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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JUAN GONZALEZ,

Defendant and Appellant.

C069759

(Super. Ct. No. 09F08955)

Sixteen-year-old victim Francisco Medina-Tomas was killed in a gang shooting at an apartment complex in Sacramento. A jury found defendant Juan Gonzalez guilty of first degree murder and found true a gang enhancement and an enhancement that a principal personally discharged a firearm. The jury found not true an enhancement that defendant personally discharged the firearm. The theory of defendant's guilt was that he was an aider and abettor to the lesser crime of disturbing the peace or issuing a challenge to fight, the natural and probable consequence of which was murder.

On appeal, defendant raises six contentions relating to the evidence, instructions, and the prosecutor's arguments to the jury. Finding no merit in these contentions, we affirm.

## FACTUAL AND PROCEDURAL BACKGROUND

The victim, a member of the Norteño gang called the Gardones, was at an apartment complex in Sacramento in November 2009 at around 9 p.m. or 10 p.m., to buy some marijuana. The apartment complex was the turf of a subset of the Sureño gang called Barrio Sur Trece, or BST, which was a rival gang of the Norteños. Three men, all of who were BST members and one of who was defendant, came up to the victim. They fired multiple shots at him. The fatal shot pierced the victim's lower back, ruptured his spinal cord and pulmonary artery, and came to rest at the base of his neck.

According to the version of the shooting most favorable to defendant, which was provided by fellow BST gang member Efren Gonzalez, defendant and his fellow gang members "hit . . . up" the victim, meaning, they asked him what gang he claimed. The victim responded, "Gardones." Defendant said he "was going to beat [the victim's] ass" to get the victim to leave the apartment complex. However, "out of the blue," "before anyone could even swing," one of the other BST members whose nickname was Psycho pulled out a gun. Defendant "[t]ried to stop [Psycho]" by "[t]r[ying] to grab the gun from [him]." "He tried to prevent it, but [Psycho] just wanted to prove himself and there [wa]s nothing much [defendant] c[ould] try to do." BST had a gang gun that bounced around from member to member and was used for protection.

## DISCUSSION

### I

#### *The Court Correctly Did Not Instruct On The Defense Of Withdrawal*

Defendant contends the court erred in failing to instruct sua sponte on the defense of withdrawal. He is wrong because there was no substantial evidence to support the defense.

"To be entitled to an instruction on the withdrawal defense, a defendant charged with aiding and abetting a crime must produce substantial evidence showing that (1) he

notified the other principals known to him of his intention to withdraw from the commission of the intended crime or crimes, and (2) he did everything in his power to prevent the crime or crimes from being committed.” (*People v. Shelmire* (2005) 130 Cal.App.4th 1044, 1055.)

Here, defendant cannot prove even the first prong. The intended crimes were fighting or challenging to fight and/or disturbing the peace. According to the version of the shooting most favorable to defendant, he and his fellow gang members asked the victim what gang he claimed. The victim told them he belonged to their rival gang. Defendant told Gonzalez “[defendant] was going to beat [the victim’s] ass” to get the victim to leave the apartment complex. However, “out of the blue,” “before anyone could even swing,” Psycho pulled out a gun. Defendant “[t]ried to stop [Psycho]” by “[t]r[ying] to grab the gun from him.”

This evidence demonstrated defendant did not withdraw or try to withdraw from fighting or challenging to fight or disturbing the peace. To the contrary, the crimes of challenging to fight or disturbing the peace were already committed before the shooter fired. Defendant and his cohorts had already asked the victim about his gang affiliation, a question that served as the challenge to fight or disturbing the peace. As the gang expert here explained, “[i]t’s a way of confronting someone” and “[i]t’s a very common approach that criminal street gang members take and, often, it precipitates a violent crime or a shooting or a homicide . . . .” Simply put, defendant did not notify the other principals of his intention to withdraw from the commission of the intended crime. Rather, he participated in committing the intended crime. No withdrawal instruction was warranted.

## II

### *Defendant's Claim Of Insufficient Evidence, Which Is Based On The Applicability Of The Withdrawal Defense, Lacks Merit*

Defendant argues there was insufficient evidence to support his murder conviction because “[t]he record establishes that the withdrawal defense should preclude [his] murder conviction.” As we have just explained, the withdrawal defense did not apply here, so defendant’s insufficient evidence argument based on that defense is a nonstarter.

