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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES NEAL,

Defendant and Appellant.

D059315

(Super. Ct. No. SCD225855)

APPEAL from a judgment of the Superior Court of San Diego County, Michael T. Smyth, Judge. Reversed.

A jury convicted Charles Neal of second degree murder (Pen. Code, § 187, subd. (a); count 1),<sup>1</sup> and shooting at an inhabited structure (§ 246; count 2). The jury determined Neal committed both offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)), and a principal used and discharged a firearm in the crimes,

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<sup>1</sup> Further statutory designations are also to the Penal Code unless otherwise specified.

causing the death of another person (§ 12022.53, subds. (d), (e)). The jury found Neal not guilty of first degree murder as charged in count 1. The court sentenced Neal to state prison for a total of 40 years to life, consisting of 15 years to life for count 1, plus a consecutive 25-year term for the firearm enhancement on that count. The court stayed sentencing on count 2. (§ 654.)

The prosecution's theory was that Neal's codefendant, Maurice Tucker, was the shooter and Neal had derivative liability for both crimes as a coconspirator.<sup>2</sup> On appeal, Neal claims the trial court committed prejudicial error by instructing the jury on a legally invalid theory of implied malice second degree murder. Under California Supreme Court authority, we agree. (*People v. Swain* (1996) 12 Cal.4th 593, 601 (*Swain*); *People v. Cortez* (1998) 18 Cal.4th 1223, 1237-1238 (*Cortez*)). We reverse the judgment.

#### FACTUAL BACKGROUND

Neal and Tucker claim membership in two separate but allied criminal street gangs, O'Farrell Park Banksters (O'Farrell) and Eastside Skyline Piru (Skyline). Stephen Cleveland, the victim, was a member of Lincoln Park Bloods (Lincoln Park), a rival gang of O'Farrell and Skyline.

At a rap music concert in April 2007, there was a fight between Skyline and Lincoln Park gang members. Cleveland took part in the fight.

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<sup>2</sup> Neal and Tucker were tried before the same jury. As to Tucker, the jury deadlocked 11 to 1 for guilt. In a second trial Tucker was convicted of first degree murder and shooting at an inhabited structure.

In June 2007 Neal and his girlfriend, Vanity August, took a trip with Tucker and his girlfriend.<sup>3</sup> While away, Neal gave August money to purchase two prepaid cell phones. Per Neal's instructions, August activated one of the phones for him, using a fake name and address and obtaining an out-of-state area code. The other cell phone was for Tucker.

On June 9, 2007, a community celebration was held in Martin Luther King Jr. Memorial Park (the park) in southeast San Diego, which is bordered on the north by Skyline Drive and on the east by 65th Street. The park is in territory claimed by the O'Farrell and Skyline gangs.

Some gangsters attended the celebration, including Tucker and his friend Joseph Brown, an O'Farrell member. At some point in the afternoon, a Cadillac with four male occupants drove slowly by the park on 65th Street. The men wore white and green clothing, the gang colors of Lincoln Park. The men looked toward the crowd, which "started scurrying about kind of hurriedly." Attendees made comments such as, "Here they go, starting trouble." The Cadillac eventually drove away.

Within about 10 minutes, four men dressed in white began descending a hill on foot toward the park. They were making the Lincoln Park gang sign. A group of O'Farrell and Skyline members began running up the hill. The Lincoln Park members retreated, but the incident ruined the celebration.

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<sup>3</sup> When she testified at trial, August was on probation on a drug-related felony conviction.

Tucker lived near the park. According to Brown, at around 5:00 p.m. he and Tucker went to Tucker's house, where they drank and smoked marijuana in the front yard for a couple of hours.<sup>4</sup> Neal showed up later in an Impala. Brown overheard Tucker tell Neal about the incident at the park, and Neal responded, "Fuck Lincoln and they were going to go ride." In gang lingo, the term "ride" means to beat up or kill someone. Tucker and Neal went into the house and changed into black jeans and black hooded sweatshirts.

