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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Placer)

THE PEOPLE, Plaintiff and Respondent, v. BRANDON ALEXANDER FERNANDEZ, Defendant and Appellant.	C101890 (Super. Ct. No. 62-038488B)

In 2003, Daniel Bezemer killed his girlfriend (the victim). Bezemer's roommate, defendant Brandon Alexander Fernandez, was involved, though the extent of his involvement is contested. In 2005, defendant pleaded guilty to murder in the second degree, and the trial court sentenced him to 15 years to life in state prison. In 2020, defendant filed a petition for resentencing, asserting he could no longer be convicted of murder due to the abrogation of the natural and probable consequences doctrine. After a hearing, the trial court denied defendant's petition. Defendant appealed, and we reversed and remanded for a new hearing because the trial court employed an incorrect standard of review. On remand, the trial court conducted a second hearing and again denied defendant's petition. Defendant appeals anew, arguing (1) the trial court again employed

an incorrect standard of review, (2) Bezemer's testimony was not sufficiently corroborated, (3) the circumstantial evidence did not sufficiently link defendant to the murder, and (4) the judge's disbelief of witness testimony does not establish the existence of a contrary state of facts. We agree that the trial court again employed an incorrect standard of review. We will reverse and remand for another new hearing. As a result, we need not address defendant's other contentions.

BACKGROUND

The victim was killed in 2003. A 2004 information charged defendant and Bezemer with murder (Pen. Code, § 187, subd. (a); count one)[1] and conspiracy to commit murder (§ 182, subd. (a)(1); count two). In 2005, defendant pleaded guilty to second degree murder. The trial court sentenced him to 15 years to life in prison.

In 2020, defendant filed a petition for resentencing under former section 1170.95, since renumbered as section 1172.6. The trial court determined that defendant had made a prima facie showing and issued an order to show cause. After an evidentiary hearing, the trial court denied defendant's petition, and defendant appealed. In an unpublished opinion, another panel of this court concluded that the trial court had employed an incorrect standard of review, reversed the order, and remanded for a new hearing. (*People v. Fernandez* (Mar. 23, 2023, C093040) [nonpub. opn.] (*Fernandez*).)

With regard to the evidence presented at defendant's second section 1172.6 evidentiary hearing, for present purposes, it is sufficient to state that the account defendant provided in his 2003 FBI interview and Bezemer's hearing testimony differed substantially. According to defendant's account in his 2003 FBI interview, he did not know of Bezemer's plans to kill the victim until defendant came upon Bezemer strangling her. While defendant admitted to assisting Bezemer after the killing by

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1 Further undesignated section references are to the Penal Code.

helping bury the victim's body and aiding in efforts to conceal the murder after the fact, defendant's position is that Bezemer alone planned and carried out the murder. Conversely, according to Bezemer's evidentiary hearing testimony, defendant encouraged Bezemer to kill the victim, defendant was instrumental in planning the killing, and defendant actively participated in the killing.

Following the conclusion of defendant's second section 1172.6 evidentiary hearing, in a minute order, the trial court denied defendant's petition. In its ruling, the trial court stated, insofar as relevant here:

"I can say safely that this Court is the finder of fact and also, as the legal determiner and arbiter of this proceeding, that the testimony of Mr. Bezemer was just–it was striking to this Court in that some of his comments and statements changed right in front of the Court, right in front of us as we went through these proceedings.

"But, likewise, [defendant] and his comments, and his statements as well, were troubling to this Court. I believe there was considerable fabrication on the part of both of them, and it was very difficult for this Court to believe either one of them, quite frankly. Again, constant fabrication, whether that be the parole board or before the Court, which then created the task for this Court to look to independent evidence which the Court did.

"And in looking at independent evidence, this Court was mindful of the burden of proof here of beyond a reasonable doubt, and, for the record, is the standard that this Court applied in making [its] ultimate finding and decision here.

[¶] . . . [¶]

"So this proceeding, the Court had to look whether the People could prove they could obtain a conviction of the defendant based on basic accomplice liability or whether he acted with reckless disregard for the life of the victim. Those are the theories which he could be convicted of murder when he's not being the actual killer.

[¶] . . . [¶]

" . . . [T]his Court finds that there is independent verification of the accomplice testimony, such that it would be adequate for a reasonable jury to conclude that [defendant] was aware and participated in the advanced plans for the killing of [the victim] and is therefore liable as an accomplice.

[¶] . . . [¶]

" . . . [T]his Court finds that beyond a reasonable doubt that a reasonable jury would convict [defendant] as he was charged.

"Therefore, the motion is denied. The conviction stands. The sentencing stands."

DISCUSSION

I

Senate Bill No. 1437 and Standard of Review

Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill No. 1437) amended "the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) The legislation "amended section 188 to provide that, except in cases of felony murder, 'in order to be convicted of murder, a principal in a crime shall act with malice aforethought.' " (*People v. Reyes* (2023) 14 Cal.5th 981, 986, quoting § 188, subd. (a)(3).)

Senate Bill No. 1437 also created, in what is now section 1172.6, a mechanism for individuals convicted of qualifying offenses to petition for resentencing. If the trial court finds that a petitioning defendant has made a prima facie showing of entitlement to relief, the court must issue an order to show cause and hold an evidentiary hearing. (§ 1172.6, subds. (c) & (d).) At that hearing, "the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted

murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019." (§ 1172.6, subd. (d)(3).)

"On appeal from the denial of a section 1172.6 petition after an evidentiary hearing, we review the superior court's factual findings for substantial evidence and the court's application of the law to those facts de novo." (*People v. Hill* (2024) 100 Cal.App.5th 1055, 1066.)

