B243042

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

IN AND FOR THE SECOND APPELLATE DISTRICT, DIVISION FOUR

PEOPLE OF THE STATE OF CALIFORNIA,
Plaintiff and Respondent,

v.

LETICIA MONTOYA et al.,
Defendants and Appellants.

APPELLANT MONTOYA'S PETITION FOR REHEARING

On Appeal from the Judgment of the
Superior Court of the State of California
in and for the County of Los Angeles
Superior Court No. PA066801

HONORABLE BEVERLY REID O'CONNELL, JUDGE

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To the HONORABLE PRESIDING JUSTICE and to the HONORABLE ASSOCIATE JUSTICES of the Court of Appeal of the State of California, Second Appellate District, Division Four:

Appellant LETICIA MONTOYA hereby petitions this court for a rehearing following the filing of its opinion in the above-entitled case on January 7, 2015.

In this petition appellant asks this court to reconsider its conclusion that the error in instructing on the natural and probable consequences doctrine does not require reversal of her first degree murder conviction.

REHEARING SHOULD BE GRANTED ON THE QUESTION OF WHETHER THE CHIU ERROR REQUIRES REVERSAL.

A. Introduction

Appellant Leticia Montoya was convicted of the first degree murder of Abraham Guerrero, committed by shooting from a motor vehicle. (1CT 178.) Undisputed evidence established that appellant was not the shooter, but the driver of the automobile. The prosecution advanced two theories of aiding and abetting: direct aiding and abetting, as described in CALCRIM No. 401, and the natural and probable consequences theory, as described in CALCRIM No. 403. (2CT [Montoya] 331-332, 334-335; 11RT 1516-1517; 1522-1524.)

While the appeal was pending, the California Supreme Court issued *People v. Chiu* (2014) 59 Cal.4th 155 (*Chiu*), which held that the natural and probable consequences theory of aiding and abetting is a legally invalid theory of conviction for first degree murder committed with deliberation and premeditation. (*Id*. at pp. 158-159, 166.) In supplemental briefing, appellant argued that *Chiu* applied here and required her conviction for first degree murder to be reduced to second degree murder because it was impossible to conclude beyond a reasonable doubt the conviction was based on the valid theory of direct aiding and abetting. (Supp. Letter Brief for Montoya, filed 6/13/14.) This Court concluded that *Chiu* error occurred but found the error harmless. (Sl.Op. 20-22.)

Appellant respectfully requests this court to grant rehearing and reconsider its conclusion that the error does not require reversal. This conclusion rests on an erroneous standard of reversibility and a misconception of the factual inferences that can necessarily be drawn from the jury's guilty verdict on the charge of shooting from a motor vehicle.

B. The relevant standard of reversibility, set out in *People v. Chiu* and *People v. Guiton*, does not permit affirmance of Montoya's conviction.

On finding that it was error for the trial court to instruct the jury that it could convict the defendant of first degree deliberate and premeditated murder as an aider and abettor under the natural and probable consequences theory, *Chiu* applied the standard of prejudice set forth in *People v. Guiton* (1993) 4 Cal.4th 1116. (*Chiu, supra*, 59 Cal.4th at p. 167.) *Chiu* explained, "[d]efendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder." (*Ibid*.) Stated another way, *Chiu* and *Guiton* require reversal here if there is a reasonable possibility that the jury based its conclusion that Montoya was guilty of first degree murder on the erroneous natural and probable consequences theory of liability. (See *Chiu*, *supra*, 59 Cal.4th 155 at pp. 167-168.)

In *Guiton*, *supra,* 4 Cal.4th 1116, the California Supreme Court considered and reaffirmed the long-standing rule that when an instructional error permits the jury to find the defendant guilty on a legally erroneous theory reversal is generally required. The governing rule for assessing prejudice in this situation is that "'when the prosecution presents its case to the jury on alternate theories, some of which are legally correct and others legally incorrect, and the reviewing court cannot determine from the record on which theory the ensuing general verdict of guilt rested, the conviction cannot stand.'" (*Id.* at p. 1122, quoting *People v. Green* (1980) 27 Cal.3d 1, 69.) This demanding standard is necessary because juries are generally not equipped to determine whether a particular

theory of conviction is contrary to law. (*Id.* at pp. 1125-1127.)[1]

C. This court's opinion misapplies the standard for determining harmlessness set out in *People v. Chiu* and *People v. Guiton.*

As explained above, the standard for determining harmlessness when an instructional error allows the jury to convict on an erroneous legal theory was set out in *Chiu* and *People v. Chun* (2009) 45 Cal.4th 1172, on which *Chiu* relied. The decision in this case quotes from *Chiu* as follows: "Where, as here, a jury receives instructions 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. [Citations.]' (*Chiu*, *supra*, 59 Cal.4th at pp. 167–168.)" (Sl.Op. 21.)

