Filed 9/25/23 P. v. Riley CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. JACK DEWAYNE RILEY, Defendant and Appellant.	E079054 (Super. Ct. No. FWV27881) OPINION

APPEAL from the Superior Court of San Bernardino County. Mary E. Fuller, Judge. Reversed and remanded with directions.

Denise M. Rudasill, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Alan L. Amann, Robin Urbanski, and Juliet W. Park, Deputy Attorneys General, for Plaintiff and Respondent.

I.

INTRODUCTION

Defendant and appellant Jack Dewayne Riley appeals from the trial court's order denying his petition to vacate his second degree murder conviction and for resentencing under Penal Code[1] section 1172.6 (formerly section 1170.95).[2] On appeal, defendant argues the trial court erred in denying his petition because the court used the wrong standard to determine whether he was entitled to relief. While this appeal was pending, the California Supreme Court clarified the law regarding second degree murder liability on a theory of directly aiding and abetting implied malice murder. (*People v. Reyes* (2023) 14 Cal.5th 981 (*Reyes*).) Because the record here indicates the trial court did not analyze the proper elements in denying defendant's section 1172.6 petition and its decision was based on a misunderstanding of the legal requirements of direct aiding and abetting implied malice murder, we reverse and remand for reconsideration.

II.

FACTUAL AND PROCEDURAL BACKGROUND[3]

On the night of June 11, 1991, Carol Romine was working as a prostitute. Scott Hayden, riding a motorcycle, approached Romine; Romine agreed to a sexual act in exchange for $40. Romine and Hayden retired to Romine's motel room, where Hayden gave Romine the $40 and they engaged in the agreed-upon sexual act. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1810.)

---

[1] All future statutory references are to the Penal Code.

[footnote continued on next page]

Hayden afterward produced a pistol from his duffel bag, held the gun to Romine's head, and demanded his money back. Romine gave Hayden the $40. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1810.)

Michael Rowe, Romine's boyfriend, was in another room of the motel and happened to observe Hayden holding the gun to Romine's head. Rowe, with the aid of a friend, accosted Hayden as Hayden was leaving Romine's room. Rowe put his hand on Hayden's back and told him to "freeze." Hayden dropped his duffel bag and put his hands in the air. Romine came out of her room, yelling that she had been robbed; Rowe told someone to call the police. Hayden said he was not waiting for the police. Rowe retrieved the $40 from Hayden's pocket as Hayden mounted his motorcycle and left. In a loud, angry voice, Hayden vowed to return. Fearing Hayden, Rowe, and Romine moved to a different motel room, in possession of the $40 and Hayden's duffel bag. Hayden's gun was inside the duffel bag. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1810.)

Hayden returned about 30 to 45 minutes later, riding as a passenger with defendant in defendant's truck. Defendant drove slowly around the motel parking lot. The victim, David Woods, was in the parking lot with some other motel residents. Defendant stopped the truck and Hayden fired two gunshots out the driver's window. Woods fell down.

---

[2] Effective June 30, 2022, the Legislature renumbered section 1170.95 as section 1172.6, with no substantive change in text. (Stats. 2022, ch. 58, § 10.) We cite to section 1172.6 for ease of reference unless otherwise indicated.

[3] The factual background is taken verbatim from this court's partially published opinion in *People v. Riley* (1993) 20 Cal.App.4th 1808, 1810-1812 (*Riley I*).

After a few seconds' pause, several more shots were fired toward Woods. Witnesses observed defendant's truck drive slowly in the parking lot, exit, make a U-turn, and drive once more slowly past the motel. Woods was struck by a bullet that entered the shoulder area and exited his chest. He died in the motel parking lot. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1810.)

The next day, defendant gave a gun to Lewis Rivenbark, defendant's business partner, for safekeeping. Defendant bragged that the gun had been used in a killing. When police later recovered the gun, they determined that the gun was used to fire a bullet found at the scene of the killing. (*Riley I*, *supra*, 20 Cal.App.4th at pp. 1810-1811.)

When defendant was arrested, he gave a videotaped statement to police. At first, defendant denied knowing about or being present at the shooting at the motel. Defendant claimed to have been at home all evening. When police told defendant that defendant's girlfriend failed to confirm his alibi, defendant changed his story. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1811.)

