aiders and abettors flowed from the statutory language. (*Id*. at pp. 1143, 1149.)" (*People v. Dennis, supra*, 17 Cal.4th at p. 517, fn. 10.) As we explain, *ante*, that language requires an intent to kill in only one first degree murder.

Riley also relies on dicta from two Court of Appeal cases, *People v. Samaniego* (2009) 172 Cal.App.4th 1148 and *People v. Rodriguez* (1987) 196 Cal.App.3d 1041. Riley makes too much of these cases. The Court in *Samaniego* was concerned with an error in the general instructions on accomplice liability, not the requirements of section

190.2. subdivision (c).[4] In *Rodriguez*, the special circumstance allegation was the prior murder circumstance found in section 190.2, subdivision (a)(2). At that time, the intent requirement for aiders and abettors was set forth in section 190.2, subdivision (b). The Court pointed out that "subdivision (b) is by its terms inapplicable to subdivision (a)(2)." (*Id.* at p. 1052.) Thus, the reasoning of the Court in *Rodriguez* is not helpful in this case.

Since section 190.2 does not require the defendant to have an intent to kill in at least two murder convictions, the multiple murder special circumstance was properly based on one first degree murder committed with an intent to kill and one implied malice murder.

3. Multiple murder special circumstance instruction

Riley contends that the trial court erred in instructing the jury on the mental state required for an aider and abettor by section 190.2, and that this error requires reversal. Betancourt makes this same contention. We agree that the trial court erred.

The court instructed the jury pursuant to CALJIC No. 8.80.1 that it could find the subdivision (a)(3) special circumstance allegation true if it found that an aider and abettor acted with an intent to kill, "**or** with reckless indifference to human life and as a major participant aided, abetted, . . . or assisted in the commission of the crime of ___ which resulted in the death of a human being." (Emphasis added.) This was incorrect.

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[4] In *Samaniego, supra,* the Court of Appeal found that an error in the general instructions on accomplice liability was harmless because the jury found true the multiple murder special circumstance allegation and thus "necessarily found that the appellant's acted willfully with intent to kill" under CALCRIM No. 702. (*Id.* at p. 1165.) Appellant contends that the Court could only have used this reasoning to find harmlessness as to both victims if it understood section 190.2, subdivision (c) to require an intent to kill both victims. We do not agree. The Court was relying on the language of CALCRIM No. 702 and the fortuitous circumstance that the aider and abettor defendant was convicted of two counts of first degree murder. CALCRIM No. 702 tells the jury "In order to prove (this/these) special circumstance[s] for a defendant who is not the actual killer but who is guilty of first degree murder (as an aider and abettor/[or] a member of a conspiracy), the People must prove that the defendant acted with the intent to kill." The instruction says nothing about second degree murders, and neither does the Court in *Samaniego*.

The reckless indifference standard applies only to the felony murder special circumstance set forth in section 190.2, subdivision (a)(17). (§ 190.2, subd. (d); see *People v. Pearson* (2012) 53 Cal.4th 306, 322.)[5] There was no subdivision (a)(17) special circumstance allegation in this case, and the court should have omitted the "reckless indifference" language from CALJIC No. 8.80.1.

This error was harmless beyond a reasonable doubt. (*People v. Brents* (2012) 53 Cal.4th 599, 612; *People v. Jones* (2003) 30 Cal.4th 1084, 1119.) Both appellants were convicted of first degree murder, which requires an intent to kill.

Each appellant contends that he was only an aider and abettor and that the other was the actual killer. Each contends that he may have been convicted of first degree murder only because the other had an intent to kill, without himself having such an intent. We do not agree.

"[W]hen the charged offense and the intended offense – murder or attempted murder – are the same, i.e., when guilt does not depend on the natural and probable consequences doctrine," then "the aider and abettor must know and share the murderous intent of the actual perpetrator." (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) The jury was not instructed on the natural and probable consequences doctrine in this case.

The jury was instructed that a person aids and abets a crime if he knows of the unlawful purpose of the perpetrator, has the intent or purpose of committing or encouraging the commission of the crime and aids or encourages the intended crime. The instructions further stated that an aider and abettor's guilt is determined by the acts of the participant and that person's "own mental state." The instructions also told the jury that

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[5] Section 190.2, subdivision (d) provides: "Notwithstanding subdivision (c), every person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, . . . or assists in the commission of a felony enumerated in paragraph 17 of subdivision (a) which results in the death of some person or persons, and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole if a special circumstance enumerated in paragraph (17) of subdivision (a) has been found true under Section 190.4."

an aider and abettor might have a more culpable or less culpable mental state than the actual perpetrator and that the aider and abettor's guilt could therefore be greater or less than the actual perpetrator's guilt. The instructions also stated that a person is not an accomplice unless he knows of the unlawful purpose of the perpetrator and has the intent or purpose of "committing, encouraging or facilitating the commission of the crime."