Arrow Morris, Brown's cousin and an O'Farrell gang member, pulled up in a dark green Suburban with tinted windows. Morris and Neal spoke and exchanged keys. Brown saw Morris drive away in the Impala, and Tucker drive away in the Suburban with Neal in the passenger seat.

Cleveland was at his home just north of the park on 65th Street, also in territory claimed by the O'Farrell and Skyline gangs. After dark, at around 8:00 p.m., he walked his girlfriend, Sharnay Robinson, to her car parked across the street. A dark green Suburban with tinted windows passed Robinson's car, screeched to a halt and backed up. Cleveland said, "What's up?" to the driver of the Suburban, and the driver responded, "What's up?," in an agitated and threatening tone. Cleveland said, "Who is that?," and the

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<sup>4</sup> When Brown testified at trial, he was in custody on several charges for participating in an armed robbery of a marijuana dispensary, in which he struck one woman with his gun and pointed it at another woman. Hoping for leniency, Brown told authorities he had information on Cleveland's murder. Brown originally faced a sentence of 27 years or more, but after striking a deal for his testimony he was allowed to plead guilty to two counts of robbery and faced a sentence of between five and 15 years. Brown conceded he was afraid of prison and would do "just about anything not to go to prison for a long time."

driver said something like "Tookie or Tuckie," or perhaps "2 B." Tucker's nicknames include "Tuck," "Tuck-Bo," "Tuck 2 Da," and "Tu 2 Da," and Neal's nicknames include "Choo-Choo" and "2 B Dat." Robinson did not recognize the driver, but she believed Cleveland did because he "started acting nervous."

An extremely tall, thin man in black clothing immediately exited the passenger side of the Suburban and ran toward Cleveland. Cleveland told Robinson to get down. He then ran toward his house as the man shot several rounds from a handgun in his direction. Robinson briefly lost sight of the men, but she saw the shooter run back to the Suburban and reenter the passenger side, after which the car went south toward Skyline Avenue. Cleveland was found mortally wounded in a neighbor's open garage.

Police found Neal's cell phone about six feet away from where the Suburban had stopped on 65th Street. The predominant DNA on the phone was likely from Neal. Police seized Tucker's cell phone, and discovered there were several "direct connect" calls between it and Neal's cell phone the evening of the shooting. Further, a string of calls were placed between Tucker's and Morris's cell phones. Cleveland's stepfather told police of a previous incident between Cleveland and Neal.

Neal had been staying with August at a motel in Chula Vista. He was out the evening of the shooting and she tried to reach him numerous times on his cell phone, but he did not answer. At about 9:00 p.m., August got a call from a friend who reported Cleveland had been shot. August turned on the television to watch the news, and Neal arrived with a man wearing a dark colored hooded sweatshirt. August did not recognize the man. Neal told August he had lost his cell phone. After 20 to 30 minutes, Neal said

he was going to Tucker's house. He left in a large dark colored SUV with tinted windows. A week later, August was with Neal when he abandoned the SUV beside a ditch in Spring Valley.

Two days after the shooting, Brown went to Tucker's house to hang out. Neal was also there. The conversation turned to Cleveland. According to Brown, Tucker said he and Neal "were driving down 65th Street going towards Skyline Drive," when they saw Cleveland. Brown "just assumed [Tucker] was driving." Tucker said Neal got out of the car and confronted Cleveland, but Neal "was taking too long so he [Tucker] jumped out and shot . . . Cleveland in the neck."<sup>5</sup> As he related the story, Tucker smiled and laughed. Neal was silent during the conversation.

A couple of months after the shooting, Brown met with Tucker after police searched his house. Tucker said police told him they found a cell phone at the scene, and Tucker believed the phone belonged to Neal. Neal was not worried, though, because it was a "rigged phone," meaning it was listed in someone else's name.

Robinson did not get a good look at the shooter's face. A few months after the shooting, she attended a party and got a "dark heavy feeling" when she made eye contact with a man called Tuck-Bo. At trial she identified the man as Tucker. She believed he was the shooter based on his height, build and "very dark skin." Tucker is 6 feet 3½ inches tall and thin, and Neal is 5 feet 9 inches tall and heavier.