Defendant told police he had come home very drunk. Hayden came to defendant's house and told him he had been robbed after patronizing a prostitute. Hayden's bag and gun were taken. Defendant suggested that they go in his truck to the motel, to try to get Hayden's possessions back. Defendant gave Hayden a .357 pistol and a speed loader. Defendant drove Hayden back to the motel in defendant's truck. Hayden saw a Black man, and told defendant the man had been involved in the robbery. Hayden leaned across defendant and yelled, "Hey, N [-----]," out the window. Hayden, still leaning

across defendant's body, rapidly fired several shots out of the driver's side window. Defendant said he did not realize Hayden was going to shoot anyone and he drove quickly away after Hayden fired the shots. Defendant did not know for sure if Hayden's shots had struck anyone. Defendant told police he had thrown the pistol away at the bottom of a lake. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1811.)

Defendant testified on his own behalf at trial. He claimed he had been drinking all afternoon on the day of the shooting. That night, Hayden came to defendant's house, saying he had been robbed by three black men. Defendant asked Hayden if he wanted to go back to the motel; Hayden said he did not want to go on his motorcycle because it would be recognized. He asked defendant to drive him to the motel, and defendant agreed. Defendant also lent Hayden a loaded revolver, and a speed loader with five more bullets. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1811.)

On the way back to the motel, Hayden for the first time told defendant about the circumstances of the robbery; i.e., that Hayden had first held his gun to the prostitute's head. Defendant knew that Hayden had boasted before that he had once shot someone who robbed him. Defendant testified that, when they arrived at the motel, defendant told Hayden he would not get out of the truck and that they should go home and call the police. Defendant claimed that he did not know Hayden was going to shoot anyone, and he was surprised when Hayden started firing out of the driver's window. Defendant drove immediately away. Defendant told his girlfriend to say that defendant had not left the house that evening. The next day, defendant gave the gun to Rivenbark; Rivenbark

was supposed to throw the gun in a lake. When defendant later learned that Rivenbark had not disposed of the gun, defendant's lawyer contacted police and told them where they could find the gun. (*Riley I*, *supra*, 20 Cal.App.4th at pp. 1811-1812.)

A witness who was present at the motel testified that he saw Hayden, in the passenger seat, fire the shots at Woods. Defendant was leaning back while Hayden was shooting. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1812.)

In rebuttal, a police officer testified that defendant told him that, when Hayden came to defendant's house on the night of the shooting, Hayden was very angry about having been robbed. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1812.)

On August 2, 1991, defendant, together with Hayden, was charged in count 1 with the murder of David Woods (§ 187, subd. (a)). Count 1 also alleged that a principal to the offense was armed with a firearm under section 12022, subdivision (a)(1). Count 2 alleged that defendant was an accessory after the fact with respect to the murder (§ 32), and count 3 charged both defendant and Hayden with shooting at an inhabited dwelling in violation of section 246, and alleged both that defendant had personally used a firearm, and that a principal was armed with a firearm in the commission of the offense (§§ 1203.06, subd. (a)(1), 12022.5, 12022, subd. (a)(1)). (*Riley I*, *supra*, 20 Cal.App.4th at p. 1812.)

Jury trial commenced on March 10, 1992. Defendant's trial was severed from Hayden's. The jury found defendant not guilty of first degree murder as to count 1, but was unable to reach a verdict on second degree murder. The jury also found defendant guilty as to count 2, and acquitted him of the charge of shooting at an inhabited dwelling in count 3. The trial court declared a mistrial as to count 1, and the murder count was retried. At the second trial, a new jury found defendant guilty of second degree murder and found true the allegation that a principal was armed with a firearm in the commission of the offense. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1812.) Defendant was sentenced to a term of 15 years to life for second degree murder, plus 1 year for the firearm enhancement; the middle term of two years on count 2, accessory after the fact, was ordered to be served concurrently. (*Riley I*, *supra*, 20 Cal.App.4th at p. 1812.)

On December 16, 1998, this court affirmed the judgment. We concluded that double jeopardy principles did not bar retrial of defendant for murder, and thus the conviction for murder was proper and that the conviction for being an accessory to murder in the first trial did not constitute an acquittal for murder. We explained: "The two offenses were not mutually exclusive, since each required a different intent and each was based on entirely different conduct. Defendant's acts of obtaining a gun and speed loader, giving them to a drunk and angry companion, suggesting that the companion return to the motel where he claimed to have been robbed, and driving the companion to the motel in defendant's truck comprised the essentials of defendant's guilt as a principal to the murder committed when the companion shot the victim from defendant's truck.