Under the above-described instructions, the verdicts convicting appellants of first degree murder showed that the jury found appellants intended to kill Gilbert. Thus, the instructional error was harmless. (See *People v. Williams* (1997) 16 Cal.4th 635, 689 [failure to instruct on element of special-circumstance allegation is harmless if jury "necessarily found an intent to kill under other properly given jury instructions"].)

4. Inherently dangerous felony

Riley contends that the trial court's instruction defining murder erroneously included references to an inherently dangerous felony and that this error allowed the jury to convict him improperly of murder under a felony murder theory without finding malice. Betancourt contends that the instruction created an impermissible mandatory presumption that automatically made him liable for the second degree murder of baby girl Gilbert.

We agree that the instruction is incorrect as given. CALJIC No. 8.10, as given in this case, told the jury that "Every person who unlawfully kills a human being or fetus with malice aforethought or a felony inherently dangerous to human life is guilty of the crime of murder in violation of Penal Code section 187." Under the typed words "to human life" the phrase "assault with a firearm" is handwritten in. The instruction also states: "The killing was done with malice aforethought or ___ a felony inherently dangerous to human life namely assault with a firearm ___ is a felony inherently dangerous to human life."

As the trial court acknowledged in discussions with counsel "this isn't a felony murder case." The only identified felony, assault with a firearm, could not support such a theory. (See *People v. Chun* (2009) 45 Cal.4th 1172, 1200 [assault with a firearm will

generally "merge" with the crime of a murder when the victim is killed by a gunshot wound]; see also *People v. Ireland* (1969) 70 Cal.2d 522, 539 [setting forth merger doctrine for felony murder].) Thus, the references to a felony inherently dangerous to human life should have been deleted from the instruction.

In reviewing an erroneous instruction, we determine whether there is a reasonable likelihood that the jury applied the instruction in a manner that violates the Constitution. (*People v. Castaneda* (2011) 51 Cal.4th 1292, 1320.) We consider all the instructions given to the jury, and do not view the erroneous instruction in isolation. (*Id.* at p. 1321.)

a. First degree murder

The erroneous instruction was a general one defining murder. The jury also received a specific instruction defining first degree murder which explained that first degree murder required express malice, along with an instruction defining malice. There is no reference to an inherently dangerous felony in those instructions. The jury was instructed to consider the instructions as a whole, and to "not single out any particular sentence of any individual point or instruction." They were also told that all instructions were not necessarily applicable.

The trial court also made the following statement to the jury after Betancourt's closing argument to clarify the theories of murder: "In this case there are three degrees of murder or three theories of murder that are being presented to you. [¶] One is first degree murder where you have an intent to kill and there is premeditation and deliberation. [¶] There are two types of second-degree or two degrees of second degree murder. One where you have [an] intent to kill with no premeditation and deliberation. [¶] And the second that we are calling implied malice murder where an act is done without intent to kill and the natural consequences of which are dangerous to human life. [¶] Depending upon what you find to be the facts, those three different types may apply to count 1 with respect to either defendant. But only the second-degree implied malice applies to count 2."

In light of the instructions as a whole and the trial court's clarifying statement, it is not reasonably likely that the jury understood the isolated reference in CALJIC No. 8.10 referring to an inherently dangerous felony as giving them permission to convict appellants of the first degree murder of Gilbert under the felony murder doctrine without finding malice.

To the extent that Riley contends that the jury might have somehow read this instruction differently because it was considering his guilt as an aider and abettor, we do not agree. As we discuss, *ante*, numerous instructions made it clear that an aider and abettor's guilt is determined by his own mental state. The instruction on first degree murder made it clear that conviction of that offense required a mental state of intent to kill, premeditation and deliberation.

b. Second degree murder

A person is guilty of second degree murder if he has an intent to kill or committed an act the natural consequences of which are dangerous to human life, and did so with knowledge of or conscious disregard for human life. Betancourt contends that the inherently dangerous felony reference in CALJIC No. 8.10 created an impermissible presumption that assault with a firearm is an intentional act, the natural consequences of which are dangerous to human life. He concludes that this presumption removed an element of the crime from the jury's consideration, and permitted the jury to convict him of the second degree murder of baby girl Gilbert without finding implied malice.