This statement is correctly quoted but it is an incomplete statement of the rule and, when quoted out of context as this court did in this case, it is an inaccurate statement of the standard of reversibility. The actual rule, stated in the very next sentence of the *Chiu* decision, is as follows: "Defendant's first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that defendant directly aided and abetted the premeditated murder. (*People v. Chun, supra,* 45

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[1] Following the lead of the United States Supreme Court in *Griffin v. United States* (1991) 502 U.S. [116 L.Ed.2d 371, 112 S.Ct. 466] (*Griffin*). *Guiton* drew a distinction between such errors and errors that permit the jury to find a defendant guilty on a factually insufficient ground. (*Guiton*, *supra,* 4 Cal.4th at p. 1128.) Under *Guiton* errors such as the erroneous natural and probable consequences instruction given here, that permitted Montoya to be convicted of first degree murder without the requisite intent, are still ordinarily reversible. But, because juries are "well equipped" to analyze the evidence and determine whether the facts are sufficient to support a legal theory, when the instructions offer the jury more than one theory of liability, at least one of which is supported by substantial evidence, the error does not provide an independent basis for reversal.

Cal.4th at pp. 1201, 1203–1205.)" (*Chiu, supra,* 59 Cal.4th at p. 167.) As applied to this case, *Chiu* and *Chun* direct reversal of Montoya's first degree murder conviction unless this court can conclude beyond a reasonable doubt that the jury found that Montoya directly aided and abetted the intentional murder; in other words, this court may uphold the conviction only if it is able to state beyond a reasonable doubt that the that the jury actually concluded that Montoya acted with the intent to cause death. *Chiu* found that the error in instructing on natural and probable consequences required reversal because "the jury may have been focusing on the natural and probable consequences theory." (*Id*. at p. 168.) By using the word "may," *Chiu* made clear that relief is warranted when it is possible that the verdict rests on the invalid natural and probable consequences theory. The possibility that the verdict *could* have rested on a valid theory of liability will not justify affirmance of the judgment unless there is no reasonable possibility that it rested on the invalid theory of liability.

The decision in this case also overstates the significance of the jury's guilty verdict of shooting from a motor vehicle. The facts here bear a close resemblance to the facts in *Chun, supra,* 45 Cal.4th 1172. There, the defendant was convicted of second degree felony murder. The underlying felony was shooting at a motor vehicle. The Supreme Court ruled that the merger doctrine of *People v. Ireland* (1969) 70 Cal.2d 522 precluded the use of that offense as the basis for the conviction, but found the error harmless there because the jury had found the defendant guilty of shooting at an occupied motor vehicle. (*Chun*, *supra,* 45 Cal.4th at p. 1205.) The jury had been instructed that the defendant, whether convicted as the perpetrator or a direct aider and abettor, must have acted willfully and maliciously. (*Ibid.*) The court concluded that under the circumstances—multiple shots were fired from three guns into a car occupied by three people—the jury's guilty verdict on this count necessarily entailed the

conclusion that the defendant acted with conscious disregard for life—in other words with implied malice. (*Ibid.*) Thus the Supreme Court was able to conclude that the erroneous felony murder instruction was harmless. (*Ibid.*)

The jury was instructed here that for Montoya to be guilty of this offense they had to find that she was the driver of a vehicle, that she knowingly permitted someone to discharge a firearm from the vehicle, and that the person in fact did discharge a firearm from the vehicle. (11RT 1528.) Performing an act knowingly is not equivalent to performing an act willfully and maliciously. But even assuming that under the circumstances of this case, Montoya acted with conscious disregard for life by knowingly permitting Flores to discharge a firearm from the car, this establishes no more than conscious disregard for life, or implied malice. The existence of implied malice in *Chun* was sufficient to uphold the second degree murder verdict there. Here, however, Montoya was found guilty of first degree murder. This required the jury to find that she acted with express malice, *i.e.,* intent to kill. The guilty verdict on the charge of discharging a firearm from a vehicle does not indicate that the jury found the existence of express malice.

This court's opinion does not explicitly rely on the guilty verdict on the motor vehicle charge as a ground for concluding that as a matter of law the jury found that Montoya directly aided an abetted an intentional killing. Instead, it asserts that the guilty verdict "indicates the jury rejected Montoya's exculpatory account of the shooting . . . in favor of her inculpatory statements to her friend Andalon." (Sl.Op. 21.) Because Andalon's testimony, if believed, indicated that Montoya and Flores planned the shooting as revenge for the rival gang's assault on Flores, the court concludes that the jury must have found her guilty of premeditated first degree murder. Appellant does not believe that Andalon's testimony will sustain the weight the court places on it. Even if the jury believed

every word of his statement could have been believed, it could still have concluded that Montoya was indifferent to whether or not Flores killed someone. This is undoubtedly a reprehensible mental state, but it is not express malice, and will not support a conviction of first degree murder as a direct aider an abettor, even when, as here deliberation and premeditation are not required. In other words, Andalon's testimony does not establish beyond a reasonable doubt that Montoya shared Flores' intent to kill.