The conviction of being an accessory was based on defendant's act the following day of attempting to dispose of the gun." (*Riley*, *supra*, 20 Cal.App.4th at p. 1808.)

On April 4, 2019, defendant filed a petition for resentencing pursuant to section 1172.6, requesting that his murder conviction be vacated based on changes to sections 188 and 189 as amended by Senate Bill No. 1437. The trial court summarily denied the petition on March 11, 2020, on grounds that defendant was neither convicted under the felony-murder rule nor the natural and probable consequences doctrine.

After defendant appealed, on June 24, 2021, we reversed the trial court's summary denial of defendant's petition and remanded the matter. (*People v. Riley* (June 24, 2021, E075100) [nonpub. opn.] (*Riley II*).) We concluded that the record of conviction did not show as a matter of law that defendant was not entitled to resentencing, and remanded the case to the trial court to issue an order to show cause and conduct an evidentiary hearing. (*Ibid.*)

On remand, the parties stipulated that the trial court could consider volumes four and five of the appellate record from defendant's 1992 trial. The court also examined the transcript of defendant's interview with law enforcement officers referenced in the relevant trial transcripts and presented to the jury at the 1992 trial. The evidentiary hearing was held May 20, 2022. Neither the prosecutor nor defense counsel presented additional evidence at the hearing but proceeded to argument.

The prosecutor argued the evidence showed defendant could be convicted under a still valid theory of murder—first degree murder perpetrated by means of discharging a firearm from a vehicle intentionally at another person outside the vehicle with the intent to inflict death. The prosecutor further asserted the evidence demonstrated that defendant had supplied the murder weapon and the means to the scene of the murder, and that the fatal shots were fired from the vehicle defendant drove. This evidence, the prosecutor argued established that defendant directly aided and abetted in the murder.

Defense counsel argued that the prosecutor could not rely on a first degree murder theory because the jury had acquitted defendant of first degree murder at trial. Counsel also asserted that defendant could not be convicted of second degree murder given the changes in the law, pointing to the evidence showing Hayden was the shooter and Hayden was the person who had disagreements with the people at the hotel where the murder occurred. Counsel noted that Hayden's malice could not be imputed to defendant, so the court would have to find that defendant himself harbored implied malice. Defense counsel further stated that there was no evidence showing defendant knew Hayden was going to commit the shooting and rather, the evidence showed Hayden's act was spontaneous. In response, the prosecutor reminded the court that defendant stopped his car a second time to allow Hayden the opportunity to fire more shots at the victim.

After considering the trial testimony and argument from the parties, the trial court denied the petition finding defendant to be an aider and abettor. The court explained, "The issue is was he an aider and abetter [*sic*] that shared the intent to kill, or was he an aider and abetter [*sic*] to the murder itself. Or was he an aider and abetter [*sic*] to another criminal act, the firing of the gun at Mr. Woods that has a natural and probable consequence of death." The court continued to note, "And if he was an aider and abetter [*sic*] under that theory, then at this hearing, because the new law requires that he be found to be a major participant as opposed to someone who was sitting outside whatever the underlying crime was in a get-away car, and did he act with reckless indifference to human life." The court thereafter proceeded to summarize the trial testimony, pointing out defendant's role in the murder, such as defendant driving slowly into the motel twice and leaning back as he drove so as to provide Hayden a better shot, defendant's knowledge of Hayden's prior instance in which Hayden had shot someone who had robbed him, and defendant providing Hayden with his gun and speed loader. Based on the trial testimony, the court determined that "the jury could have found that [defendant] was actually the shooter based on Rowe's testimony or that Petitioner was an aider and abettor." The court then proceeded to evaluate the evidence on whether or not defendant was a major participant who acted with reckless indifference to human life as an aider and abettor and found, beyond a reasonable doubt, that defendant could still be convicted of murder.

Thereafter, defense counsel asked whether the court was using its findings on major participation and reckless indifference as a means to conclude that defendant had acted with implied malice, and reminded the court that this case was not prosecuted under the felony-murder rule, and thus those concepts were not applicable. The court then clarified, "The reckless indifference, the major participant and reckless indifference to human life is the implied malice," and denied the petition. Defendant timely appealed.

III.

DISCUSSION

Defendant contends the trial court erred in denying his petition because the trial court utilized the wrong standard in denying his petition. Specifically, he claims the court erred in analyzing whether he was a major participant who acted with reckless indifference to human life despite the fact that his second degree murder conviction was not based on the felony-murder rule.