We will assume for the sake of argument that such a presumption was created. We find the error harmless beyond a reasonable doubt. It did not contribute to the verdicts. (See *People v. Huggins* (2006) 38 Cal.4th 175, 211-212 [instructional errors, including instructions with erroneous presumptions, are subject to harmless error analysis].)

Here, there was some testimonial evidence from Betancourt that he tried to shoot above the car, was not trying to kill Gilbert and did not believe that he had shot her. Riley told police that he did not shoot Gilbert and was not present when she was shot.

These statements were contradicted by the forensic evidence, which showed that Gilbert was shot three times in the head, there was no damage to nearby walls and no bullet holes in the car.

Firing a gun at someone's head multiple times at close range is unquestionably dangerous to human life. There is nothing to suggest that appellants were unaware of Gilbert's presence, or believed that the gun was unloaded or non-functional. Thus, the jury must have found that appellants acted with implied malice. (See *People v. Hach* (2009) 176 Cal.App.4th 1450, 1457 [because evidence showed that defendant was 10 feet away from car when he shot directly into it and knew there were two people in the car, the jury must have found that defendant committed an act that was dangerous to life, knew of the danger and acted with conscious disregard for life and thus acted with implied malice]; *People v. Frye* (1992) 7 Cal.App.4th 1148, 1160-1161 [where jury is erroneously instructed with conclusive presumption, but no reasonable juror could find predicate facts without also finding presumed facts, the instruction is superfluous and does not require reversal].)

5. Natural and probable consequences doctrine

Betancourt contends that the trial court erred in failing to instruct the jury on the natural and probable consequences doctrine. We see no error.

A trial court has a sua sponte duty to instruct on this doctrine "only when the prosecution has elected to *rely* on the 'natural and probable consequences' theory of accomplice liability and the trial court has determined that the evidence will support instructions on that theory." (*People v. Prettyman* (1996) 14 Cal.4th 248, 269.) Although the prosecution did request such an instruction, the trial court correctly found that the instruction was not appropriate under the theory articulated by the prosecutor for the instruction. The prosecutor did not thereafter refer to this doctrine. Further, there was no evidence that one of the appellants intended to aid and abet the other in committing a target offense, but the other instead committed murder. Thus, the trial court had no obligation to instruct on this theory.

Betancourt is mistaken in contending that *People v. Taylor* (2004) 32 Cal.4th 863 required an instruction on the natural and probable consequence doctrine. That case is premised on implied malice in the murder of a fetus. (*Id*. at pp. 865, 868-869.) There does not appear to have been an accomplice involved.

6. Doubling LWOP

Riley contends that the trial court erred in doubling his life without the possibility of parole term pursuant to the Three Strikes law.

As Riley acknowledges, there is a split of authority on this issue. Our colleagues in Division Two of this District Court of Appeal have held that such a term may be doubled. (*People v. Hardy* (1999) 73 Cal.App.4th 1429, 1433-1434.) The Third District Court of Appeal has held that terms of life without the possibility of parole may not be doubled. (*People v. Smithson* (2000) 79 Cal.App.4th 480, 503-504.)

We agree with our colleagues in Division Two that the term may be doubled. There is no express provision in the Three Strikes law for a term of life without the possibility of parole. (*People v. Hardy, supra,* 73 Cal.App.4th at p. 1433.) Therefore, we look to the purpose of the Three Strikes law. That purpose is to "ensure longer prison sentences and greater punishment for those who commit a felony and have been previously convicted of serious and/or violent felony offenses." (*Ibid.*) Thus, the term should be doubled.

"A doubled sentence of life without possibility of parole is consistent with Penal Code section 669, which provides in pertinent part: 'Life sentences, whether with or without the possibility of parole, may be imposed to run consecutively with one another.'" (*People v. Hardy, supra,* 73 Cal.App.4th at p. 1433.) We agree with our colleagues that doubling an LWOP term is the equivalent of sentencing a defendant to two consecutive LWOP terms. (*Ibid.*)

7. Count 2 LWOP sentence

Appellants contend that the trial court erred in sentencing them to a term of life without the possibility of parole for the count 2 second degree murder conviction. Respondent agrees. We agree as well.

Section 190.2, subdivision (a)(3) states that a sentence of life without the possibility of parole (or death) can be imposed for first degree murder if the defendant has been convicted of more than one murder in the proceeding. Under section 190, subdivision (a), the sentence for second degree murder is 15 years to life. Thus, the trial court erred in sentencing appellants to life without the possibility of parole for the second degree murder conviction. (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1047-1048.) The sentence must be corrected to 15 years to life. For appellant Riley, this sentence must be doubled to 30 years to life pursuant to the Three Strikes law.

