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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

LEOBARDO HERNANDEZ,

Defendant and Appellant.

B266206

(Los Angeles County  
Super. Ct. No. YA088222)

APPEAL from a judgment of the Superior Court of Los Angeles County.

Mark S. Arnold, Judge. Reversed and remanded with directions.

Patricia A. Scott, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Steven D. Matthews and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

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## INTRODUCTION

A jury convicted Leobardo Hernandez of the first degree willful, premeditated, and deliberated murder of Juan Frias, and it found true gang and firearm allegations. At trial, it was undisputed that Hernandez was present at the scene of the murder, but that he was not the shooter. The trial court instructed the jury on two forms of aider and abettor liability: a direct aiding and abetting theory and a natural and probable consequences theory. During closing arguments, the prosecutor argued the jury could convict Hernandez of first degree murder under either theory of liability. Hernandez argues, and the People concede, that, in light of the California Supreme Court's decision in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), the trial court prejudicially erred when it misinstructed the jury as to the mental state required for aiding and abetting a first degree premeditated murder. We agree and reverse Hernandez's conviction. Upon remand, the People shall have the option of accepting a reduction of Hernandez's conviction to second degree murder or retrying Hernandez on the first degree murder charge under a legally valid theory of culpability.

## FACTUAL AND PROCEDURAL BACKGROUND

### 1. The murder

This case arises out of an August 6, 2010 gang-related shooting. Hernandez, a member of the South Los street gang, was riding in an SUV with two other South Los members, Javier Rodriguez, also known as "Cricket," and Daniel Rodriguez, also known as "Tripper." Tripper was driving and Hernandez was riding in one of the back seats. Cricket was carrying a nine-millimeter Beretta handgun that Hernandez had given him. They were driving near South Vermont Avenue and 111th Street in Los Angeles, an area contested by several rival gangs, looking for someone to retaliate against in response to the recent killing of a fellow South Los member.

Around 6:00 p.m., Frias was sitting in the front seat of his car, which was parked near his friend's house on South Vermont Avenue. Tripper stopped the SUV in front of

Frias' car because Frias looked like a member of a rival gang.<sup>1</sup> Cricket then got out of the SUV, while Hernandez and Tripper stayed inside. Cricket approached Frias and asked him where he was from. When Frias did not answer, Cricket shot Frias in the face, killing him. Cricket got back inside the SUV and told Hernandez and Tripper that he had "got 'em."

## **2. The investigation**

In September 2011, Toni Martinez, a detective with the Los Angeles Sheriff's Department, learned that Hernandez might be a suspect in Frias' murder. Detective Martinez arranged for two Sheriff's deputies to pose as undercover inmates who would share a jail cell with Hernandez, in an attempt to get Hernandez to talk about Frias' murder.

On September 26, 2011, the undercover deputies were placed in a cell with Hernandez. After the deputies developed a rapport with Hernandez, Martinez removed Hernandez from his cell and briefly questioned him about the murder. Martinez did not mention specific details about the murder or show Hernandez photographs of the crime scene. Rather, she told Hernandez that she was investigating a murder in the neighborhood on South Vermont Avenue where Frias was killed, and she showed Hernandez generic photographs of that neighborhood. She also showed Hernandez two six-pack photographic lineups, one that contained a photograph of Hernandez and one that contained a photograph of Cricket. She then returned Hernandez to his jail cell, where he described the details of the murder to the undercover deputies.<sup>2</sup>

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<sup>1</sup> Frias was not a member of a gang, and Hernandez and the other passengers in the SUV did not know who Frias was when they approached him.

<sup>2</sup> The description of Frias' murder set forth above is drawn largely from Hernandez's conversation with the undercover deputies.

### 3. The trial

Hernandez was tried by a jury for murder (Pen. Code,<sup>3</sup> § 187, subd. (a)), along with three firearm enhancements (§ 12022.53, subs. (b), (c), (d), & (e)) and a gang enhancement (§ 186.22, subd. (b)). At trial, no evidence was presented that Hernandez was the shooter in Frias' murder; rather, the People relied entirely on aiding and abetting principles in pursuing Hernandez's conviction.