II

Applicable Theories of Liability for Murder

For the trial court to properly conclude, beyond a reasonable doubt, that defendant here was guilty of murder under the law as amended (§ 1172.6, subd. (d)(3)), the People had to prove he was the actual killer (see *People v. Strong* (2022) 13 Cal.5th 698, 710 [§ 1172.6 relief is unavailable if the defendant was the actual killer]), or that he directly aided and abetted the murder and thus possessed malice aforethought (see *People v. Gentile* (2020) 10 Cal.5th 830, 848 ["Senate Bill 1437 does not eliminate direct aiding and abetting liability for murder because a direct aider and abettor to murder must possess malice aforethought"], abrogated on another ground as stated in *People v. Oyler* (2025) 17 Cal.5th 756, 836). Felony murder is not at issue in this case.

III

Analysis

Defendant argues that the trial court applied an incorrect standard of review. We agree.

As stated, "[a]t the hearing to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder under California law as amended by the changes to Section 188 or 189 made effective January 1, 2019." (§ 1172.6, subd. (d)(3).) "At this stage, '[t]he question is whether the petitioner committed [the underlying crime] under a still-valid theory, and that is a factual question.' [Citation.]

The trial court is therefore 'a fact finder tasked with holding the People to the beyond a reasonable doubt standard' and ' "must impartially compare and consider all the evidence that was received throughout the entire trial" and determine whether that "proof . . . leaves [the court] with an abiding conviction that the charge is true." ' " (*People v. Harris* (2024) 105 Cal.App.5th 623, 632.)

In its ruling, the trial court referred to itself as "the finder of fact and also, as the legal determiner and arbiter of this proceeding." The court stated that it "was mindful of the burden of proof here of beyond a reasonable doubt, and, for the record, is the standard that this Court applied in making [its] ultimate finding and decision here." These recitations are consistent with the applicable standard of review.

The trial court also stated, however, that "the Court had to look *whether the People could prove they could obtain a conviction* of the defendant based on basic accomplice liability *or whether he acted with reckless disregard for the life* of the victim." (Italics added.) This passage is problematic for two reasons. First, the court referred to whether the People "could prove they could obtain a conviction." However, the correct standard for the trial court at defendant's section 1172.6 evidentiary hearing was whether the prosecution *has proved*, beyond a reasonable doubt, that *defendant is guilty* of murder under California law as amended. (§ 1172.6, subd. (d)(3).) Second, the trial court's reference to whether defendant acted with reckless disregard for life is inapposite. Under section 189, the question whether a defendant was a major participant in an underlying felony who acted with reckless indifference to human life pertains to the felony murder theory of liability (§ 189, subd. (e)(3)), which is not at issue here.

Towards the end of its ruling, the trial court stated that the evidence "would be adequate for a reasonable jury to conclude that [defendant] was aware and participated in the advanced plans for the killing of [the victim] and is therefore liable as an accomplice," and that "this Court finds that beyond a reasonable doubt that a reasonable jury would convict [defendant] as he was charged." These passages again invoke what a

finder of fact "would" conclude, as opposed to whether the prosecution *has proved*, beyond a reasonable doubt, that *defendant is guilty* of murder under California law as amended. (§ 1172.6, subd. (d)(3).) Furthermore, the trial court in referring to a jury identified the wrong finder of fact. At the section 1172.6 hearing, it is the trial court that is the " 'fact finder tasked with holding the People to the beyond a reasonable doubt standard' . . . ." (*People v. Harris, supra,* 105 Cal.App.5th at p. 632.)

Because of these erroneous recitations in the trial court's ruling, we cannot say with any confidence that the court applied the appropriate standard of review in denying defendant's section 1172.6 petition.

Defendant argues that the trial court's error in applying an incorrect standard of review requires reversal. In the respondent's brief, the People state that the trial court's "gaffe" in referring to a reasonable jury was harmless. Neither party addresses the standard for harmless error review applicable here. (See *People v. Vance* (2023) 94 Cal.App.5th 706, 716-717 [determining that the standard of *People v. Watson* (1956) 46 Cal.2d 818 applies where the trial court employed the incorrect standard of proof at a former § 1170.95 evidentiary hearing].) In any event, we cannot conclude from this record that the error in employing an incorrect standard of review at the evidentiary hearing was harmless.

Lastly, defendant argues, as he did on his prior appeal from the first denial of his resentencing petition, that the evidence presented at the hearing "was legally insufficient to support the denial of relief." Therefore, while stopping short of invoking the term "double jeopardy," defendant argues that we should reverse and remand not for a new hearing, but with directions that the trial court vacate his murder conviction and impose a sentence for the crime of accessory after the fact. We reject this argument again, as we did on defendant's prior appeal (*Fernandez, supra,* C093040), and for the same reasons. (See *People v. Hernandez* (2021) 60 Cal.App.5th 94, 111 [an evidentiary hearing under § 1172.6 "does not implicate double jeopardy because section [1172.6] 'involves a

resentencing procedure, not a new prosecution' "]; accord, *People v. Mitchell* (2022) 81 Cal.App.5th 575, 589.)

In light of our determination, we need not address defendant's remaining contentions as they have been rendered moot.

DISPOSITION

The order denying defendant's section 1172.6 petition for resentencing is reversed, and the matter is remanded for the trial court to conduct a new hearing under section 1172.6.

\s\
Krause, J.

We concur:

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Duarte, Acting P. J.

\s\
Boulware Eurie, J.