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Opinion following order vacating prior opinion

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE,

Plaintiff and Respondent,

v.

JOSE JOHNNY PRADO,

Defendant and Appellant.

B221964

(Los Angeles County
Super. Ct. No. KA084737)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Charles Horan, Judge. Affirmed.

Matthew Alger for Defendant and Appellant.

Edmund G. Brown, Jr. and Kamala D. Harris, Attorneys General, Dane R. Gillette,
Chief Assistant Attorney General, Pamela C. Hamanaka and Lance E. Winters, Assistant
Attorneys General, Michael R. Johnsen, Lawrence M. Daniels and Lauren E. Dana,
Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Jose Johnny Prado appeals from the judgment entered upon his jury conviction of first degree murder. Defendant contends the trial court committed reversible error when it failed to instruct the jury that (1) under the natural and probable consequences doctrine, an aider and abettor could be guilty of a lesser degree of murder than the perpetrator, and (2) the absence of heat of passion is an element of malice aforethought. We find no reversible error.

Defendant also contends that he was prejudiced by the trial court's inadequate inquiry into the effectiveness of his appointed counsel under *People v. Marsden* (1970) 2 Cal.3d 118 (*Marsden*). On direction from the California Supreme Court, we vacated our previous decision in order to reconsider this contention in light of *People v. Sanchez* (2011) 53 Cal.4th 80 (*Sanchez*). After considering the parties' supplemental briefing, we again affirm the judgment.

FACTUAL AND PROCEDURAL SUMMARY

The murder victim, Oscar Torres, owned a Hummer stretch limousine that his friend Anthony Limon drove for him. On October 4, 2008, Torres arranged for Limon to drive Jose Saenz, who went by the name Toro. Saenz directed Limon to pick up three other individuals, including defendant. They went to a liquor store and a bar, cruised around Hollywood and were headed to Montebello when Saenz told Limon to drive to Torres's house in Whittier.

Once there, Saenz, Limon, and defendant went up to Torres's front door. Torres eventually let them in. In the meantime, someone turned the limousine around and parked it in front of the house facing in the opposite direction. Defendant entered Torres's house last and stayed closest to the door. Saenz pulled a gun and pointed it at Torres within seconds of entering. Limon stepped between them and tried to take the gun away from Saenz. Defendant pushed Limon away and they struggled. Limon did not see a gun in defendant's hand but felt what appeared to be a gun. While Limon was trying to run to another room, he heard a pop. He saw defendant and Saenz hitting Torres with their fists. Limon then rushed defendant, and the two struggled again. Someone hit

Limon on the back of the head. He was shot in the back either when he heard the original popping sound or during his second struggle with defendant. He heard someone say, “Dome him” or “Kill him.”

The outside surveillance system captured Torres running out of the house chased by Saenz, who was shooting at him. Torres fell to the ground face up, and Saenz stood over him, shooting him repeatedly in the head. Saenz then ran into and out of the house and entered the limousine, which had started moving during the shooting. On his way out of the house, defendant wiped the door frame with his shirt sleeve while holding a gun in his other hand. He ran after Saenz, turned around, and ran back into the house, racking the slide of a gun, then ran out and entered the limousine.

The 19 entry and exit gunshot wounds on Torres’s body indicated that he had been shot repeatedly in the back and in the face. Ten spent casings were recovered from the front yard; an eleventh casing was found in the house. All bullets were fired from the same handgun. About forty firearms were recovered from the house, as well as four pay-owe sheets, one of which bore the name “Toro.”

Defendant was charged with one count of murder as to Torres and one count of attempted premeditated murder as to Limon. The jury convicted him of first degree murder and acquitted him of the attempted murder charge. The court denied defense counsel’s motion for a new trial and defendant’s request to represent himself. Defendant was sentenced to a term of 25 years to life for the murder conviction, with a one-year enhancement for a sustained allegation of a prior prison term.

