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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. ARMANDO ANDRES CARACHURE, Defendant and Appellant.	G051613 (Super. Ct. No. 13CF2054) O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Kimberly Menninger, Judge. Affirmed.

J. Courtney Shevelson, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland and Brendon W. Marshall, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

A jury convicted defendant Armando Andres Carachure of first degree murder, being an active gang member, and related allegations. The trial court imposed a sentence of life without the possibility of parole (LWOP). He raises two issues on appeal.

First, defendant claims the trial court committed the same instructional error regarding accomplice liability that the California Supreme Court found reversible in *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*). He is mistaken. The trial court's instructions are distinguishable from the instructions that were at issue in *Chiu*.

Second, defendant claims the trial court improperly imposed a parole revocation fine given his LWOP sentence. He is mistaken. Defendant's sentence also includes a determinate term for the substantive gang crime.

I

FACTS AND PROCEDURAL BACKGROUND

On February 21, 2013, Fidel Guajardo was on his bicycle near Jerome Park in Santa Ana in the early evening. Jerome Park is within the territory of the Townsend Street gang. Guajardo is a member of Sick Heads, a rival gang.

Guajardo stopped and spoke with his friend, Ricardo G., who was rollerblading. After a couple of minutes, Ricardo G. left and continued rollerblading. Shortly thereafter, Ricardo G. heard someone shout the word, "Luisito." Ricardo G. turned around and saw two or three males chasing Guajardo. Two of the males eventually caught Guajardo and stabbed him in the back 16 times, causing him to bleed to death. Ricardo G. later identified defendant as one of the men who had been chasing Guajardo.

Shortly after the stabbing, defendant and Luis Gaytan (a.k.a. "Luisito"), both members of the Townsend Street gang, arrived at the home of Gaytan's girlfriend on foot. Gaytan had blood on his shoes; defendant had blood on his hands, clothes, and shoes. Defendant had a knife in his hands. They both went into a bedroom and stayed in

there for about 15 minutes. When they emerged, they had changed out of some of their clothes. Defendant was carrying a brown plastic bag that had some clothing inside of it. Gaytan's girlfriend later found a bottle of rubbing alcohol in the room; it had Guajardo's blood on it.

The People filed a two-count information charging defendant with murder and with being an active member of a criminal street gang. (Pen. Code, §§ 187, subd. (a), 186.22, subd. (a).)[1] The People alleged as a "special circumstance," that defendant committed the murder as an active gang member to further the activities of the gang. (§ 190.2, subd. (a)(22).) The People further alleged defendant: committed the murder for the benefit of, at the direction of, or in furtherance of the gang (§ 186.22, subd. (b)(1)); personally used a dangerous weapon (§12022, subd. (b)(1)); and had acquired two prison priors (667.5, subd. (b)).

A jury found defendant guilty of committing murder in the first degree and being an active gang member. The jury found true the gang special circumstance and the gang enhancement. The jury found not true the allegation defendant had personally used a knife. The trial court found true defendant's prison priors.

For the first degree murder, the trial court sentenced defendant to life in prison without the possibility of parole due to the gang special circumstance allegation. The court also sentenced defendant to eight months in prison for the substantive gang crime, but stayed the sentence under section 654. The court also imposed and stayed a $280 parole revocation restitution fine.

[1] Further statutory references are to the Penal Code.

II

DISCUSSION

A. The Instructional Issue

Defendant claims that the trial court improperly instructed the jury that it could find him guilty of first degree murder under the natural and probable consequence doctrine. (*Chiu, supra*, 59 Cal.4th 155.) While such an instruction would constitute reversible error if it were prejudicial; here, the trial court did not so instruct the jury.

Generally, a defendant may be convicted of a crime either as a perpetrator or as an aider and abettor. (§ 31.) "If the defendant himself commits the offense, he is guilty as a direct perpetrator. If he assists another, he is guilty as an aider and abettor." (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) An aider and abettor is a person who "knowingly and with criminal intent aids, promotes, encourages, or instigates by act or advice" a perpetrator of a crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560-561.)

