IN THE SUPREME COURT OF CALIFORNIA

PEOPLE OF THE STATE OF CALIFORNIA, Plaintiff and Respondent, v. ANDRES QUINONEZ REYES, Defendant and Appellant.	No. S270723 (Fourth Dist., Div. 3, No. G059251) (Orange County Superior Court No. 04CF2780)

Appeal from the Superior Court of Orange County
Hon. Richard M. King, Judge

APPELLANT'S SUPPLEMENTAL BRIEF
(Cal. Rules of Court, rule 8.520(d))

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New opinions by this Court and the Court of Appeal support Reyes's arguments

Pursuant to rule 8.520(d) of the Rules of Court, appellant respectfully submits this supplemental brief discussing new authorities.

A. Reyes's subjective knowledge and intent.

The general expectation that gang members will back each other up does not allow an inference as to Reyes's intent at the time of the crime. In the petition hearing, as at trial, the People's theory was that Reyes intentionally acted as "backup" when gunman Lopez accosted a motorist. (See RB 10 (Reyes was "serving as 'back up'"); RB 33 ("consistent with his role as 'back up,' and the expectation that he would provide support and assistance, Reyes and the others in his group worked as a unit to chase the car and track down Rosario"); exh. (3) 525 (opening summation in jury trial: "the theme that is very, very obvious in this case is backup. It's backup").) The Court of Appeal largely adopted this theory. (See People v. Reyes (August 4, 2021, No. G059251) [nonpub. opn.] 2021 WL 3394935, *6 (relying on the fact that Reyes "and Lopez were both members of a criminal street gang"); id. at p. *2 (citing expert testimony about backup).)

This theory is inconsistent with this Court's recent opinion finding insufficient evidence that a gang member intended to

participate in the gang's conspiracy to kill rivals. In People v. Ware (2022) 14 Cal.5th 151, 168-170, the People argued that defendant Hoskins's intent to participate in the conspiracy could be inferred in part because he was an active member of the gang and therefore expected to act as backup. This Court rejected the purported inference:

> It is also undisputed that Brim members, like gang members generally, were expected to support the goals of the gang, including by backing each other up in fights. But a "general agreement, implicit or explicit, to support one another in gang fights does not provide substantial proof of the specific agreement required for a conviction of conspiracy to commit assault," much less conspiracy to commit murder.

(Id. at p. 170, quoting United States v. Garcia (9th Cir. 1998) 151 F.3d 1243, 1244.) (See also AOB 46-50; ARB 16, 23-26.) Under Ware, Reyes's passive presence at the scene cannot be transformed into an intent to act as backup to facilitate Lopez's sudden decision to approach a passing motorist.[1]

Put another way, the People's theory amounts to imputed

[1] Although both Ware and Garcia dealt with conspiracy, the same principle applies to direct aiding and abetting, as Garcia indeed recognized. (See Garcia at p. 1246 ("membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting") (brackets, quotation marks, and citations omitted).)

malice: Reyes was a participant in the criminal activities of his gang, so that the malice of another member of the gang on this occasion could be imputed to him, converting his passive presence into active "backup." This is prohibited by the 2021 amendments, which specify that the remedial legislation is not limited to a conviction based on felony murder or the doctrine of natural and probable consequence (two instances of imputed malice) but rather applies to a conviction based on any "other theory under which malice is imputed to a person based solely on that person's participation in a crime." (Pen. Code, § 1172.6, subds. (a), (a)(1), as amended by Stats. 2021, ch. 551 (S.B. 775); see also Pen. Code, § 188, subd. (a)(3).) A new Court of Appeal opinion confirms that the 2021 amendments extend to a conviction based on any theory imputed malice, without limitation. (See People v. Maldonado (2023) 87 Cal.App.5th 1257 [304 Cal.Rptr.3d 391, 394, 396].)

Separately, the theory that Reyes was backing up his gang assumes that Lopez himself was engaged in gang activity when he approached a motorist, and that Reyes was aware of this. (See RB 29-33 (elaborating on this theory).) This Court recently reaffirmed that the bare fact that a gang member commits a shooting does not allow an inference that the shooting is gang related. (People v. Renteria (2022) 13 Cal.5th 951, 973.) Although Renteria was a "lone actor" case in which no other member of the gang was present (id. at p. 970), it is relevant to Reyes's case because none of the other gang members participated in Lopez's approach to the motorist, his

confrontation with the motorist, and the subsequent shooting, and Lopez himself did not evince any gang motivation. For example, just as in Renteria, there was no evidence that Lopez or anyone else displayed gang signs or shouted out gang slogans in the course of the confrontation. (See Exh. (1) 164-165, 196-197; see Renteria at p. 971.) It is therefore a matter of speculation whether Lopez was acting on behalf of the gang. Without substantial evidence that he was so acting, *and* that Reyes was aware of this and intended to participate, the role of gang "backup" could not be imputed to Reyes.[2]

The actual killer's possession of a gun does not show that he intended to use it offensively, much less that Reyes was aware of any such intent. The People argue that Reyes knew of "Lopez's intent to commit a life-endangering act" in part because he "was aware that Lopez had armed himself." (RB 45; see also RB 29, 32.) This Court has disagreed with such reasoning: "Individuals – gang members included – frequently possess guns without harboring any intent to use the guns to commit premeditated, deliberate killings." (People v. Ware, supra, 14 Cal.5th at p. 171.) (See also AOB 57-59; ARB 16-17.) Thus, it is speculative whether Reyes inferred from Lopez's possession of a gun that he intended to shoot at anyone on the way home.

