

SUPREME COURT COPY
IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA

COPY

THE PEOPLE,)	No. S113421
)	
Plaintiff and Respondent,)	Los Angeles County
)	Sup.Ct. No NA039436-
)	02
vs.)	SUPREME COURT
)	FILED
WARREN JUSTIN HARDY,)	JUL -7 2014
)	
Defendant and Appellant.)	Frank A. McGuire Clerk
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		Deputy

Automatic Appeal from the Judgment of the Superior Court
State of California, County of Los Angeles, No. NA039436-02
Hon. John David Lord, Judge Presiding

**APPELLANT'S SUPPLEMENTAL OPENING
BRIEF**

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DEATH PENALTY

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**APPELLANT'S SUPPLEMENTAL OPENING
BRIEF**

Appellant Warren Justin Hardy submits this supplemental brief pursuant to Rules 8.520 (d) (1) and 8.630 (d) of the California Rules of Court.

AUTHORITY TO FILE SUPPLEMENT BRIEFING

Rule 8.520 (d) (1) of the California Rules of Court provides that, "a party may file a supplemental brief limited to new

authorities . . . that were not available in time to be included in the party's brief on the merits." The word count limitation is 2,800 words. Rule 8.630(d) permits the filing of such briefs in capital appeals.

Appellant's Opening Brief was filed on June 12, 2013. Respondent's Brief was filed on October 30, 2013. On June 2, 2014, this Court issued its decision in *People v. Chiu* (2014) 59 Cal.4th 155. *Chiu* held that "an aider and abetter may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine." (*Id.* at pp. 158-159.) One of the prosecution's theories for first degree murder in count 1 was that it was a natural and probable consequence of Hardy's aiding and abetting. (2CT 542-544 [CALJIC Nos. 3.01, 3.02, 548-549 [CALJIC No. 8.20].) The *Chiu* holding applies to the erroneous theory of instruction Hardy's jury received. *Chiu's* holding requires reversal of the judgment of guilt on count 1 and the judgment of death.

ARGUMENT

XXIII

THE JUDGMENT OF DEATH, AND THE JUDGMENT OF GUILT ON COUNT 1 SHOULD BE REVERSED BECAUSE THE TRIAL COURT IMPROPERLY INSTRUCTED THE JURY THAT AN AIDER AND ABETTOR CAN BE GUILTY OF FIRST DEGREE PREMEDITATED MURDER UNDER THE NATURAL AND PROBABLE CONSEQUENCES DOCTRINE, WHICH IMPERMISSIBLY AND UNCONSTITUTIONALLY PERMITTED A GUILTY VERDICT BASED ON AN IMPROPER LEGAL THEORY.

A. Summary of Argument.

The jury found Hardy guilty of first degree murder. The verdict form required jurors to select whether Hardy was: “(A) The Actual Killer; or (B) An Aider and Abettor and had the intent to kill; or was a Major Participant and acted with reckless indifference to human life.” (3CT 597.) The jury chose B. (3CT 597.) The prosecution argued four theories of murder, including deliberate and premeditated murder, and guilt of murder through aiding and abetting any of the other charged crimes under the natural and probable consequences doctrine. (11RT 2355-2358, 2365.) The court instructed on all the theories. (2CT 543-544

[CALJIC No. 3.02, 548-549.) The verdict does not reflect what theory, or theories, the jurors found true beyond a reasonable doubt. Thus, any instructional error that involved an improper legal theory for guilt on murder requires reversal. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128; *People v. Green* (1980) 27 Cal.3d 1, 69-71; in accord (*Mills v. Maryland* (1988) 486 U.S. 367, 376 [108 S.Ct. 1860, 100 L.Ed.2d 384]; accord, *Zant v. Stephens* (1983) 462 U.S. 862, 881 [103 S.Ct. 2733, 77 L.Ed.2d 235]; *Yates v. United States* (1957) 354 U.S. 298, 312 [77 S.Ct. 1064, 1 L.Ed.2d 1356]; *Stromberg v. California* (1931) 283 U.S. 359, 369-370 [51 S.Ct. 532, 75 L.Ed. 1117]; *Keating v. Hood* (9th Cir. 1999) 191 F.3d 1053, 1062.) Accordingly, the verdict of guilt on count 1 and the judgment of death must be reversed.

B. Standard of Review.

Errors in jury instructions are questions of law which are reviewed de novo. (*People v. Cole* (2004) 33 Cal.4th 1158, 1206.)