Defendant timely appealed. We affirmed the judgment in an unpublished decision filed on April 4, 2011. The Supreme Court granted review and transferred the case back to us with directions to vacate our decision and reconsider it in light of *Sanchez, supra*, 53 Cal.4th 80. On February 8, 2012, we vacated our previous decision and invited the parties to submit supplemental briefs on *Sanchez*’s applicability to this case.

DISCUSSION

I

Defendant contends the court incorrectly instructed the jury on the law of aiding and abetting and malice aforethought. The trial court in criminal cases must instruct the jury sua sponte on the applicable law. (*People v. Breverman* (1998) 19 Cal.4th 142, 154 (*Breverman*)). Its failure to properly instruct the jury is reviewed de novo. (*People v. Martin* (2000) 78 Cal.App.4th 1107, 1111.) The contention that an instruction misstates the law is cognizable even absent an objection in the trial court. (*People v. Smithey* (1999) 20 Cal.4th 936, 976, fn. 7.)

A

Defendant contends that CALJIC Nos. 3.00 and 3.02 were incorrectly given because they did not inform the jury that he could be guilty of a lesser offense than Saenz. The correctness of jury instructions is determined “from the entire charge of the court, not from a consideration of parts of an instruction or from a particular instruction.” (*People v. Castillo* (1997) 16 Cal.4th 1009, 1016.) We therefore examine the entire set of jury instructions given in this case.

The case was originally submitted to the jury on the theory that defendant intended to aid and abet Torres’s murder. Generally, an aider and abettor is guilty of the crime he or she intended to aid and abet. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117 (*McCoy*)). If the mens rea of the aider and abettor “is more culpable than the actual perpetrator’s, the aider and abettor may be guilty of a more serious crime than the actual perpetrator.” (*Id.* at p. 1120.) Conversely, if the aider and abettor’s mens rea is less culpable, the aider and abettor may be guilty of a lesser crime. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165 (*Samaniego*)). The court instructed the jury in terms of CALJIC No. 3.00 that “[e]ach principal, regardless of the extent or manner of participation[,] is equally guilty.” Courts have found the “equally guilty” language of CALJIC No. 3.00, and of the similarly worded CALCRIM No. 400, to be misleading. (*People v. Nero* (2010) 181 Cal.App.4th 504, 518 (*Nero*); *Samaniego, supra*, 172 Cal.App.4th at 1164-1165). Instructing the jury that principals are “equally guilty”

amounts to reversible error when the trial court precludes the jury from making appropriate findings under other instructions. (See *Nero*, 181 Cal.App.4th at p. 519-520 [reversible error where the trial court reread CALJIC No. 3.00 twice after the jury asked whether it could convict the defendant of a lesser crime]; cf. *Samaniego*, 172 Cal.App.4th at p. 1165-1166 [no reversible error where the jury made appropriate findings under other instructions].)

Here, the trial court also instructed the jury in terms of CALJIC No. 3.01, that liability for a crime is premised on the aider and abettor's own knowledge and intent, and No. 3.31, that there must be a union of act and mental state. The jury was separately instructed on murder as a violation of Penal Code section 187 (CALJIC No. 8.10), express malice (CALJIC No. 8.11), and first and second degree murder (CALJIC Nos. 8.20 and 8.30). In response to these instructions, the jury asked the court to clarify whether defendant would be an aider and abettor to murder if Saenz had manifested an intent to kill but defendant only knew that a lesser offense, such as "roughing up," would be committed. Contrary to defendant's contention, the jury's question does not indicate that the jury was misled by CALJIC No. 3.00. Rather, it indicates that the jury was following CALJIC Nos. 3.01 and 3.31 and was considering whether, based on his knowledge and intent, defendant could be guilty of a lesser crime than murder. Unlike the court in *Nero*, the court here did not answer the jury's question by rereading CALJIC No. 3.00 and thus cannot be said to have misled the jury.

