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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.

THOMAS GALLO,

Defendant and Appellant.

E080793

(Super.Ct.No. FVA05963)

OPINION

APPEAL from the Superior Court of San Bernardino County. Jon D. Ferguson, Judge. Affirmed.

Thomas Gallo, in pro. per.; and Savannah Montanez, under appointment by the Court of Appeal, for Defendant and Appellant.

No response from Plaintiff and Respondent.

Thomas Gallo appeals from the denial of his petition to vacate his attempted murder convictions under former section 1170.95 (now section 1172.6) of the Penal Code. (Unlabeled statutory citations refer to this code.) We affirm.

BACKGROUND

At trial, the People presented evidence that on June 9, 1996, Gallo, armed with a shotgun, opened fire on and robbed a group of people who were waiting in their car at a gas station. (*People v. Gallo* (Oct. 31, 2000, E025618) [nonpub. opn.] (*Gallo*)). The driver and passenger sustained serious injuries from the shotgun pellets but survived. (*Ibid.*) The jury convicted Gallo of two counts of attempted first degree murder (§§ 187, subd. (a), 664), one count of second degree robbery (§ 211), and two counts of attempted second degree robbery (§§ 211, 664). (*Gallo, supra*, E025618.) The jury also found that Gallo personally used a firearm (§ 12022.5, subd. (a)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)) in the commission of the crimes. (*Gallo, supra*, E025618.)

In 2018, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.), which eliminated natural and probable consequences liability for murder, narrowed the definition of first degree felony murder, and created a procedure for vacating prior murder, attempted murder, and manslaughter convictions that could not be sustained under the new law. (Stats. 2018, ch. 1015, § 4; *People v. Gentile* (2020) 10 Cal.5th 830, 843, 853.) Following that procedure, in 2022 Gallo filed a petition to vacate his attempted murder convictions. He alleged that he was entitled to relief because he had

been convicted under a natural and probable consequences theory of liability. The People opposed the petition, arguing that the record of conviction established as a matter of law that Gallo was convicted as the direct perpetrator and not under any accomplice theory of liability.

At the hearing, defense counsel submitted on the petition after conceding that Gallo was “the only shooter.” The court summarily denied the petition. It concluded that the record of conviction demonstrated that the jury found Gallo acted with intent to kill, so he was convicted of attempted murder under a still-valid theory of liability.

DISCUSSION

We appointed counsel to represent Gallo on appeal, and counsel filed a no-issue brief under *People v. Delgadillo* (2022) 14 Cal.5th 216 (*Delgadillo*), asking us to exercise our discretion to conduct an independent review of the record. After defense counsel filed the *Delgadillo* brief, we advised Gallo that he could file a personal supplemental brief, which he did.

Gallo argues that he is entitled to resentencing because errors at his trial deprived him of a fair trial and impeded his ability to put on a defense. Those arguments are irrelevant to Gallo’s entitlement to relief under section 1172.6, which is not a mechanism for litigating issues that could have been raised on direct appeal. Rather, section 1172.6 authorizes the trial court to vacate a covered homicide conviction if it may have been based on a now-invalid theory and the prosecution fails to prove the defendant guilty on a now-valid theory. (*People v. Lewis* (2021) 11 Cal.5th 952, 972, fn. 6 [“A petitioner is

entitled to relief under section 1170.95 only when he or she ‘could not be convicted of first or second degree murder because of changes to section 188 or 189 made effective January 1, 2019’].)

On appeal, Gallo does not argue that he was tried under a natural and probable consequences theory, and the record of conviction establishes that he was not. The jury instructions given at his trial demonstrate that he was convicted of willful, deliberate, and premeditated first degree attempted murder as the direct perpetrator. His jury was not instructed on the natural and probable consequences doctrine, aider and abettor liability, or any theory of imputed malice, and the instruction on attempted murder required the jury to find that he harbored “a specific intent to kill.” (*People v. Strong* (2022) 13 Cal.5th 698, 710 [“relief is unavailable if the defendant was . . . the actual killer [and] acted with the intent to kill”].) Consequently, he is categorically ineligible for relief under section 1172.6.

DISPOSITION

We affirm the order denying Gallo’s petition.

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MENETREZ
J.

We concur:

RAMIREZ
P. J.

RAPHAEL
J.