## III

### *The Prosecutor Did Not Commit Misconduct In Closing Argument When Arguing The Lack Of A Withdrawal Defense*

Defendant contends the prosecutor committed misconduct in closing argument with regard to the way he argued the lack of a withdrawal defense. Although there was no objection, defendant claims the issue is reviewable because the court failed to “fulfill its gatekeeping function,” “objections and admonitions could not cure the prosecutor’s egregious misconduct,” and if they could have, defense counsel was ineffective for failing to object. There was no misconduct because the prosecutor’s closing argument was consistent with the law.

The four parts of the closing argument defendant takes issue with are as follows:

(1) “Even if you didn’t intend it to happen, even if afterwards, once you got this ball rolling, once you lit the fuse and it was about to explode in everyone’s face, if you didn’t like the result that you created, you are guilty of the crime.”

(2) Assuming everything Efren Gonzalez said was true, “[d]o you think the law is going to say that’s okay. You’re not responsible for the murder. Absolutely not. It logically doesn’t make sense.” “Because under the law, if you go and you aid and abet, that . . . challenge to fight, that crime, once that crime is committed, you’re on the hook for the natural and probable consequences of it. Period.”

(3) “When you’re taking the gun away, that does not facilitate the murder. That may be technically true. However, we’re not talking about aiding and abetting the murder. We’re talking about aiding and abetting a challenge to fight that winds up in a murder that you should have expected.”

(4) “If you start this ball rolling, if you want to live this lifestyle and you want to roll up to this kid [the victim], you better think about what happens. Because twelve people are going to hear about it, and they are going to find you guilty of murder, and that’s what I’m going to ask you to do.”

These portions of closing argument were legally correct because they stated in lay terms why the withdrawal defense did not apply here. It did not apply because once defendant and his cohorts got the ball rolling by confronting the victim about his gang status, the crime of challenging to fight was already complete. And, at that point, the law does not allow a withdrawal defense. (See *People v. Shelmire*, *supra*, 130 Cal.App.4th at p. 1055 [“To be entitled to an instruction on the withdrawal defense, a defendant charged with aiding and abetting a crime must produce substantial evidence showing that (1) he notified the other principals known to him of his intention to withdraw from the commission of the intended crime or crimes. . . .”]) This is exactly what the prosecutor was arguing in closing when pointing out that Efren Gonzalez’s version of events actually implicated defendant.

## IV

### *The Jury Instructions Regarding*

#### *Defendant's Liability For First Degree Murder Were Correct*

Defendant contends the court erred in instructing the jury that he could be convicted of first degree murder based on vicarious liability for the malice and premeditation of the shooter.<sup>1</sup> He is wrong.

Defendant's contention is based on *People v. Concha* (2009) 47 Cal.4th 653 (*Concha*), a case that is inapplicable because it involved a provocative act murder. *Concha* held as follows: "Once 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

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<sup>1</sup> The two instructions defendant challenges, CALCRIM Nos. 520 and 521, were given as follows:

"The defendant is charged in Count One with murder in violation of Penal Code section 187. To prove the defendant is guilty of this crime, as under straight aider and abettor liability, the People must prove that one, the perpetrator committed the act that caused death of another person; and, two, when the perpetrator acted, he had a state of mind called malice aforethought.

"There are two kinds of malice aforethought, express malice and implied malice. Proof of either is sufficient to establish the state of mind required for murder.

"The perpetrator acted with express malice if he unlawfully intended to kill. The perpetrator acted with implied malice if he intentionally committed an act, the natural and probable consequences of the act were dangerous to human life. Three, at the time of the act, he knew his act was dangerous to human life; and four, he deliberately acted with conscious disregard for human life." (CALCRIM No. 520.)

"A person is guilty of first degree murder if the People have proved that he acted willfully, deliberately, and with premeditation.

"The perpetrator acted willfully if he intended to kill. The perpetrator acted deliberately if he carefully weighed the considerations for and against his choice and knowing the consequences, decided to kill. The perpetrator acted with premeditation if he decided to kill before completing the act that caused death." (CALCRIM No. 521.)

examining the defendant's personal mens rea and applying section 189." (*Concha*, at p. 663.) To reach this holding, *Concha* relied on *People v. McCoy* (2001) 25 Cal.4th 1111. (*Concha*, at pp. 660, 662, 665, 666.) The issue in *McCoy* was an aider and abettor's liability for an intended crime, and the court was careful to note, "Nothing 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.)

Indeed, "aider and abettor culpability under the natural and probable consequences doctrine is not premised upon the intention of the aider and abettor to commit the nontarget offense because the nontarget offense was not intended at all." (*People v. Canizalez* (2011) 197 Cal.App.4th 832, 852.) "Because the nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime." (*Ibid.*) Therefore, defendant's contention is wrong that the instructions were erroneous because he could indeed be convicted of first degree murder based on vicarious liability for the malice and premeditation of the shooter.

