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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

RENEE MICHELLE BIRD,

Defendant and Appellant.

E079628

(Super.Ct.No. RIF150377)

OPINION

APPEAL from the Superior Court of Riverside County. Samuel Diaz, Jr., Judge.

Dismissed.

William D. Farber, under appointment by the Court of Appeal, for Defendant and Appellant.

No appearance for Plaintiff and Respondent.

Defendant and appellant Renee Michell Bird appeals from a trial court's order denying her petition for resentencing under Penal Code¹ 1170.95² (now renumbered to section 1172.6). For the reasons set forth *post*, we dismiss the appeal.

FACTUAL AND PROCEDURAL HISTORY

A. PROCEDURAL HISTORY

On May 13, 2009, an information charged defendant with first degree murder with malice aforethought under section 187, subdivision (a) (count 2).³ As to count 2, the information also alleged that a principal was armed with a firearm under section 12022, subdivision (a)(1).

Defendant and Hernandez were tried together. They, however, had separate juries. (See *People v. Hernandez, et al.* (Dec. 19, 2012, E053487) [nonpub. opn.] (*Hernandez*).)⁴

In the argument to defendant's jury, the prosecutor argued that defendant was guilty of murder as an aider and abettor, or under the natural and probable consequences theory.

¹ All statutory references are to the Penal Code unless otherwise specified.

² Effective June 30, 2022, the Legislature renumbered section 1170.95 to section 1172.6. (Stats 2022, ch. 58, § 10.) For the sake of simplicity, we refer to the provision by its new numbering.

³ In count 1, codefendant Argenis Christopher Hernandez was charged with first degree murder under section 187, subdivision (a). Codefendant Hernandez is not a party to this appeal.

⁴ Defendant was a party to the prior appeal from the underlying case in case No. E053487. Thereby, we hereby take judicial notice of this court's unpublished opinion in that case.

At the conclusion of trial, the trial court instructed defendant's jury with CALCRIM Nos. 400 and 401—that in order to find defendant guilty as an aider and abettor or the person who committed the crime, the jury must find that defendant knew of the perpetrator's unlawful intent and specifically aided, facilitated, promoted, encouraged, or instigated the commission the crime. The court also instructed the jury on the natural and probable consequences doctrine with CALCRIM No. 403. Moreover, the court instructed the jury with CALCRIM No. 520—that a finding of intent to kill or implied malice was required for a murder conviction.

After deliberations, the jury found defendant guilty of second degree murder under section 187, subdivision (b). The jury also found true that defendant committed the crime knowing that a principal in the crime was armed with a firearm under section 12022, subdivision (a)(1).

Codefendant Hernandez's jury found him guilty of first degree murder under section 187, subdivision (a), and the jury also found true that Hernandez willfully discharged a firearm causing death in the commission of murder.

On April 22, 2011, the trial court denied probation to defendant and sentenced her to a determinate term of one year imprisonment followed by an indeterminate term of 15 years to life. After both defendant and codefendant Hernandez appealed, this court affirmed the judgments in *Hernandez, supra*, case No. E053487. On March 6, 2013, this court issued a remittitur.

On July 18, 2019, defendant filed a petition seeking to vacate her second degree murder conviction and seeking resentencing under section 1172.6. In her petition,

defendant alleged that she had been charged by information and convicted of first or second degree murder under the felony-murder rule, or the natural and probable consequences doctrine. Hence, she could no longer be convicted of first or second degree murder under the changes made to sections 188 and 189.

At the hearing on the petition on August 19, 2022, defendant was present with her counsel. The court started the hearing by stating: “The Court reviewed all the exhibits, all the trial transcript, and [defense counsel] requested to have—informed the Court the defendant is going to testify at the hearing and is going to present new evidence at the hearing.” The court was then prepared to continue the hearing to September 2, 2022, based on the “new” evidence to be presented by defendant’s testimony. However, when defense counsel asked defendant if she wanted to testify, defendant answered, “No. I want this to be over with.” After further discussion regarding continuing the hearing for defendant to testify, defense counsel stated that defendant had indicated on several occasions that she wanted to testify. However, based on their conversation off the record at the hearing, defendant stated that she did not want to testify. Defendant stated for the record: “I do not want to testify.” Counsel then submitted on his “previously filed paperwork.”

The court then stated: “Obviously at this hearing, the burden of proof is beyond a reasonable doubt. The Court has reviewed the testimony of the witnesses, all of the exhibits, it’s in the back. If you guys want to see it, it’s literally on my—it takes half of my desk. And the court was ready to rule several weeks ago. [9] At this time, the Court finds that the defendant was a direct aider and abettor beyond a reasonable doubt. The

defendant is not eligible for relief under Penal Code Section [1172.6]. And that’s after reviewing all of the testimony and—of the witnesses and reviewing the exhibits.”

B. FACTUAL HISTORY⁵

“On May 5, 2009, around 8:00 p.m., Riverside County Deputy Sheriff Myling Bordeau was dispatched in response to a reported shooting in Moreno Valley. Deputy Bordeau discovered two bullet holes in a white vehicle and another above the garage of an adjacent residence. One individual had sustained a bullet wound to his upper thigh. After interviewing several witnesses, Deputy Bordeau was given a lead on a potential suspect with whom he wished to speak; it was the victim in the instant case.

“Speaking with the victim made Deputy Bordeau aware of Hernandez as another potential suspect. Hernandez lived just around the corner from the location of the shooting. Deputy Bordeau and a colleague went to speak with Hernandez, who falsely identified himself and denied any knowledge of someone by the victim’s name. Hernandez testified the officers told him the victim had reported that Hernandez was involved in the shooting; Hernandez was mad he had been so implicated.