A. *Legal Background*

Effective January 1, 2019, the Legislature passed Senate Bill No. 1437 "'to amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.'" (*People v. Gentile* (2020) 10 Cal.5th 830, 846-847 (*Gentile*); see Stats. 2018, ch. 1015, § 1, subd. (f).) The Legislature accomplished this by amending sections 188 and 189.

Section 188, which defines malice, now provides in part: "Except as stated in subdivision (e) of [s]ection 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime." (§ 188, subd. (a)(3); Stats. 2018, ch. 1015, § 2.)

Section 189, subdivision (e), now limits the circumstances under which a person may be convicted of felony murder: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) [defining first degree murder] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of [s]ection 190.2." (Stats. 2018, ch. 1015, § 3.)

Effective January 1, 2022, Senate Bill No. 775 expanded eligibility for relief to include individuals convicted of attempted "murder under the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person's participation in a crime." (§ 1172.6, subd. (a), as amended by Stats. 2021, ch. 551, § 2; Legis. Counsel's Dig., Sen. Bill No. 775 (2020-2021 Reg. Sess.).) But it did not expand eligibility for relief pursuant to section 1172.6 to one who directly aids and abets another who commits murder or attempted murder.

Senate Bill No. 1437 also created a procedure for offenders previously convicted of felony murder or murder under the natural and probable consequences doctrine to seek retroactive relief if they could no longer be convicted of murder under the new law. (§ 1172.6, subd. (a); *Gentile*, *supra*, 10 Cal.5th at p. 843; *People v. Lewis* (2021) 11 Cal.5th 952, 959 (*Lewis*); *People v. Strong* (2022) 13 Cal.5th 698, 708 (*Strong*).) "[T]he process begins with the filing of a petition containing a declaration that all requirements for eligibility are met [citation], including that '[t]he petitioner could not presently be convicted of murder or attempted murder because of changes to . . . [s]ection 188 or 189 made effective January 1, 2019 . . . .'" (*Strong*, *supra*, at p. 708, fn. omitted.) "When the trial court receives a petition containing the necessary declaration and other required information, the court must evaluate the petition 'to determine whether the petitioner has made a prima facie case for relief.' [Citations.] If the petition and record in the case establish conclusively that the defendant is ineligible for relief, the trial court may dismiss the petition." (*Ibid.*) In Senate Bill No. 775, the Legislature amended the language of section 1172.6, codifying *Lewis*, *supra*, 11 Cal.5th 952, expanding the scope of the petitioning process and clarifying some of the procedural requirements. (Stats. 2021, ch. 551, § 2.)

Petitioners who request counsel "are entitled to the appointment of counsel upon the filing of a facially sufficient petition . . . ." (*Lewis*, *supra*, 11 Cal.5th at p. 957.) "[O]nly after the appointment of counsel and the opportunity for briefing may the superior court consider the record of conviction to determine whether 'the petitioner

makes a prima facie showing that he or she is entitled to relief.'" (*Ibid*., italics omitted; see *id*. at p. 966.) The court's "prima facie inquiry . . . is limited. . . . '"[T]he court takes petitioner's factual allegations as true and makes a preliminary assessment regarding whether the petitioner would be entitled to relief if his or her factual allegations were proved. If so, the court must issue an order to show cause."' [Citation.] '[A] court should not reject the petitioner's factual allegations on credibility grounds without first conducting an evidentiary hearing.'" (*Id*. at p. 971.) A trial court's failure to follow the procedures enacted in section 1172.6 is analyzed for prejudice under the state law standard of *People v. Watson* (1956) 46 Cal.2d 818, 836. (*Lewis*, *supra*, at pp. 973-974.) Under this standard, we ask whether it is reasonably probable defendant would have obtained a more favorable outcome if proper procedures had been followed. (*Lewis*, *supra*, at p. 974.)