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<sup>5</sup> The evidence showed Cleveland was shot in the torso, but not the neck.

Robinson did get a fairly good look at the driver's face. She did not identify Neal from a photographic lineup. Before the preliminary hearing, someone emailed her a photo of Tucker's brother, Marcus Marshall, which appeared on MySpace. In the photo, Marshall was wearing a removable metal grill on his teeth. Robinson told two detectives she broke down crying when she saw the photo, and she was 100 percent sure Marshall was the driver.

At the preliminary hearing, Robinson positively identified Marshall from his photo as the driver. She also testified she was certain the driver "had metal in his mouth" the night of the shooting.

At trial, Robinson testified that when she first saw Marshall's photo she believed he was the driver because "the same facial structure, the same facial features matched perfectly with what I [saw] that night." She testified, however, that she could not be certain Marshall was the driver, but his photo "[l]ooks similar to the driver." She denied saying she was 100 percent sure Marshall was the driver.

Robinson conceded that before trial she had never identified Neal. She was asked to describe Neal's face, and after a lengthy pause she responded, "Wide set and chubby." She testified Neal looked "very similar" to a drawing she helped create of the driver. She also testified the driver did not have metal on his teeth, but later in her testimony she did not dispute a description of the driver as wearing a grill. There was no evidence Neal ever wore a grill.

In the opinion of a criminal street gang expert, the shooting was committed in association with and for the benefit of the O'Farrell and/or Skyline gangs. The expert

explained that in gang culture "[r]espect is everything," and O'Farrell and Skyline would consider Lincoln Park's appearance at the park, and the earlier fight at the rap concert, "disrespectful acts" requiring retaliation. Further, the fastest way for a gang member to earn respect within his gang is to shoot and kill a rival gang member.

## DISCUSSION

### I

#### *Count 1: Murder*

### A

#### *Instructional Error*

Neal contends the jury instructions were materially flawed because they authorized the jury to convict him on a legally invalid theory, implied malice second degree murder. Neal did not object at trial, but we may nonetheless review the instructions because they affected his substantial rights. (§ 1259; *People v. Vines* (2011) 51 Cal.4th 830, 885, fn. 30.) We review jury instructions as a whole, in light of the trial record, to determine whether it is reasonably likely the jury understood a challenged instruction in the manner claimed. (*People v. Paysinger* (2009) 174 Cal.App.4th 26, 30.)

The prosecution's theory was that codefendants conspired to murder Cleveland, with Tucker doing the shooting and Neal doing the driving.<sup>6</sup> Neal was not charged with a conspiracy count, but "an uncharged conspiracy may properly be used to prove criminal liability for acts of a coconspirator." (*People v. Belmontes* (1988) 45 Cal.3d 744, 788-

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<sup>6</sup> The prosecution did not raise an aider and abettor theory.

789, disapproved of on another point in *People v. Doolin* (2009) 45 Cal.4th 390, 421, fn. 22.) "Conspiracy is a specific intent crime requiring both an intent to agree or conspire and a further intent to commit the target crime or object of the conspiracy." (*People v. Iniguez* (2002) 96 Cal.App.4th 75, 78, fn. omitted.)

"Murder is the unlawful killing of a human being . . . with malice aforethought." (§ 187, subd. (a).) Malice aforethought "may be express or implied." (§ 188.) " 'It is express when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature.' " (*Swain, supra*, 12 Cal.4th at p. 600.) "*Implied malice* murder, in contrast to express malice, requires instead an intent to do some act, the natural consequences of which are dangerous to human life." (*Id.* at p. 602; *People v. Cravens* (2012) 53 Cal.4th 500, 507 [" 'Malice is implied when the killing is proximately caused by " 'an act, the natural consequences of which are dangerous to life, which act was deliberately performed by a person who knows that his conduct endangers the life of another and who acts with conscious disregard for life.' " ' "].)