“On May 8, 2009, the victim and Robert Peters were walking down the street. Bird, Hernandez’s ex-girlfriend, neighbor, and continuing intimate, pulled over and told the victim, ‘That was fucked up what you did’; she was angry and upset at the victim. Bird and the victim ended up yelling at each other and arguing for several minutes until she drove off.

⁵ The facts are taken from the unpublished opinion in *Hernandez, supra*, from the appeal of defendant and codefendant’s underlying case.

“Bird picked Hernandez up and drove him to where she had just seen the victim. When they saw the victim, Bird pulled across the center of the street quickly. Hernandez exited the vehicle with a gun. Hernandez chambered a round in the gun as he walked toward the victim. Hernandez asked the victim why he had snitched. Hernandez then fired multiple gunshots at the victim; he kept firing even after the victim fell to the ground. Hernandez got back into the car and Bird drove off; she drove them back to her house.

“Walter Mendez, an investigator from the Riverside County Sheriff’s Department, was dispatched to the site of the shooting. He found the victim laying on his back, suffering from apparent gunshot wounds to his upper torso. The victim was in extreme pain, gasping for air, crying, and scratching the ground around him. Investigator Mendez received information at the site regarding the possible location of the suspects.

“At Bird’s home, officers found a car matching the description of the one that fled the scene of the murder. Bird and Hernandez lived across the street from one another. The police established a perimeter around defendants’ homes and asked via a public address system that the residents exit the respective residences. Defendants exited their homes; they were taken into custody.

“During an interview at the police station, Bird told Sheriff’s Detective Lance Colmer he should have officers look for the gun on the side of her home. Detective Colmer relayed the information to a deputy at the home, who saw what appeared to be the barrel of a semi-automatic gun through a grate in the outside wall of the garage. He secured the yard until Sheriff’s Detective Randall Thomas collected, secured, processed,

and photographed the black semi-automatic Smith and Wesson handgun into evidence. A magazine was found with the gun, but it was empty of ammunition.

“Mark Fajardo, Chief Forensic Pathologist and Coroner, examined the photographs, notes, diagrams, and medical records of the autopsy of the victim. Fajardo concluded there were 10 separate gunshot wounds to the victim’s body. One by his right armpit, three in the left flank, one to his back, three to his hands, one to his leg, and one to his right buttock. He testified the cause of the victim’s death was multiple gunshot wounds.

“Kristen Wilson, a forensic technician, took photographs and collected shell casings and a bullet fragment from the scene. In all, she recovered 11 nine-millimeter shell casings. She photographed and collected the gun obtained at Bird’s residence; it was the same caliber as the shell casings found at the scene of the shooting.

“James Hall, a retired forensic scientist, test fired rounds from the gun found at Bird’s residence and microscopically compared the cartridge casings from both the May 5, 2009, and May 8, 2009, shootings, and the test firings. He determined the markings on two of the shell casings collected from the May 5 shooting matched those from the test firings. Likewise, he determined that two of the shell casings collected from the scene of the May 8 shooting matched those test fired from the weapon collected from Bird’s residence.”

Moreover, in our unpublished opinion, we summarized defendant’s actions as follows: “Bird knew [Hernandez] was a member of MS-13, a very large, extremely dangerous and violent gang. She had seen him with a gun on a previous occasion and

knew he had a prior conviction involving gun and drug possession. Hernandez told Bird he had used the gun in [a] previous shooting. She knew Hernandez was mad at the victim for implicating him in the first shooting. Bird told a detective Hernandez had a really bad temper. [¶] After her confrontation with the victim, [Bird] informed Hernandez she had seen the victim. Indeed, Hernandez told the police—and testified—that Bird had called to tell him she had seen the victim. Hernandez informed the police Bird told him to get his gun. When she arrived at his home, Hernandez asked her where the victim was; she immediately drove him to the victim’s location. Hernandez testified Bird had some culpability in the shooting. Bird agreed with an officer’s statement that the victim ‘had it coming.’ She admitted the killing occurred because the victim snitched on Hernandez. She told an officer the shooting was her fault. Thus, the evidence was sufficient to establish that Bird played much more than a mere passive role in the killing of the victim.” (*Hernandez, supra*, at pp. *12-13}

DISCUSSION

After defendant appealed, and upon his request, this court appointed counsel to represent him. Counsel has filed a brief under the authority of *People v. Delgadillo* (2022) 14 Cal.5th 216 (*Delgadillo*). In the opening brief, pursuant to *Anders v. California* (1967) 386 U.S. 738, appellate counsel has identified the following issue to assist the court in its search of the record for error:

“1. Did the trial court err in denying appellant’s section 1172.6 petition on finding she was a direct aider and abettor beyond a reasonable doubt and thus ineligible for relief?”

On February 17, 2023, we sent notice to defendant regarding the filing of a *Delgadillo* brief, as follows: “Counsel for appellant has filed a brief stating no arguable issues can be found. Because this is an appeal from the denial of a post-conviction proceeding, this court is not required to conduct an independent review of the record but may do so in its discretion. [Citations.] The appellant is personally granted 30 days to file any supplemental brief deemed necessary. If appellant files a supplemental brief, this court will evaluate the specific arguments presented in that brief in its opinion. [Citation.] Failure to timely file a supplemental brief may result in the dismissal of the appeal as abandoned.” More than 30 days have elapsed, and we have received no communication from defendant.

Because defendant’s counsel filed a brief raising no issues, and defendant was given an opportunity to file a personal supplemental brief but declined to do so, we consider defendant’s appeal abandoned and order the appeal dismissed. (*Delgadillo, supra*, 14 Cal.5th at p. 232.)

DISPOSITION

The appeal is dismissed.

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MILLER
J.

We concur:

RAMIREZ
P. J.

McKINSTER
J.