Instead, the court answered the jury's question by instructing in terms of CALJIC No. 3.02 on the doctrine of natural and probable consequences. Under this doctrine, an aider and abettor may be guilty of any other crime committed by the perpetrator that is a natural and probable consequence of the crime he or she intended to aid and abet. (*McCoy*, *supra*, 25 Cal.4th at p. 1117.) As modified to fit this case, CALJIC No. 3.02 instructed the jury it had to be satisfied beyond a reasonable doubt that defendant aided and abetted the commission of the crime of assault or assault with a firearm, that his co-principal committed murder, and that murder was a natural and probable consequence of the commission of the crime of assault or assault with a firearm.

Under the doctrine of natural and probable consequences, the aider and abettor may be guilty of a lesser necessarily included offense to the crime the actual perpetrator ultimately committed if only the lesser offense is “a reasonably foreseeable consequence” of the crime originally aided and abetted. (*People v. Woods* (1992) 8 Cal.App.4th 1570, 1587-1588 (*Woods*)). Defendant argues that CALJIC No. 3.02 was misleading because it did not inform the jury that defendant could be guilty of a lesser degree of murder than Saenz if the lesser degree of murder was a natural and probable consequence of the crime of assault or assault with a firearm under the circumstances known to defendant. Defendant relies on *Woods*, but that case does not premise the natural and probable consequences doctrine on defendant’s knowledge or view of the circumstances. Rather, the test is objective: “whether a reasonable person under like circumstances would recognize that the crime was a reasonably foreseeable consequence of the act aided and abetted. [Citation.]” (*Id.* at p. 1587.) Consistent with *Woods*, CALJIC No. 3.02 instructs the jury to determine objectively whether murder was a reasonably foreseeable consequence of assault or assault with a firearm.

CALJIC No. 3.02 did not instruct the jury how to determine the degree of murder, but the court already had instructed the jury on first and second degree murder in terms of CALJIC Nos. 8.20 and 8.30. These instructions were consistent with *Woods*, where the court reasoned that “[e]ven when lesser offense instructions are not required for the perpetrator because the evidence establishes that, if guilty at all, the perpetrator is guilty of the greater offense, the trial court may have a duty to instruct sua sponte on necessarily included offenses as to aider and abettor liability.” (*Id.* at p. 1593.) The error reviewed by the court in *Woods* was that the trial court had instructed the jury that it could not find the aider and abettor guilty of second degree murder if it found the perpetrator guilty of first degree murder. (*Id.* at pp. 1579-1580.) Here, the trial court instructed on second degree murder even though the execution-style killing of Torres left no doubt that the perpetrator was guilty of first degree murder. (See *People v. Lenart* (2004) 32 Cal.4th 1107, 1127 [the manner of killing may supply the element of premeditation and

deliberation].) It did not affirmatively preclude the jury from finding defendant guilty of second degree murder. *Woods* is, therefore, distinguishable.

CALJIC 8.20 instructs the jury to find murder in the first degree if “the killing was preceded and accompanied by a clear, deliberate intent on the part of *the defendant* to kill, which was the result of deliberation and premeditation.” It then explains that “[t]o constitute a deliberate and premeditated killing, *the slayer* must weigh and consider the question of killing and the reasons for and against such a choice.” CALJIC 8.30 defines second degree murder as “the unlawful killing of a human being with malice aforethought when *the perpetrator* intended unlawfully to kill.” (Italics added.) The interchangeable use of the terms “defendant,” “slayer,” and “perpetrator” is not problematic in cases of direct liability for murder where they all refer to the same person. But a defendant charged as an aider and abettor is not the slayer or perpetrator. Given without modification in this case, the instructions create some confusion whether defendant (the aider and abettor) or Saenz (the slayer or perpetrator) must have had a deliberate intent to kill.