8. Section 667, subdivision (a) enhancement

Riley contends that the trial court erred in imposing a section 667, subdivision (a) enhancement on count 2 and then ordering that enhancement to run consecutively to count 1. Respondent questions whether the trial court made such an order, but agrees that such an order would be unauthorized. We agree.

The trial court ordered count 2 to run concurrently to count 1. A section 667, subdivision (a) enhancement imposed on an indeterminate sentence must run concurrently with that underlying term. (*People v. Williams* (2004) 34 Cal.4th 397, 403-405.)

We agree with Riley that the trial court's statements at sentencing can be reasonably understood as ordering the section 667, subdivision (a) enhancement to run consecutively to other punishment. The court stated: "For a total of four years plus five years on the 667(a)(1) prior both on count 2 and count 1 for a total, according to my calculations, of 20 years, which is five years for the 667(a)(1) twice, which is ten years plus four years on the 211's. That is 9 years plus 1 year on the 12022(a)(1). [¶] For life without the possibility of parole plus 20 years."

This error does not appear in the minute order for Riley's sentencing hearing or in the abstract of judgment. In the interest of clarity, we order stricken that portion of the trial court's oral pronouncement of judgment which orders the section 667, subdivision (a) enhancement to run consecutively to any other punishment. That enhancement is to run concurrently.

9. Fines

At sentencing, the trial court imposed a $10,000 restitution fine and a security surcharge in the amount of $120. The trial court did not impose a parole revocation fine. The minute order and abstract of judgment show a $10,000 parole revocation fine and a security fee in the amount of $160. Appellants contend that the minute order and abstract of judgment must be corrected to reflect the trial court's oral pronouncement. They contend that the prosecutor's failure to object at the sentencing hearing forfeited any claim of error. We do not agree.

The minute order and abstract of judgment are correct. The oral pronouncement of judgment was not correct.

Since appellants received a determinate term for their two robbery convictions, a parole revocation fine was required. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.) This is true even though appellants also received sentences of life without the possibility of parole. (*Ibid*.) The amount of the fine must be equal to the restitution fine assessed pursuant to section 1202.4. (§ 1202.45.) Here, that amount is $10,000. The trial court erred in failing to impose this fine at the sentencing hearing.

A security fee in the amount of $40 per conviction is required by section 1465.8. Since appellants suffered four convictions in this case, the correct amount of the fine is $160. The trial court erred in imposing a lower amount at the sentencing hearing.

The claims were not forfeited. An invalid fine pursuant to section 1465.8 and the failure to impose a required fine under section 1202.45 both fall "within the narrow class of sentencing errors exempt from the waiver rule." (*People v. Smith* (2001) 24 Cal.4th

849, 853; *People v. Talibdeen* (2002) 27 Cal.4th 1151, 1157.) The abstracts of judgment are correct and will remain unchanged.

10. Count 2 sentence

Appellants contend that the court ordered the count 2 sentence to be served concurrently with the count 1 sentence and the abstract of judgment should be corrected to reflect that pronouncement. Respondent agrees. We agree as well.

When there is a discrepancy between the oral pronouncement of judgment and the abstract of judgment, the oral pronouncement controls. (*People v. Sharret* (2011) 191 Cal.App.4th 859, 864.) Thus, the abstract must be corrected to show that the sentence on count 2 is concurrent to the sentence on count 1.

## Disposition

The sentence of life without the possibility of parole for count 2 is stricken and the correct sentence of 15 years to life in prison is imposed for appellant Betancourt, and 15 years to life doubled to 30 years to life for appellant Riley. Sentence on count 2 is to be served concurrently to sentence on count 1. The clerk of the superior court is instructed to prepare a corrected abstract of judgment reflecting these changes and to deliver a copy of the corrected abstract to the Department of Corrections and Rehabilitation.

The trial court's statement at the sentencing hearing that the section 667, subdivision (a) enhancement is to run consecutively to other punishment is stricken. The court's statement that the amount of the security fee is $120 also ordered stricken. No change to the abstract of judgment is required. The trial court failed to impose a $10,000 parole revocation fine at the sentencing hearing. That fine is ordered imposed. No change to the abstract of judgment is required. The judgment of conviction is affirmed in all other respects.

**NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS**

ARMSTRONG, J.

We concur:

TURNER, P. J.

KRIEGLER, J.