## V

### *The Trial Court Did Not Err In Instructing That An Aider And Abettor Is Equally Guilty As The Perpetrator*

Defendant contends the trial court violated his constitutional rights by instructing pursuant to former CALCRIM No. 400 that, "A person is equally guilty of a crime, whether he committed it personally or aided and abetted the perpetrator who committed it." There was no error.

The People's theory was that defendant was guilty as an aider and abettor under the natural and probable consequences doctrine. As we have just discussed in part IV, aider and abettor liability under this doctrine imposes vicarious liability for the nontarget offense committed by the perpetrator that is the natural and probable consequence of the target offense. (*People v. Canizalez, supra*, 197 Cal.App.4th at p. 852.) "Because the

nontarget offense is unintended, the mens rea of the aider and abettor with respect to that offense is irrelevant and culpability is imposed simply because a reasonable person could have foreseen the commission of the nontarget crime. It follows that the aider and abettor will always be ‘equally guilty’ with the direct perpetrator of an unintended crime that is the natural and probable consequence of the intended crime.” (*Ibid.*)

“Consequently, the statement in CALCRIM former No. 400 that “[a] person is *equally guilty* of the crime [of which the perpetrator is guilty] whether he or she committed it personally or aided and abetted the perpetrator who committed it” (italics added), is a correct statement of the law when applied to natural and probable consequences aider and abettor culpability and was properly given in this case.” (*People v. Canizazlez, supra*, 197 Cal.App.4th at p. 852.)

## VI

### *The Prosecutor Did Not Commit Misconduct In*

#### *Closing When Arguing About Defendant’s Gang Membership*

Defendant contends the prosecutor committed misconduct in closing with regard to the gang evidence. Although there was no objection, defendant claims the issue is reviewable for the same reasons he argued the alleged misconduct in part III is reviewable. Again, we find no misconduct because the prosecutor’s closing argument was consistent with the law.

The five parts of the closing argument defendant now takes issue with are as follows:

(1) “But I would like the defense to come up here and suggest to you that the person who shot that night didn’t commit a first degree murder, that they haven’t lived a lifestyle where this potential for violence at any moment with another gang member already having a gun on their person happens, that they hadn’t gone through that deliberative process hundreds of times in their head, and that it didn’t play out exactly like they had envisioned it before . . . .”

(2) “If what was going to happen happened, . . . [t]here is going to be a violent confrontation. . . . I’m not going to involve myself in that. I’m going to get out of this lifestyle. I’m not going to do that stuff anymore. That’s what the law is asking that you do.”

(3) “So when you are asking yourselves, was there premeditation and deliberation in this case? You can say to yourself, we know the players involved. These are straight up BST guys who are down for the cause. They had a gun on them. [¶] . . . [¶] Because a defense attorney may stand up and say it happened quickly. There is not a lot of evidence of premeditation and deliberation. [¶] I would say the complete opposite is true. [¶] You know what? It’s almost the same in every case where you have people who choose to live this lifestyle.”

(4) “The bottom line question and what the law says is this. Look, Danger, [defendant] you can involve yourself in this lifestyle. . . . And you go up and you challenge someone, you better stop and think for one second if the stuff goes bad, . . . [y]ou’re going to be responsible for all of the natural and probable things that come from this illogical ridiculous plan to maintain your respect, you are going to be on the hook for this.”

(5) “If you start this ball rolling, if you want to live this lifestyle and you want to roll up to this kid [the victim], you better think about what happens. Because twelve people are going to hear about it, and they are going to find you guilty of murder, and that’s what I’m going to ask you to do.”

Defendant’s contention is that these passages were assertions that gang membership could substitute for proof of the charged offenses. Not so. These passages made the accurate point that, based on the law and the facts, the way that defendant had led his gang lifestyle and the choices he had made the night of the shooting virtually ensured that the natural and probable consequences of his and his fellow gang members’ asking the victim what gang he claimed was the cause of the victim’s death. Just as the

gang expert explained, BST members commonly took the approach of asking people where they were from to immediately identify the person as an ally or potential rival, and such an approach often precipitated a violent crime, shooting, or homicide. Such was the case here, where the evidence showed defendant and his cohorts provoked the victim by asking him what gang he claimed and then shot him with a gang gun that bounced around from member to member.

#### DISPOSITION

The judgment is affirmed.

ROBIE, J.

We concur:

RAYE, P. J.

BLEASE, J.