If a petitioner has made a prima facie showing of entitlement to relief, "'the court shall issue an order to show cause.'" (*Strong*, *supra*, 13 Cal.5th at p. 708.) Once the court determines that a defendant has made a prima facie showing, it "must [then] hold an evidentiary hearing at which the prosecution bears the burden of proving, 'beyond a reasonable doubt, that the petitioner is guilty of murder or attempted murder' under state law as amended by Senate Bill [No.] 1437. [Citation.]." (*Strong*, *supra*, at p. 709.) At the hearing, the court may consider previously admitted evidence, so long as it remains "admissible under current law, including witness testimony, stipulated evidence, and matters judicially noticed. The court may also consider the procedural history of the case

recited in any prior appellate opinion." (§ 1172.6, subd. (d)(3).) The parties may offer new or additional evidence to meet their respective burdens. "'A finding that there is substantial evidence to support a conviction for murder, attempted murder, or manslaughter is insufficient to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.' [Citation.] 'If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.'" (*Strong*, *supra*, at p. 709; accord, *Lewis*, *supra*, 11 Cal.5th at p. 960.) "Senate Bill [No.] 1437 relief is unavailable if the defendant was either the actual killer, acted with the intent to kill, or 'was a major participant in the underlying felony and acted with reckless indifference to human life . . . .'" (*Strong*, *supra*, at p. 710.)

B. *Standard of Review*

Ordinarily, on appeal from an order denying a petition under section 1172.6 following an evidentiary hearing, we review the trial court's factual findings for substantial evidence. (*People v. Richardson* (2022) 79 Cal.App.5th 1085, 1090.) Under this standard, we "'"examine the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value that would support a rational trier of fact in finding [the defendant guilty] beyond a reasonable doubt."' [Citation.] Our job on review is different from the trial judge's job in deciding the petition. While the trial judge must review all the relevant evidence, evaluate and resolve contradictions, and

make determinations as to credibility, all under the reasonable doubt standard, our job is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support a rational fact finder's findings beyond a reasonable doubt." (*People v. Clements* (2022) 75 Cal.App.5th 276, 298; see *People v. Guiffreda* (2023) 87 Cal.App.5th 112, 124-125.) "But where there is an issue as to whether the trial court misunderstood the elements of the applicable offense, the case presents a question of law which we review independently. [Citation.]" (*Reyes*, *supra*, 14 Cal.5th at p. 988.)

C. *Analysis*

Defendant contends the trial court erred by utilizing the felony-murder standard in denying his section 1172.6 petition when his second degree murder conviction was not prosecuted under the felony-murder rule. The People assert that the trial court "expressly noted that it was using the felony murder analysis as a means to determine whether [defendant] had acted with the implied malice required for second degree murder" and that the court's finding of reckless indifference was "tantamount to, and necessarily subsumes, a finding that [defendant] acted with implied malice."

Second degree murder requires either express or implied malice. (§§ 187, subd. (a), 188, subd. (a).) Malice is express when there is a manifested intent to kill. (§ 188, subd. (a)(1).) "'[I]mplied malice has both a physical and a mental component, the physical component being the performance "'of an act, the natural consequences of which are dangerous to life,'" and the mental component being the requirement that the defendant "'knows that his conduct endangers the life of another and . . . acts with a

conscious disregard for life.'"' [Citation.]" (*People v. Taylor* (2004) 32 Cal.4th 863, 868.) A finding of implied malice depends upon a determination that the defendant subjectively appreciated the risk involved and may be proven by circumstantial evidence. (*People v. Superior Court* (*Costa County*) (2010) 183 Cal.App.4th 690, 697.)

While the words "natural" and "consequences" overlap, the rest of the two constructions are completely different. "[T]he use of the term 'natural consequences' in the . . . definition of implied malice does not import into the crime of murder the case law relating to the distinct 'natural and probable consequences' doctrine developed in the context of aiding and abetting liability." (*People v. Martinez* (2007) 154 Cal.App.4th 314, 334.) Thus, cases have held that "Senate Bill [No.] 1437 did nothing to remove implied malice as a basis for a second degree murder conviction." (*People v. Roldan* (2020) 56 Cal.App.5th 997, 1005.) Indeed, this court has said, "Though [Senate Bill No. 1437] abolished the natural and probable consequences doctrine, it maintained the viability of murder convictions based on implied malice, and the definition of implied malice remains unchanged. [Citation.]" (*People v. Clements*, *supra*, 75 Cal.App.5th at p. 298.)

In *Gentile*, *supra*, 10 Cal.5th 830, our Supreme Court stated that "notwithstanding . . . [the] elimination of natural and probable consequences liability for second degree murder, *an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life*." (*Gentile*, *supra*, at p. 850,

italics added; accord, *People v. Powell* (2021) 63 Cal.App.5th 689, 713 (*Powell*).) "We understand this to mean that an aider and abettor who acts with implied malice can be guilty of murder entirely apart from the natural and probable consequences doctrine." (*People v. Superior Court* (2021) 73 Cal.App.5th 485, 499.)