The trial court instructed the jury on two forms of aiding and abetting liability under which it could convict Hernandez of first degree murder: a direct aiding and abetting theory and a natural and probable consequences theory. Under the direct aiding and abetting theory, the court instructed the jury it could convict Hernandez of first degree murder if it found: (1) the perpetrator committed the crime; (2) the defendant knew that the perpetrator intended to commit the crime; (3) before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; and (4) the defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. The court further instructed that "[s]omeone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime." The trial court instructed the jury it alternatively could convict Hernandez of first degree murder under a natural and probable consequences theory if it found: (1) the defendant is guilty of assault with a firearm; (2) during the commission of the crime of assault with a firearm a coparticipant in that assault with a firearm committed the crime of murder; and (3) under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of the murder was a natural and probable consequence of the commission of the assault with a firearm. The court further instructed that "[a] natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is

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<sup>3</sup> All undesignated statutory references are to the Penal Code.

natural and probable, consider all of the circumstances established by the evidence. If the murder was committed for a reason independent of the common plan to commit the assault with a firearm, then the commission of murder was not a natural and probable consequence of assault with a firearm.” The court also instructed on the elements of assault with a firearm.

During closing argument, the prosecutor did not argue Hernandez was the direct perpetrator of Frias’ murder. Rather, she argued only that he was guilty of murdering Frias as an aider and abettor. Specifically, she told the jury it could convict Hernandez under either of the two theories of aider and abettor liability the court instructed on. While the prosecutor relied primarily on a direct aiding and abetting theory, she told the jury that it did not need to go so far as finding Hernandez intended to aid and abet a murder, so long as it found he intended to aid and abet an assault with a firearm, the natural and probable consequence of which was murder.

On July 20, 2015, the jury began deliberating. During the first ten minutes of its deliberations, the jury requested a device to listen to “C.D.[s].” The court provided the jury a laptop. About an hour into deliberations, the jury asked for a reading of Detective Martinez’s testimony. Detective Martinez’s testimony was read back to the jury at the beginning of the second day of deliberations. Finally, on the second day of deliberations, the jury requested the court to define the term “gang injunction.” The court denied the jury’s request, finding the term was not relevant to any of the issues in the case.

#### **4. The verdict and sentencing**

The jury returned its verdict on the second day of deliberations. The jury found Hernandez guilty of first degree murder, and it found true both the firearm and gang enhancement allegations.<sup>4</sup> The court sentenced Hernandez to a total term of 50 years to

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<sup>4</sup> The verdict form provided to the jury contained a request for a finding as to the firearm allegation under section 12022.53, subdivision (d); it did not contain requests

life in prison. The court imposed a term of 25 years to life for the first degree murder conviction, and it imposed an additional consecutive term of 25 years to life for the firearm enhancement under section 12022.53, subdivision (d). The court imposed, but stayed, a 10-year term for the gang enhancement.

Hernandez filed a timely appeal.

### **DISCUSSION**

Hernandez contends, and the People agree, the trial court erred when it instructed the jury on the natural and probable consequences doctrine as a basis upon which it could convict him of first degree premeditated murder. Hernandez also argues, and the People also agree, the court's error requires reversal of his conviction because there is nothing in the record to demonstrate the jury relied on a valid theory of liability when it found him guilty of first degree premeditated murder.

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) “If conflicting instructions on the mental state element of an alleged offense can act to remove that element from the jury’s consideration, the instructions constitute a denial of federal due process and [courts] invoke the *Chapman*[<sup>5</sup>] ‘beyond a reasonable doubt’ standard for assessing prejudice.” (*People v. Maurer* (1995) 32 Cal.App.4th 1121, 1128.)