A "willful, deliberate, and premeditated killing" is murder in the first degree. (§ 189.) "A willful murder is an intentional murder." (*People v. Moon* (2005) 37 Cal.4th 1, 29; *People v. Castaneda* (2011) 51 Cal.4th 1292, 1320-1321 [first degree murder may not be based on implied malice].) "Second degree murder is the unlawful killing of a human being with malice, but without the additional elements (i.e., willfulness, premeditation, and deliberation) that would support a conviction of first degree murder." (*People v. Sarun Chun* (2009) 45 Cal.4th 1172, 1181.)

California recognizes three theories of second degree murder: unpremeditated murder with express malice; implied malice murder; and second degree felony murder. (*Swain, supra*, 12 Cal.4th at p. 601; *People v. Taylor* (2010) 48 Cal.4th 574, 623-624.) In *Swain*, however, our high court held that when the target crime of a conspiracy is murder, a finding of intent to kill is required; a conviction cannot be based on a theory of implied malice second degree murder. (*Swain, supra*, 12 Cal.4th at p. 607.) The court explained: "The element of malice aforethought in implied malice murder cases is . . . derived or 'implied,' in part through hindsight so to speak, from (i) proof of the specific intent to do some act dangerous to human life *and* (ii) the circumstance that a killing has resulted therefrom. It is precisely due to this nature of *implied malice* murder that it would be *illogical* to conclude one can be found guilty of conspiring to commit murder where the requisite element of malice is implied. Such a construction would be at odds with the very nature of the crime of conspiracy—an 'inchoate' crime that 'fixes the point of legal intervention at [the time of] agreement to commit a crime,' and indeed 'reaches further back into preparatory conduct than [the crime of] attempt' [citation]—precisely because commission of the crime could never be established, or be deemed complete, unless and until a killing actually occurred." (*Id.* at p. 603.)

Here, the court instructed the jury with CALCRIM No. 417, titled Liability for Coconspirators' Acts, as follows: "A member of a conspiracy is criminally responsible for the crimes that he or she conspires to commit, no matter which member of the conspiracy commits the crime. [¶] A member of a conspiracy is also criminally responsible for any act of any member of the conspiracy if that act is done to further the

conspiracy and that act is a natural and probable consequence of the common plan or design of the conspiracy. This rule applies even if the act was not intended as part of the original plan."

The court also instructed the jury with a modified version of CALCRIM No. 416, titled Evidence of Uncharged Conspiracy, that to convict Neal of murder there must be proof he intended to and did agree with Tucker or an unidentified coconspirator to commit murder; at the time of the agreement, Neal and one or more persons intended that one or more of them would commit murder; and one or more of them committed at least one overt act in furtherance of the agreement. After enumerating a series of alleged overt acts, the court added: "*To decide whether a defendant and one or more of the other alleged members of the conspiracy intended to commit murder, please refer to the separate instructions that I will give on that crime*" (Italics added.)

The court then instructed the jury on the elements of murder, including principles of implied malice second degree murder. The court gave the jury a modified version of CALCRIM No. 520, titled First or Second Degree Murder With Malice Aforethought, as follows: "The defendants are charged in count 1 with murder, in violation of . . . section 187. To prove that a defendant is guilty of this crime, the People must prove that: 1, the defendant committed an act that caused the death of another person; and 2, when the defendant acted, he had the 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 defendant acted with express malice if he . . . unlawfully intended to kill. The defendant acted with

implied malice if: 1, he intentionally committed an act; 2, the natural and probable consequence[s] of the act were dangerous to human life; 3, at the time he acted, he knew his act was dangerous to human life; and 4, he deliberately acted with . . . conscious disregard for human life." (Italics added.) Further, the court went on to instruct the jury that if it found Neal guilty of murder it must determine whether it was in the first or second degree.