Powell explained the actus reus required of the actual perpetrator is the commission of "a life-endangering act." (*Powell*, *supra*, 63 Cal.App.5th at pp. 712-713.) By "life-endangering act," the court meant an act for which the natural and probable consequences are dangerous to human life and proximately caused death. (*Id*. at p. 713, fn. 27.) To be culpable as a direct aider and abettor of implied malice murder, the accomplice "must, by words or conduct, aid the commission of the life-endangering *act*, not the result of that act." (*Id*. at p. 713.) Thus, the aider and abettor's actus reus "includes whatever acts constitute aiding the commission of the life endangering act." (*Ibid*.) "The mens rea, which must be personally harbored by the direct aider and abettor, is knowledge that the perpetrator intended to commit the [life-endangering] act, intent to aid the perpetrator in the commission of the [life-endangering] act, knowledge that the *act* is dangerous to human life, and acting in conscious disregard for human life." (*Ibid*.) Like this court in *Clements*, *Powell* further recognized that Senate Bill No. 1437 did not abolish second degree murder liability under this theory, although it did so under a natural and probable consequences theory. (*Powell*, *supra*, at p. 713.)

In other words, while Senate Bill No. 1437 eliminated natural and probable consequences liability for second degree murder based on imputed malice, the courts have held that implied malice remains a valid theory of second degree murder liability for an aider and abettor. (*Gentile*, *supra*, 10 Cal.5th at p. 850 ["an aider and abettor who does not expressly intend to aid a killing can still be convicted of second degree murder if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life"]; *People v. Rivera* (2021) 62 Cal.App.5th 217, 232 ["[A] person may still be convicted of second degree murder, either as a principal or an aider and abettor, 'if the person knows that his or her conduct endangers the life of another and acts with conscious disregard for life.'"]; *People v. Offley* (2020) 48 Cal.App.5th 588, 595-596 [Senate Bill No. 1437 did not "alter the law regarding the criminal liability of direct aiders and abettors of murder because such persons necessarily 'know and share the murderous intent of the actual perpetrator.'"]; see *Reyes*, *supra*, 14 Cal.5th at p. 990 ["Case law has recognized and applied this theory, and we see no basis to abrogate it."].)

A defendant can be convicted of second degree murder "only if the prosecution can prove the defendant acted with the accompanying mental state of mind of malice aforethought. The prosecution cannot 'impute[ ] [malice] to a person based solely on his or her participation in a crime.'" (*Gentile*, *supra*, 10 Cal.5th at p. 846, quoting § 188, subd. (a)(3).) Second degree murder under a direct aiding and abetting theory "requires that 'the aider and abettor . . . know and share the murderous intent of the actual

perpetrator.'" (*Gentile*, *supra*, at p. 850; accord, *People v. Cravens* (2012) 53 Cal.4th 500, 508.)

As our Supreme Court recently explained in *Reyes*, *supra*, 14 Cal.5th 981, "'[d]irect aiding and abetting is based on the combined actus reus of the participants and the aider and abettor's own mens rea. [Citation.] In the context of implied malice, the actus reus required of the perpetrator is the commission of a life endangering act. For the direct aider and abettor, the actus reus includes whatever acts constitute aiding the commission of the life-endangering act. Thus, to be liable for an implied malice murder, the direct aider and abettor must, by words or conduct, aid the commission of the life-endangering *act*, not the result of that act. The mens rea, which must be personally harbored by the direct aider and abettor, is knowledge that the perpetrator intended to commit the act, intent to aid the perpetrator in the commission of the *act*, knowledge that the *act* is dangerous to human life, and acting in conscious disregard for human life.'" (*Id*. at pp. 990-991.)

"[I]mplied malice murder requires attention to the aider and abettor's mental state concerning the life endangering act committed by the direct perpetrator, such as shooting at the victim." (*Reyes*, *supra*, 14 Cal.5th at p. 992.) "Aiding and abetting may be shown by circumstantial evidence. It is well settled that the presence at the scene of the crime and failure to prevent it, companionship and conduct before and after the offense, including flight, are relevant to determining whether a defendant aided and abetted in the commission of the crime." (*People v. Glukhoy* (2022) 77 Cal.App.5th 576, 599.) Other

relevant circumstances include "the victim's vulnerability, the number of assailants, the ferocity and duration of the attack, . . . the unusualness or unexpectedness of the victim's death" (*People v. Superior Court* (*Valenzuela*) (2021) 73 Cal.App.5th 485, 502) and the defendant's motive (*Glukhoy*, *supra*, at p. 599). "Giving a false statement evincing consciousness of guilt is another circumstance tending to prove aiding and abetting." (*Id.* at p. 602.)