In *People v. Concha* (2009) 47 Cal.4th 653 (*Concha*), a provocative act murder case, the court stated that “[o]nce liability for murder is established in a provocative act murder case *or in any other murder case*, the degree of murder liability is determined by examining *the defendant’s personal mens rea* and applying [Penal Code] section 189.” (*Id.* at p. 663; italics added.) Although defendant did not rely on *Concha*, we invited the parties to brief the effect of this statement on the natural and probable consequences doctrine. After considering the supplemental briefs, we conclude that the holding in *Concha* is not meant to apply to an aider and abettor’s liability under that doctrine. The *Concha* court followed closely the reasoning of *McCoy*, *supra*, 25 Cal.4th at pages 1118-1119, that a defendant’s personal mens rea is relevant for first degree murder. (See *Concha*, at pp. 660, 662, 665, and 666.) The issue in *McCoy* was an aider and abettor’s guilt of the intended crime, and the court stated that “[n]othing we say in this opinion necessarily applies to an aider and abettor’s guilt of an unintended crime under the natural and probable consequences doctrine.” (*McCoy*, at p. 1117.) Based as it is on

McCoy, the *Concha* court's discussion of a defendant's personal mens rea does not determine an aider and abettor's liability for first degree murder under the natural and probable consequences doctrine. The reference to the defendant's intent in CALJIC 8.20 is inconsequential in this case because the rest of the instructions on murder point to the perpetrator's, not the aider and abettor's, mens rea. Any confusion caused by this reference would favor defendant because it would preclude the jury from convicting him of first degree murder if he did not deliberately intend to kill, even were that crime a reasonably foreseeable consequence of the target crime of assault with a firearm.

Defendant cites *People v. Hart* (2009) 176 Cal.App.4th 662 (*Hart*), for the proposition that "the trial court has a duty, sua sponte, to instruct the jury . . . that it must determine whether premeditation and deliberation . . . was a natural and probable consequence of the target crime." (*Id.* at p. 673.) The court in *Hart* reversed an aider and abettor's conviction of attempted premeditated murder because the trial court had not instructed the jury that attempted premeditated murder, rather than just attempted murder, must be a natural and probable consequence of attempted robbery. (*Ibid.*) This issue is now before our Supreme Court in *People v. Favor*, review granted March 16, 2011, S189317. We decline to consider whether the holding of *Hart* may be applicable beyond the attempted murder context.

Even were it so applicable, on the facts of this case we find no prejudice resulting from the court's failure to instruct the jury that first degree murder, not just murder, must have been a reasonably foreseeable consequence of the assault with a firearm. Any such error was harmless under *Chapman v. California* (1967) 386 U.S. 18, 24. (See *Neder v. United States* (1999) 527 U.S. 1, 15 (*Neder*); *People v. Prieto* (2003) 30 Cal.4th 226, 256.) The error is harmless where it is clear beyond a reasonable doubt "that a rational jury would have found the defendant guilty absent the error," as it is where "a defendant did not, and apparently could not, bring forth facts contesting the omitted element." (*Neder, supra*, 527 U.S. at pp. 15, 18-19).

The prosecutor argued that Saenz entered Torres's house having planned the murder and he brought defendant as backup. Defendant actively facilitated the murder by

standing closest to the door, pushing Limon out of the way when he tried to wrest the gun from Saenz, fighting with Limon, and beating Torres. In his closing arguments before and after the natural and probable consequences instruction was given, the prosecutor relied heavily on various events recorded by the surveillance cameras. He argued that some of Saenz's gestures caught on film just before Torres opened the door were evidence of a plan: Saenz motioned to defendant as if to stand in position, rubbed his hands and smiled, and gave what looked like a thumbs up. The prosecutor argued that defendant's gestures caught on film were evidence that he knew of Saenz's plan to kill Torres: defendant, who entered Torres's house last, appeared to close the door in a manner that would not leave fingerprints and was seen after the murder wiping off the door. The prosecutor pointed to the fact that someone turned the limousine around in the meantime as additional evidence that the murder was planned. Limon did not see a gun in defendant's hand, but he felt what appeared to be a gun, and defendant was captured on film holding a gun and racking the slide of a gun after the murder. The jury could infer that defendant had a gun all along as opposed to holding Saenz's gun after the murder.