We conclude the court erred by not tailoring the murder and malice instructions to the prosecution's theory of derivative conspiracy liability against Neal.<sup>7</sup> The People concede that since Neil was not the shooter but the alleged driver, his liability "could have only been predicated on his liability as a coconspirator." Thus, under *Swain*, an element of a murder charge against Neal was express malice. "[E]xpress malice and an intent unlawfully to kill are one and the same." (*People v. Saille* (1991) 54 Cal.3d 1103, 1114, fn. omitted.) While the jury was instructed it must find intent to kill as the object of the uncharged conspiracy, the jury acquitted Neal of first degree murder. The instructions improperly gave the jury the opportunity to proceed to find Neal guilty of implied malice second degree murder in contravention of *Swain*.

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<sup>7</sup> Citing *Swain, supra*, 12 Cal.4th at pp. 602-603, the bench notes for CALCRIM No. 563, for the crime of conspiracy to commit murder, caution as follows: "Do not cross-reference the murder instructions unless they have been modified to delete references to implied malice. Otherwise, a reference to implied malice could confuse jurors, because conspiracy to commit murder may not be based on a theory of implied malice." (Bench Notes to CALCRIM No. 563 (2012) p. 359.)

## B

### *Prejudice*

As a constitutional matter, a reviewing court may not set aside a judgment because of instructional error absent prejudice. (Cal. Const., art. VI, § 13.) "Instructional error regarding the elements of the offense requires reversal of the judgment unless the reviewing court concludes beyond a reasonable doubt that the error did not contribute to the verdict." (*People v. Sarun Chun, supra*, 45 Cal.4th at p. 1201.) "[T]o find the error harmless, a reviewing court must conclude . . . the jury based its verdict on a legally valid theory." (*Id.* at p. 1203.) "A 'legally incorrect theory' is one 'which, if relied upon by the jury, could not *as a matter of law* validly support a conviction of the charged offense.'" (*People v. Calderon* (2005) 129 Cal.App.4th 1301, 1306.)

The People claim a lack of prejudice because "the jury did not *necessarily* find him guilty of second degree murder based on a theory to commit implied malice murder." The People assert "there was absolutely no evidence of implied malice, and all of the evidence indicated that [Neal] intended to kill Cleveland." The People also point out that the prosecutor consistently argued for first degree murder, and did not argue implied malice as the prosecution did in *Swain*. (*Swain, supra*, 12 Cal.4th at p. 607.)

The People do not expressly state any valid theory for a second degree murder conviction against Neal. We presume the People's position is that the jury could have found Neal guilty of *express* malice second degree murder. The jury, however, acquitted Neal of first degree murder, an element of which is express malice. Moreover, if the jury

acquitted on first degree murder for lack of deliberation, rather than lack of express malice, second degree murder is still a legally invalid theory.

*Swain* left open the questions of "whether there exists a viable offense of conspiracy to commit express malice 'second degree' murder, and if there be such an offense, what is the applicable punishment." (*Swain, supra*, 12 Cal.4th at p. 608.) *Cortez, supra*, 18 Cal.4th 1223, resolved the questions. The court held that "all conspiracy to commit murder is necessarily conspiracy to commit premeditated and deliberated first degree murder, and . . . all murder conspiracies are punishable in the same manner as murder in the first degree pursuant to the punishment provisions of . . . section 182." (*Cortez, supra*, at pp. 1237-1238.) The court explained that the specific intent required to conspire to commit murder is the functional equivalent of premeditation and deliberation. (*Id.* at pp. 1231-1232.) The court also held that when the target offense of a conspiracy is murder, the court is not to instruct the jury to determine the "degree" of the murder since the only possibility is murder in the first degree. (*Id.* at p. 1240.)