As defendant argues, the trial court's finding that he was a major participant who acted with reckless indifference for human life is simply misplaced because defendant was not convicted under the felony-murder rule. (§ 189, subd. (e).) While the trial court clarified "[t]he reckless indifference, the major participant and reckless indifference to human life is the implied malice," an examination of the court's entire statements of reason in denying the petition show that the court misapprehended the elements for an aiding and abetting an implied malice murder. The record is clear that the trial court was focused on the "major participant/reckless indifference" test for felony murder, which had no application to this case, and did not apply the elements for aiding and abetting implied malice murder. It appears the court misunderstood the elements of direct aiding and abetting implied malice murder.

In *Reyes*, *supra*, 14 Cal.5th 981, the Supreme Court found "[t]o the extent the trial court purported to sustain Reyes's conviction on a theory of directly aiding and abetting implied malice murder, the trial court's findings rested on an error of law." (*Id.* at p. 990.) Likewise, here, as defense counsel argued during oral argument, because the trial

court focused on the felony murder elements and misunderstood the scope of the legal analysis in denying defendant's section 1172.6 petition, its decision was based on an error of law.

The Supreme Court explained: "In denying Reyes's resentencing petition, the trial court said it was 'guided by the principles' of implied malice murder in CALCRIM No. 520. That instruction alone, however, does not encompass the elements of aiding and abetting implied malice murder as set out in *Powell*. By relying exclusively on the legal principles outlined in CALCRIM No. 520, the trial court did not appear to recognize that implied malice murder requires, among other elements, proof of the aider and abettor's knowledge and intent with regard to the *direct perpetrator's* life endangering act. [Citation.] [¶] The trial court's factual findings illustrate the nature of its error. The court found that 'the defendant, along with several other gang members, one of which [was] armed, traveled to rival gang territory' and then considered whether that act was done with the mental state required for implied malice. In particular, after finding the natural and probable consequence of the act to be 'dangerous to human life,' the trial court asked whether Reyes 'at the time he acted, . . . knew that the act was dangerous to human life,' and whether 'he deliberately acted with conscious disregard for human life.' But implied malice murder requires attention to the aider and abettor's mental state concerning the life endangering act committed by the direct perpetrator, such as shooting at the victim. [Citation.] Here, assuming the life-endangering act was the shooting, the trial court should have asked whether Reyes knew that Lopez intended to shoot at the

victim, intended to aid him in the shooting, knew that the shooting was dangerous to life, and acted in conscious disregard for life. [Citation.] Because the court did not do so, its decision was based on an error of law insofar as the court sustained Reyes's murder conviction on a direct aiding and abetting theory." (*Reyes*, *supra*, 14 Cal.5th at pp. 991-992, citing *Powell*, *supra*, 63 Cal.App.5th at pp. 712-713, fn. 27.) The Supreme Court thus reversed the judgment of the Court of Appeal with directions to remand the matter to the trial court for further proceedings and did not conduct a harmless error analysis. (*Reyes*, *supra*, at p. 992.)

As in *Reyes*, in the present case, the trial court committed reversible error by misunderstanding the legal requirements of direct aiding and abetting an implied malice murder. Under the circumstances of this case, we decline to analyze whether the error was harmless. We disagree with the People's arguments that the trial court applied the correct elements in denying the petition and that *Reyes* is distinguishable from the present matter. We therefore reverse the trial court's order denying defendant's section 1172.6 resentencing petition, and remand the matter for the trial court to make a determination under the correct standard of aiding and abetting an implied malice murder in the first instance.

IV.

DISPOSITION

The order denying defendant's section 1172.6 resentencing petition is reversed, and the matter is remanded for the trial court to reconsider whether defendant could be

convicted beyond a reasonable doubt of second degree murder on a theory of directly aiding and abetting an implied malice murder. "We express no view on the merits of [defendant's] resentencing petition under a proper application of the elements of implied malice murder on a direct aiding and abetting theory." (*Reyes*, *supra*,14 Cal.5th at p. 992.)

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.