An aider and abettor's liability extends not only to crimes that were directly aided and abetted ("target" offenses), but also to any more serious crimes that were reasonably foreseeable ("nontarget" offenses). (*People v. Laster* (1997) 52 Cal.App.4th 1450, 1463.) Indirect aider and abettor liability for nontarget offenses is known as the "natural and probable consequences" doctrine. (*People v. Montes* (1999) 74 Cal.App.4th 1050, 1055 [in a gang confrontation an attempted murder was a natural and probable consequence of an assault or disturbing the peace].)

In 2014, the California Supreme Court held that the natural and probable consequences doctrine does not extend to first degree premeditated murder. (*Chiu, supra*, 59 Cal.4th at pp. 158-159.) In *Chiu*, the defendant was involved in a brawl with a fellow gang member who shot and killed a high school student. (*Id.* at pp. 159-160.) During the brawl, the defendant yelled to the perpetrator, "shoot him, shoot him." The defendant was charged with murder. (*Id.* at p. 60.) At trial, the prosecutor argued two alternate theories of liability. First, the prosecutor argued that the jury could find

defendant guilty of murder as a direct aider and abettor of the perpetrator (the shooter) in the murder itself. (*Ibid*.) Second, the prosecutor argued that the jury could also find defendant guilty of murder because he aided and abetted the target offenses (assault or disturbing the peace), and murder was a natural and probable consequence of those crimes. (*Ibid*.) The jury found defendant guilty of first degree premeditated murder. (*Ibid*.)

The Supreme Court held that while a defendant may be found guilty of second degree murder based on the natural and probable consequences theory, that theory does not apply to first degree premeditated murder because the mental state required (willfulness, premeditation, and deliberation) "is uniquely subjective and personal. It requires more than a showing of intent to kill; the killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. [Citations.]" (*Chiu, supra,* 59 Cal.4th at p. 166.) Therefore, "where the direct perpetrator is guilty of first degree premeditated murder, the legitimate public policy considerations of deterrence and culpability would not be served by allowing [an aider and abettor] to be convicted of that greater offense under the natural and probable consequences doctrine." (*Ibid.*)

In *Chiu*, the Supreme Court went on to find instructional error in the case because the trial court's instructions allowed the jury to find the defendant guilty of first degree premeditated murder under a natural and probable consequences theory based on the *perpetrator's* premeditation and deliberation. (*Chiu, supra*, 59 Cal.4th at pp. 160-161.) However, in this case, the *Chiu* problem does not exist because the trial court's instructions only allowed the jury to find defendant guilty of first degree premeditated murder based on the *defendant's* premeditation and deliberation.

In both cases, the trial courts properly instructed the jury on both direct aider and abettor liability (aiding and abetting the perpetrator in the murder) and aider and abettor liability based on the natural and probable consequences doctrine (aiding and

abetting the target offenses, with murder as a natural and probable consequence). In *Chiu*, the alleged target offenses were assault or disturbing the peace; here, the alleged target offenses were assault or battery. (*Chiu*, *supra*, 59 Cal.4th at p. 160.) That is, the court in this case properly instructed the jury that it could find defendant guilty of *second degree* murder if it found that he directly aided and abetted Gaytan in the murder of Guajardo, or if he aided and abetted in an assault or battery of Guajardo and a murder was a natural and probable consequence.

What is distinguishable in *Chiu* is that the trial court committed instructional error by improperly instructing the jury on what constitutes *first degree* premeditated murder. (*Chiu*, *supra*, 59 Cal.4th at pp. 160-161.) In *Chiu*, the court instructed the jury "that to find defendant guilty of first degree murder, the People had to prove that the *perpetrator* acted willfully, deliberately, and with premeditation, and that all other murders were of the second degree." (*Ibid*., italics added.) That is, in *Chiu* the jury was permitted to find the defendant guilty of first degree premeditated murder either as a direct aider and abettor, or under the natural and probable consequences doctrine, so long as *the perpetrator* (the shooter) acted with premeditation and deliberation.