The People also claim the jury "was left with no option other than finding [Neal] guilty of first degree murder," but it "apparently arrived at the second degree murder verdict through lenity." The People assert that since there may have been jury lenity, the second degree murder conviction must stand. The People cite *People v. Avila* (2006) 38 Cal.4th 491 (*Avila*), which explains: "As a general rule, inherently inconsistent verdicts are allowed to stand. [Citation.] For example, 'if an acquittal of one count is factually irreconcilable with a conviction on another, or if a not true finding of an enhancement allegation is inconsistent with a conviction of the substantive offense, effect is given to

both.' [Citation.] Although ' "error," in the sense that the jury has not followed the court's instructions, most certainly has occurred in such situations, 'it is unclear whose ox has been gored.' [Citation.] It is possible that the jury arrived at an inconsistent conclusion through 'mistake, compromise, or lenity.' [Citation.] Thus, if a defendant is given the benefit of an acquittal on the count on which he was acquitted, 'it is neither irrational nor illogical' to require him to accept the burden of conviction on the count on which the jury convicted." (*Id.* at p. 600; *People v. Santamaria* (1994) 8 Cal.4th 903, 911 [" 'An acquittal of one or more counts shall not be deemed an acquittal of any other count.' "].)

The record here does not suggest jury lenity. Neal plausibly asserts the jury may have rejected the argument he was the driver, in light of Robinson's unequivocal pretrial identifications of Tucker's brother as the driver, but under the implied malice instruction attributed some responsibility to Neal because he encouraged Tucker to "ride" on Lincoln Park, a gang term that means to beat up *or* murder a rival gang member. During closing, the prosecution argued, "We know what happened because Tucker and Neal talk about riding on Lincoln. This is the agreement."

In any event, the general rule discussed in *Avila* applies when a jury renders inherently inconsistent verdicts on two or more *legally valid* theories. (See, e.g., *Avila*, *supra*, 38 Cal.4th at p. 600 [acquittal of defendant on rape count, but true finding on rape-murder special circumstance allegation, did not require reversal of murder convictions on ground of inconsistent jury verdicts].) Here, the only legally valid theory was first degree murder, which the jury decided in Neal's favor. It would not be rational or logical to

require Neal to accept the burden of the second degree murder conviction since it is legally invalid. " [I]t is erroneous to speak of a "crime" of "conspiracy to commit murder of the second degree"; "a conspiracy to commit murder can only be a conspiracy to commit murder of the first degree" [citation]. Similarly, it is unnecessary to label the crime "conspiracy to commit murder of the first degree" there is no crime of "conspiracy to commit murder of the second—or any other—degree" from which it may be distinguished." (*Cortez, supra*, 18 Cal.4th at p. 1241 (dis. opn. of Mosk, J.).)

We conclude inherent prejudice exists. But for the instructional errors, the jury would not have convicted Neal of second degree murder. The conviction is contrary to law and cannot stand. (See *People v. Iniquez, supra*, 96 Cal.App.4th at p. 79 [reversal required when the defendant pleaded guilty to a "nonexistent offense," conspiracy to commit attempted murder].)

## II

### *Count 2: Shooting at an Inhabited Structure*

Additionally, Neal contends reversal of his conviction on count 1 for instructional error also requires reversal of his conviction on count 2. Section 246 provides: "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house [or] occupied building . . . is guilty of a felony. . . . [¶] As used in this section, "inhabited" means currently being used for dwelling purposes, whether occupied or not."

The People agree that since Neal was not the shooter, his liability for count 2 "could have only been predicated on his liability as a coconspirator." The court instructed the jury as follows: "To prove that a defendant is guilty of the crime charged

in count 2, the People must prove that: 1, the defendant *conspired to commit . . . murder*; 2, a member of the conspiracy committed shooting at an inhabited building to further the conspiracy; and 3, shooting at an inhabited building was a natural and probable consequence of a common plan or design of the crime that the defendant conspired to commit." (Italics added.)

Neal asserts the court's instructions on second degree murder and malice allowed the jury to find him guilty of count 2 on the same theory as count 1, that he conspired to commit implied malice second degree murder, a legally invalid theory. The People do not respond to Neal's position. We agree with Neal that prejudicial error requires reversal since the instructions authorized the jury to find implied malice second degree murder as an element of count 2.

#### DISPOSITION

The judgment is reversed.

McCONNELL, P. J.

WE CONCUR:

McDONALD, J.

AARON, J.