However, there is a more important factual misconception here. The conclusion that the guilty verdict on the firearm discharge count indicates that the jury chose Andalon's version of the facts rather than Montoya's statement is based on a false dichotomy. There is no logical basis for concluding that the jury's only choices in this case were to believe Montoya's statement to the police in its entirety or to believe Andalon. It was well within the jury's purview as the trier of fact to reject both Andalon's statement indicating that Montoya and Flores actively planned and prepared to kill rival gang members, and Montoya's statement that she did not have any idea before the shots were fired that Flores intended to commit an assault with a firearm against rival gang members. The jury could well have been skeptical of Montoya's assertion that she did not know that Flores had a rifle and that he intended to use it to shoot at rival gang members and at the same time have been disbelieved Andalon's story about going to fetch Flores' rifle. Again, such a resolution of the facts would, under the circumstances, indicated that she acted with conscious disregard for life, but would not have established that she intended to aid and abet an intentional killing. Such a resolution of the facts would have resulted in a guilty verdict on the charge of shooting from a motor vehicle as a direct aider and abettor and a guilty verdict of first-degree murder on a natural and probable consequences theory.

Indeed, it is not only possible but plausible that this is exactly what the jury did. Andalon testified that after speaking with Flores, he called Montoya at work. (S.Op. 4.) Yet there was no corroboration that such a call was ever made, and the absence of corroboration could have raised a reasonable doubt about whether this aspect of his statement was true.[2] (Sl.Op. 7.) In addition, Montoya allegedly told Andalon that the decision to go get Flores's rifle was made when she and Flores were getting high on PCP. (Sl.Op. 4-5.) Yet Montoya presented evidence that she had tested negative for drugs, including PCP, on 24 occasions between February 2008 and February 2009. (Sl.Op. 7.)[3] Again, this evidence does not conclusively establish that she did not smoke PCP before the homicide, but 10 months of clean tests indicate that she was not regularly using drugs at the time of the homicide, and the evidence could have raised a reasonable doubt about this aspect of Andalon's testimony. These facts, which the jury could reasonably have viewed as undermining Andalon's assertion that he spoke with Montoya, were cited in the factual and procedural background section of the opinion, but not mentioned in the discussion of prejudice.

Finally, the likelihood that the jury relied on the natural and probable

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[2] The prosecutor established on cross-examination of the AT&T representative who testified to this fact that if Ms. Montoya's employer had more than one telephone line, the call might not have been recorded under the business's primary number, but this possibility does not corroborate Andalon's testimony. At most it indicates that the absence of a record of the call does not irrefutably establish that the call was not made.

[3] The prosecutor established on cross-examination that she did not test for drugs between December 25 and December 30, 2008. (Sl.Op. 7.) This negative evidence does not corroborate Andalon's testimony. It simply indicates that the negative drug tests do not entirely refute his assertion that she was getting high on PCP on the night of December 27-28, 2008, a 12-month record of clean tests, which started before December, 2008 and continued for two months afterward, could have raised a reasonable doubtg about the truth of Andalon's testimony about her PCP use.

consequences doctrine to find Montoya guilty of first degree murder is enhanced by the fact the prosecutor asked them to do just this. As appellant pointed out in her opening brief (AOB Montoya 18), the prosecutor argued that the jury could find Montoya guilty without finding that she intended to aid and abet an intentional murder:

> Now, when you have a rifle out the window, there are three people standing there and you pull the trigger, that's an assault with a deadly weapon. But then, as you see under the circumstances, any reasonable person would know that if you have a loaded firearm pointing at a person and you pull that trigger; oh, yes, a natural probable consequence might be that person might get shot and killed.

(11RT 1426.) If the jury heeded the prosecutor, it may well "have been focusing on the natural and probable consequences theory." (*Chiu, supra,* 59 Cal.4th at p. 168.)

In short, under the circumstances of the case, the jury may have used the natural and probable consequences theory of liability to find Montoya guilty of first degree murder without finding that she had an intent to kill. For the reasons explained above, this court's conclusion that the verdict rested on the jury's conclusion that Montoya acted with the explicit intent to kill is not supported by the law or the evidence. Appellant respectfully requests this court to grant rehearing and hold that the *Chiu* error requires reversal.

CONCLUSION

For the foregoing reasons, rehearing should be granted to reconsider if the *Chiu* error was requires reversal.

DATED: January 21, 2015

Respectfully submitted,

_____

Sara H. Ruddy
Attorney for Appellant
Leticia Montoya

Word-Count Certificate

In accordance with Cal. Rules of Court 8.384(b)(1), 8.490(b)(6), and 8.204(c)(1), I hereby certify that appellant's opening brief contains 2,680 words, as ascertained by the word-count function of the computer program used to prepare the brief.

DATED: January 21, 2015

Respectfully submitted,

_____

Sara H. Ruddy
Attorney for Appellant
Leticia Montoya

DECLARATION OF SERVICE BY MAIL

I am employed in the City of Berkeley, County of Alameda, State of California.

I am over 18 years of age, and not a party to the within cause; my business address is 2020 Milvia Street, Suite 300, Berkeley, CA 94704

On January 21, 2015, I served a true copy of the attached:

APPELLANT'S PETITION FOR REHEARING

on each of the following, by placing a true copy thereof in a sealed envelope(s) addressed as follows:

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and with postage thereon fully prepaid, placing said envelopes for mailing on the above date.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on January 21, 2015, at Berkeley, CA.

SARA H. RUDDY