The jury was instructed on two kinds of aider and abettor liability, and the prosecution argued both that defendant intended to aid and abet a premeditated murder and that murder was a natural and probable consequence of an assault with a firearm, were that the only crime defendant intended to aid and abet. We cannot be sure which theory the jury applied, but its question to the court that prompted the instruction on the natural and probable consequences doctrine suggests that defendant was convicted under that doctrine. During deliberations, the jury sent a second note to the court asking whether an attempted murder occurred if Torres rather than Limon was Saenz's intended target. The court instructed the jury that, if it believed Saenz intended to shoot Torres rather than Limon, there could be no attempted murder against Limon. Following that instruction, the jury convicted defendant of first degree murder as to Torres and acquitted him of the attempted murder of Limon. The jury's second note to the court indicates that Saenz's actions led the jury to believe that he had already attempted to kill Torres while

everyone was inside the house. His deliberate murder of Torres outside the house was therefore reasonably foreseeable. Both first and second degree murder require an intent to kill. If murder was a natural and probable consequence of assault with a firearm—the intended offense about which the court instructed—it is not reasonably possible under the facts of this case to conclude that there could be a reasonable doubt whether the murder was willful, deliberate, and premeditated. The jury’s view of the evidence makes clear that it would have found defendant guilty of first degree murder even had the court explicitly instructed that first degree murder, not just murder, could be a natural and probable consequence of the assault with a firearm or that defendant could be guilty of a lesser degree of murder than Saenz.

B

Defendant challenges the jury instruction on malice aforethought on the ground that it did not inform the jury that absence of heat of passion was an element of malice and the prosecution had the burden to prove this negative. Alternatively, he argues that if, as given, the malice instruction was proper under California law, the instruction was nevertheless contrary to *Mullaney v. Wilbur* (1975) 421 U.S. 684 (*Mullaney*), which placed the burden to prove the absence of heat of passion on the prosecution.

These arguments are mistaken. CALJIC No. 8.50, which sets up the distinction between murder and manslaughter, satisfies *Mullaney*. (*People v. Rios* (2000) 23 Cal.4th 450, 462 (*Rios*)). The instruction provides that where a killing occurs “in the heat of passion or is excited by a sudden quarrel that amounts to adequate provocation . . . the law is that malice, which is an essential element of murder, is absent.” In such cases, in order to establish that the killing is murder rather than manslaughter, the burden is on the prosecution to prove beyond a reasonable doubt the absence of the heat of passion or sudden quarrel. The trial court did not give CALJIC No. 8.50 in this case, instructing the jury only on express malice in terms of CALJIC No. 8.11. But the trial court had no duty to give CALJIC No. 8.50 unless the issue of heat of passion on sudden provocation was “properly presented.” (*Rios, supra*, 23 Cal.4th at pp. 461-462, quoting *Mullaney, supra*, 421 U.S. at p. 704). To be “properly presented,” the issue must be suggested by the

prosecution’s own evidence, or defendant must make a showing on this issue “sufficient to raise a reasonable doubt of his guilt of murder.” (*Rios*, at p. 462.)

Defendant argues that the evidence created a possibility that Torres may have provoked Saenz because Maria Duarte, Torres’s girlfriend, who was hiding in a bedroom closet during the incident, testified that she heard a conversation that turned into an increasingly loud argument. Duarte’s account was not based on anything other than vague sounds emanating from the entryway; it was not specific enough to establish that Torres provoked Saenz or that any provocation was adequate. Limon testified that Saenz pointed a gun at Torres within seconds of entering the house. The surveillance cameras caught the murder of the unarmed Torres, who ran out of the house wearing only boxer shorts, fell on his back after having been shot from behind, and was then repeatedly shot in the face. The evidence does not suggest that this execution-style murder resulted from a heat of passion on sudden provocation, and the court was not required to instruct the jury on an irrelevant issue.

II

Defendant contends that on the day of sentencing, when he complained of the adequacy of his appointed counsel’s representation and asked to represent himself, the court should have held a hearing under *Marsden*, *supra*, 2 Cal.3d 118. As directed by the Supreme Court, we have reconsidered this contention in light of *Sanchez*, *supra*, 53 Cal.4th 80. After considering the parties’ supplemental briefs, we conclude that *Sanchez* does not require that a *Marsden* hearing be held in this case.