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[2] The jury's gang findings do not affect the analysis for the reasons discussed in subsection (B) below.

Reyes's post-crime conduct does not support implied malice at the time of the crime. The Court of Appeal and the People gave great weight to Reyes's subsequent confrontation with Nieves, using the same gun that Lopez had used, some 40 minutes later, when Reyes had returned to his own neighborhood. (See People v. Reyes, supra, 2021 WL 3394935 at p. *6; RB 34-35.) In People v. Ware, supra, 14 Cal.5th at p. 172, defendant "collaborated with [the actual gunman's] girlfriend to pressure [a witness] not to testify," and even made implicit threats against the witness. Yet, "none of those conversations indicated [defendant] knew of the shooting before it happened or played any role in the actual event." (Ibid.) So, too, Reyes's subsequent participation in a different confrontation under different circumstances – approaching a possible interloper in Reyes's own neighborhood, rather than offensively entering rival or disputed territory (under the People's theory) – reveals nothing about his actions, knowledge, or state of mind at the time of the charged crime. The happenstance that he came into possession of the same gun that Lopez had used in the prior crime similarly reveals nothing about his knowledge and intent at that earlier time.

Reyes's comment to a detective does not show consciousness of guilt. The Court of Appeal relied on the fact that en route to the juvenile detention facility, when the detective told Reyes that he was charged with a probation violation, he responded that because he was present with his "homies" when

one of them shot and killed someone, "I'm going to get charged with murder too," even though "I didn't shoot." (See People v. Reyes, supra, 2021 WL 3394935 at p. *5; see exh. (1) 208.)

In People v. Guiffreda (2023) 87 Cal.App.5th 112, 119, defendant aider and abettor in a felony-murder case told an acquaintance "that they had murdered someone." The superior court concluded that this statement reflected consciousness of guilt and therefore supported reckless indifference, as required under the amended felony-murder statute. (Id. at p. 121; see Pen. Code, § 189, subd. (e)(3).) The Court of Appeal disagreed: "Though [defendant's] statements may have reflected a consciousness of guilt for the killing *after the fact*, nothing she said to [the acquaintance] suggested that she participated in the robbery knowing that the violent manner in which it would be committed carried a grave risk of death." (Guiffreda at p. 130, emphasis added; cf. People v. Ware, supra, 14 Cal.5th at p. 172 (statement after the fact did not support knowledge or intent).) So, too, Reyes's subsequent, fatalistic realization that he had been swept up with the actual killer and charged with murder, even though he was merely present and "didn't shoot," reveals nothing about his knowledge of the risks at the time of the crime. (See also AOB 54-57.)

The fact that Reyes was only 15 years old is highly relevant to his state of mind. The Courts of Appeal continue to recognize the importance of defendant's youth in evaluating his knowledge and intent at the time of the crime. Thus, People v. Keel (2022)

84 Cal.App.5th 546, 662 found insufficient evidence of the closely analogous element of reckless indifference (Pen. Code, § 189, subd. (e)(3)) in part because defendant, like Reyes in this case, "was a mere 15 years old." His "youth at the time of the shooting greatly diminishes any inference he acted with reckless disregard for human life during the armed robbery." (Ibid., quotation marks and citation omitted; see also id. at pp. 558-559 (defendant's youth is "potentially an important factor").)

Another recent case reversed the denial of a Penal Code section 1172.6 petition and remanded for a new hearing because the superior court's explanation of its ruling did not refer to defendant's youth (age 20 in that case) and therefore may not have considered it in its analysis of reckless indifference, given the state of the law at that time. (People v. Jones (2022) 86 Cal.App.5th 1076, 1092-1093.) Jones thus impliedly recognized the importance of this factor, even in the case of a young adult.

In light of these authorities and the numerous opinions discussed in the briefing (see AOB 69-75; ARB 29-31), Reyes's youth weighs heavily against the subjective component of implied malice. It is remarkable that so significant a factor was not even mentioned in the analyses of the superior court or of the Court of Appeal. (See RT 297-299; People v. Reyes, supra, 2021 WL 3394935 at pp. *2-*3, *5 (referring to expert's testimony in the statement of facts but omitting any reference to Reyes's youth in the analysis of the subjective component of implied malice).) This omission would have required remand for a new hearing even if the evidence of implied malice had been sufficient. (Cf. People v.

Jones, supra, 86 Cal.App.5th at pp. 1091-1093 (remanding for a new hearing where the Court of Appeal decided the case prior to issuance of the leading opinion establishing youth as a factor in the sufficiency of evidence of reckless indifference).)