Conversely, in this case the trial court instructed the jury correctly regarding first degree premeditated murder (CALCRIM No. 521): "The defendant is guilty of first degree murder if the People have proved that *he* acted willfully, deliberately, and with premeditation. The defendant acted willfully if *he* intended to kill. The defendant acted deliberately if *he* carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill." (Italics added.) That is, the jury was instructed that if it found defendant guilty of murdering Guajardo as an aider and abettor, it could only find defendant guilty of murder in the first degree if it found that *defendant himself* acted with premeditation and deliberation. We presume that the jury understood and faithfully followed the court's instructions. (*People v. Homick* (2012) 55 Cal.4th 816, 867.)

Unlike the jury instructions at issue in *Chiu*, nothing in the trial court's instructions allowed the jury to set the degree of murder at first degree based on anyone's premeditation and deliberation other than defendant's own premeditation and deliberation. Therefore, if the jury relied on an aiding and abetting theory—and it appears it did based on its "not true" finding on the personal use of the knife allegation—it could only be as a direct aider and abettor. That is, the jury must have concluded that defendant directly aided and abetted Gaytan in the murder of Guajardo and *defendant himself* did so with premeditation and deliberation.

The jury's finding that defendant committed first degree premeditated murder necessarily means that it did not rely on the natural and probable consequences theory. That is, the jury had to find that defendant *intended to kill* with premeditation or deliberation; not that defendant intended to commit one of the target crimes with premeditation and deliberation. Indeed, the prosecutor in closing argument reinforced the trial court's instructions and explicitly told the jury that it could only find defendant guilty of first degree premeditated murder as a direct perpetrator or a direct aider and abettor, but not as an aider and abettor under the natural and probable consequences theory.

Defendant acknowledges the prosecutor informed the jury that reliance on the natural and probable consequences doctrine would only support a second degree murder conviction, but he claims the prosecutor's statement "was never supported or endorsed by anything in the trial court's aiding and abetting instruction under CALCRIM No. 403 or in any other instruction." Not so.

The trial court instructed the jury about the natural and probable consequences doctrine using CALCRIM No. 403: "If you decide that the defendant aided and abetted one of these crimes and that Murder or Voluntary Manslaughter was a natural and probable consequence of that crime, the defendant is guilty of Murder or Voluntary manslaughter." The court then instructed the jury on the elements of murder

using CALCRIM No. 520. The last paragraph of that instruction reads: "If you decide that the defendant committed murder, it is murder of the second degree, unless the People have proved beyond a reasonable doubt that it is murder of the first degree as defined in CALCRIM No. 521." Before the *Chiu* decision, the last sentence of CALCRIM former No. 520 (2012) informed the jurors: "If you decide that the defendant committed murder, you must then decide whether it is murder of the first or second degree."

As *Chiu* explained, the trial court's instructions in that case erroneously allowed the jury to convict the defendant of first degree murder based on the natural and probable consequences doctrine. Here, however—as we have previously explained—the trial court avoided this pitfall by correctly informing the jury that in order to find *defendant* guilty of first degree premeditated murder they had to find that *he* premeditated and deliberated the murder under CALCRIM No. 521.

Because the trial court committed no instructional error, we need not address either party's harmless error analysis. Defendant is not entitled to reversal of his first degree murder conviction under *Chiu*.

B. The Parole Revocation Fine

Defendant claims that the trial court improperly imposed a $280 parole revocation fine given his LWOP sentence. He is mistaken.

"In every case where a person is convicted of a crime and his or her sentence includes a period of parole, the court shall . . . assess an additional parole revocation restitution fine . . . ." (§1202.45, subd. (a).) The fine is suspended unless parole is revoked. (§1202.45, subd. (c).) Ordinarily, if a trial court imposes an LWOP sentence it cannot impose the fine. (*People v. Battle* (2011) 198 Cal.App.4th 50, 63.) But if a defendant's sentence also includes a determinate term, the parole revocation fine is required even if the defendant "is unlikely to ever serve any part of the parole period on his determinate sentence." (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075 [parole

revocation fine upheld where court imposed determinate sentence in addition to defendant's death sentence].)

Here, in addition to defendant's LWOP sentence, the trial court also imposed and stayed a determinate term of eight months for the substantive gang crime. (§ 186.22, subd. (a).) Thus, the court properly imposed and suspended the $280 parole revocation fine.

III

DISPOSITION

The judgment is affirmed.

MOORE, ACTING P. J.

WE CONCUR:

ARONSON, J.

IKOLA, J.