The relevant facts are these: On the day of sentencing, after the trial court denied the defense motion for a new trial, defendant asked to represent himself in order to file his own motions—based on “inadequate aid of counsel.” Defendant said he was not prepared to proceed without looking at the transcript of his trial and the law of ineffective assistance of counsel, but he wanted to state for the record the reasons for his dissatisfaction. The court allowed defendant to state the reasons for his dissatisfaction with counsel, and defendant complained generally of his counsel’s failure to investigate, present evidence, and call witnesses. Defense counsel interrupted, suggesting that “this is

sounding like a *Marsden* motion.” The court did not believe defendant was making a *Marsden* motion and denied what appeared to be an open-ended request to investigate in pro. per. and delay the proceeding. After sentencing, defendant again asked to be allowed to explain on the record his dissatisfaction with counsel. The court again allowed him to do so, and this time defendant claimed that counsel did not talk to him before filing the motion for a new trial. When defendant began divulging information that counsel had told him about her experience and her problems with the prosecution and detectives in the case, the court warned him that he might be waiving his attorney-client privilege.

When a defendant seeks to substitute new counsel on the ground that appointed counsel was ineffective, the trial court must permit the defendant to relate specific examples of the attorney’s inadequate performance. (*Marsden, supra*, 2 Cal.3d at p. 124.) A *Marsden* motion may be made at any stage of a criminal proceeding. (*People v. Smith* (1993) 6 Cal.4th 684, 695-696.) “““Although no formal motion is necessary, there must be ‘at least some clear indication by defendant that he wants a substitute attorney.’” [Citations.]” (*People v. Dickey* (2005) 35 Cal.4th 884, 920.) Generally, the trial court in a criminal case has no authority to consider a second motion for a new trial, but an exception has been recognized for a motion based on ineffective assistance of counsel. (*People v. DeLouize* (2004) 32 Cal.4th 1223, 1228 & fn. 1; *People v. Stewart* (1988) 202 Cal.App.3d 759.) Some appellate courts have held that a defendant’s expressed desire to file a motion for a new trial based on ineffective assistance of counsel triggers the trial court’s duty to hold a *Marsden* hearing. (See *People v. Reed* (2010) 183 Cal.App.4th 1137, 1146-1148, citing *People v. Mejia* (2008) 159 Cal.App.4th 1081 and *People v. Mendez* (2008) 161 Cal.App.4th 1362; contra *People v. Richardson* (2009) 171 Cal.App.4th 479, 484-485.)

In *Sanchez*, the Supreme Court disapproved “the procedure of appointing substitute or ‘conflict’ counsel solely to evaluate a defendant’s complaint that his attorney acted incompetently,” instead of conducting a *Marsden* hearing. (*Sanchez, supra*, 53 Cal.4th at p. 84.) The court disapproved both *People v. Mejia, supra*, 159 Cal.App.4th

1081 and *People v. Mendez, supra*, 161 Cal.App.4th 1362, to the extent that they “incorrectly implied that a *Marsden* motion can be triggered with something less than a clear indication by a defendant, either personally or through current counsel, that the defendant ‘wants a substitute attorney.’ [Citation.]” *Sanchez, supra*, 53 Cal.4th at p. 90, fn. 3.) The Supreme Court affirmed the Court of Appeal’s conclusion that a *Marsden* hearing was required in *Sanchez* because defense counsel in that case requested that substitute counsel be appointed to look into Sanchez’s reasons for wanting to withdraw his plea. (*Ibid.*)

Here, defendant did not indicate that he wanted a substitute attorney; rather, he made a request to represent himself. Defense counsel interjected that defendant’s request sounded “like” a *Marsden* motion. But counsel did not state affirmatively that defendant was making such a motion or that he wanted a substitute attorney. While defendant’s request for a continuance could be construed as a request to file a second motion for a new trial, this time based on ineffective assistance of counsel, *Sanchez* confirms that such a request in itself is not a *Marsden* motion. On this record, the court was not required to conduct a *Marsden* hearing.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

We concur:

EPSTEIN, P. J.

WILLHITE, J.

MANELLA, J.