Reyes's flight without rendering aid does not support implied malice, as illustrated by recent cases finding insufficient evidence of the analogous element of reckless indifference. The People have argued that the fact that Reyes did not render aid to the victim but rather immediately fled tends to support the subjective component of implied malice. (RB 34.) In People v. Keel, supra, 84 Cal.App.5th at pp. 553, 560, defendant did not aid the victim, and he and the actual killer "fled in different directions." Neither of these facts supported reckless indifference, especially given the rapidity of the events. (See id. at pp. 560-561.) Here, too, events unfolded rapidly and unexpectedly, and as soon as the shot was fired Reyes dissociated himself and, like some of the others, fled in a different direction from the gunman. (Exh. (1) 158; RT 206:20-23; 212:16-17.) Even in his panic he would have known that some of the numerous bystanders on the street would summon aid.

In People v. Guiffreda, supra, 87 Cal.App.5th at p. 127, defendant did not render aid but rather "walked quickly from the room after the assault." Such "actions immediately after the beating" did not constitute substantial evidence of reckless indifference. (Ibid.) Guiffreda is particularly significant in its application of this Court's repeated admonition that "when

different inferences may be drawn from the circumstances, the defendant's actions after the shooting may not be very probative of her mental state." (Ibid., quoting In re Scoggins (2020) 9 Cal.5th 667, 679.) Given the ambiguity of what motivated defendant to flee without rendering aid, that fact did not provide substantial evidence in support of reckless indifference. (Guiffreda at p. 127.) Reyes's case is even easier, for the People's inferences are in large part based not on ambiguous facts but on speculation, such as their surmise that Reyes "did not react with shock or surprise." (RB 34.)

B. The People's burden of proof.

The evidentiary hearing should consider all issues interrelated with the murder conviction. The People have argued that in the evidentiary hearing the "sole issue" should be Reyes's mental state, not the objective component of implied malice. (RB 26.) According to the People, this is the only issue that arises from the 2018 amendments to Penal Code section 188, in light of the language of Penal Code section 1172.6, subdivision (d)(3). (RB 26.) As the Court of Appeal recently explained, this misreads subdivision (d)(3), as the People themselves impliedly recognized in that case:

> A plain reading of this subdivision requires the prosecution to prove beyond a reasonable doubt that defendant is guilty of murder under current law. The People do not argue that the language of section

> 1172.6, subdivision (d)(3) precludes the trial court from revisiting the jury's predicate felony finding when reviewing the evidence admitted at the evidentiary hearing to determine whether the prosecution has made a reasonable doubt showing of guilt.

(People v. Burgess (2023) 88 Cal.App.5th 592 [2023 WL 2178363, *5], as modified March 20, 2023; see also id. at p. *6 ("Subdivision (d)(3) of section 1172.6 does not limit the court's inquiry [in a felony-murder hearing] to major participant and reckless indifference; it encompasses a broader murder inquiry"); ibid. (court may consider issues "interrelated" with the murder).) Accordingly, it is permissible to consider the interrelated issue of the objective conduct (act). In fact, it is not even feasible to evaluate whether Reyes knew and disregarded the risk of his own conduct without first determining the qualifying conduct at issue, that is, the conduct carrying a high probability of death that Reyes allegedly undertook with knowledge and with conscious disregard of the risk to life. (See AOB 10-13.)

Collateral estoppel does not bar consideration of the objective component of implied malice. The People have argued that it is not permissible to "relitigate[]" the objective component of implied-malice murder because the jury had already impliedly found that Reyes either committed an objectively dangerous act under the former doctrine of natural and probable consequence. (RB 26-29.) As this Court recently explained in the same context

of section 1172.6, collateral estoppel does not preclude consideration of a factual issue that is different from the one the jury resolved, whether the difference existed at the time of that finding or arose because of subsequent legislative or judicial actions. (People v. Strong (2022) 13 Cal.5th 698, 715, 716-717; see also People v. Burgess, supra, 2023 WL 2178363 at p. *6.) Further, it is defendant's own acts that constitute the objective component. (People v. Gentile (2020) 10 Cal.5th 830, 850.) Thus, a juror's conclusion that the murder was a reasonably foreseeable consequence of a specified target crime does not resolve whether Reyes's *own* conduct satisfied the *higher* standard for the objective component of implied-malice murder. (See, e.g., ARB 7-9.) The target crimes on which the court instructed were disturbing the peace and conspiracy to commit either disturbing the peace or assault. (CT (2) 425.) Jurors who found Reyes guilty of second-degree murder under this theory did not necessarily agree on the target crime, much less on what acts Reyes himself undertook in furtherance of that specific target crime

The People also rely on the jury's gang findings to support the subjective component of implied malice. (RB 30.) Even assuming arguendo that the gang findings had any relevance (see ARB 21; People v. Ware, supra, 14 Cal.5th at p. 170), those findings are inapplicable because of the Legislature's intervening changes to the elements of the gang statute. (See ARB 22; Stats. 2021, ch. 699 (A.B. 333).)

CONCLUSION

For the foregoing reasons, and the reasons set forth in the opening and reply briefs, defendant and appellant respectfully requests that the judgment of the Court of Appeal be reversed.

Dated: March 24, 2023.

Respectfully submitted,

/s/ Richard A. Levy

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