In *Chiu*, the California Supreme Court held aiders and abettors may be convicted of first degree premeditated murder under direct aiding and abetting principles, but not under the natural and probable consequences doctrine. (*Chiu, supra*, 59 Cal.4th at pp. 158-159.) The court explained the purpose of the natural and probable consequences doctrine in the murder context is to deter persons from aiding or encouraging the commission of offenses that would naturally, probably and foreseeably result in an unlawful killing. (*Id.* at p. 166.) While that purpose is furthered by holding

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for findings for the firearm allegations under section 12022.53, subdivision (b) & (c), which were also alleged in the information.

<sup>5</sup> *Chapman v. California* (1967) 386 U.S. 18, 24 [17 L.Ed.2d 705, 87 S.Ct. 824].

a defendant culpable for second degree murder, the court reasoned, it is not served in the context of first degree murder, which requires a mental state of premeditation and deliberation that is uniquely subjective and personal. (*Ibid.*) That is so, the court explained, because “[t]he connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences doctrine, especially in light of the severe penalty involved and the above-stated [purpose] of deterrence.” (*Ibid.*) Direct aiding and abetting principles, however, do not raise the same issue. “An aider and abettor who knowingly and intentionally assists a confederate to kill someone could be found to have acted willfully, deliberately, and with premeditation, having formed his own culpable intent. Such an aider and abettor, then, acts with the means rea required for first degree murder.” (*Id.* at p. 167.)

The defendant in *Chiu* initiated a brawl during which one of his friends grabbed a gun and killed one of the brawl’s other participants. (*Chiu, supra*, 59 Cal.4th at pp. 160-161.) There was conflicting evidence about whether the defendant had instructed his friend to grab the gun and shoot the victim. (*Id.* at p. 160.) The trial court instructed the jury that it could convict the defendant of first degree murder if it found he either directly aided and abetted the murder or aided and abetted the target offense of assault or disturbing the peace, the natural and probable consequence of which was murder. (*Ibid.*) Because the record indicated the jury may have relied on the natural and probable consequences doctrine in convicting the defendant of first degree premeditated murder, the court reversed the defendant’s conviction, explaining it could not conclude beyond a reasonable doubt the jury relied on a different and legally valid theory. (*Ibid.*) The court held the appropriate remedy for the court’s instructional error was to offer the People the opportunity to accept a reduction of the defendant’s conviction to second degree murder or to retry the defendant for first degree murder, under a legally valid theory of culpability. (*Ibid.*)

We agree with the parties that the trial court erred when it instructed the jury that it could convict Hernandez of first degree premeditated murder under a natural and

probable consequences theory. Here, the court's instruction erroneously permitted the jury to convict Hernandez of first degree murder even if it found he did not act willfully, deliberately, and with premeditation. (*Chiu, supra*, 59 Cal.4th at p. 167.)

We also agree with the parties that the court's error requires us to reverse Hernandez's conviction for first degree premeditated murder. "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground." (*Chiu, supra*, 59 Cal.4th at p. 167.) Although there was evidence from which the jury could have found Hernandez guilty of first degree premeditated murder under direct aiding and abetting principles, the prosecutor relied on the natural and probable consequences doctrine at trial in arguing Hernandez's guilt. She told the jury during her closing argument that it did not need to rely on direct aiding and abetting principles, so long as it found Frias' murder was the natural and probable consequence of the target crime, assault with a firearm. There is nothing in the record that demonstrates beyond a reasonable doubt that the jury relied on a direct aiding and abetting theory, as opposed to the natural and probable consequences theory, when it reached its verdict. Accordingly, we must reverse Hernandez's conviction for first degree murder. (*Id.* at pp. 167-168.)

## DISPOSITION

The judgment is reversed and the matter is remanded in accordance with *Chiu, supra*, 59 Cal.4th 155, for the People either to accept a reduction of Hernandez's conviction to second degree murder or to retry Hernandez for first degree murder under a legally valid theory of culpability. If the People accept a reduction of his conviction, the trial court is directed to resentence Hernandez.

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LAVIN, J.

WE CONCUR:

ALDRICH, Acting P. J.

STRATTON, J.\*

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