C. The Jury Instructions Were Erroneous Under *People v. Chiu*.

People v. Chiu held an aider and abettor may not be convicted of first degree premeditated murder under the natural and probable consequences doctrine. The connection between the aider and abettor's culpability and the perpetrator's

premeditation is simply too attenuated. Under *Chiu*, an aider and abettor may still be convicted of first degree premeditated murder, but the conviction must be obtained based on direct aiding and abetting principles. (*People v. Chiu, supra*, 59 Cal.4th at pp. 158-159, citing *People v. McCoy* (2001) 25 Cal.4th 1117-1118.) In other words, to obtain the first degree murder conviction of an aider and abettor, the prosecution must show the defendant aided and abetted the murder with knowledge of the perpetrator's unlawful purpose, and with the intent of committing, encouraging, or facilitating the murder. (*Ibid.*) This did not occur in Hardy's trial.

Under the instructions used, and the theories advanced by the prosecution, it is highly probable at least one juror convicted Hardy of murder as an aider and abettor to another charged crime, under the natural and probable consequences doctrine.

The trial court gave the following instruction on aiding, abetting, and natural and probable consequences:

One who aids and abets another in the commission of a crime [or crimes] is not only guilty of that crime or those crimes, but is also guilty of any other crime committed by a principal which is a natural and

probable consequence of the crime[s] originally aided and abetted.

In order to find the defendant guilty of the crimes[s] of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake, as charged in Count[s] 1-8, you must be satisfied beyond a reasonable doubt that:

1 The crime or any one of the following crimes of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake were committed;

2 That the defendant aided and abetted any one of those crime[s];

3 That a co-principal in that crime committed the [sic] any one of the following crimes of: crime[s] of murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake; and

4 That any one of the following crime[s] of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake were a natural and probable consequence of the commission of any one of the crime[s] of: murder, or robbery, or kidnap for rape, or rape in concert, or rape, or sexual penetration/rape by a foreign object - a wooded stake in concert, or sexual penetration/rape by a foreign object - a wooden stake.

(2CT 543-544.)

The court also instructed with CALJIC No. 8.20, explaining that any murder that is “perpetrated by any kind of willfull, deliberate and premeditated killing with express malice aforethought is murder of the first degree.” (2CT 548.) The instruction explained deliberation and premeditation:

The word “deliberate” means formed or arrived at or determined upon as a result of careful thought and weighing of considerations for and against the proposed course of action. The word “premeditated” means considered beforehand.

If you find that the killing was preceded and accompanied by a clear, deliberate intent on the part of the defendant to kill, which was the result of deliberation and premeditation, so that it must have been formed upon pre-existing reflection and not under a sudden heat of passion or other condition precluding the idea of deliberation, it is murder of the first degree.

The law does not undertake to measure in units of time the length of the period during which the thought must be pondered before it can ripen into an intent to kill which is truly deliberate and premeditated. The time will vary with different individuals and under varying circumstances.

The true test is not the duration of time, but rather the extent of the reflection. A cold, calculated judgment and decision may be arrived at in a short period of time, but a mere unconsidered and rash impulse, even though it includes an intent to kill, is

not deliberation and premeditation as will fix an unlawful killing as murder of the first degree.

To constitute a deliberate and premeditated killing, the slayer must weigh and consider the question of killing and the reasons for and against such a choice and, having in mind the consequences, [he] decides to and does kill.

The prosecutor argued that Hardy was guilty of murder based on either of two types of liability: as a principal, or as an aider and abettor. (11RT 2353-2354.) She argued jurors could convict Hardy of murder if he had knowledge of the unlawful purpose of the perpetrator (Pearson or Armstrong), and, with the intent to facilitate or encourage, aided, abetted, or promoted the crime. (11RT 2355.) The prosecutor specifically argued an aider and abettor is responsible for all crimes of the principal, and the natural and probable consequences of any crimes abetted. (11RT 2356.)

The prosecutor argued Hardy's aiding and abetting liability, explaining he was "equally responsible for all of the crimes, even if you decide he didn't commit a particular crime. He is still responsible." (11RT 2356.) She continued:

Each person involved in the crime is also responsible for other crimes that the other people involved have committed, and that what this instruction says.

One who aids and abets another in the commission of a crime or crimes is not only guilty of that crime, or those crimes, but is also guilty any of the crimes committed by a principal, which is the natural and probable consequence of the crimes originally aided and abetted.

For example, initially it appears from the evidence that they were going to rob her. Once they realized that she didn't have anything of real value, six dollars in food stamps, they got mad. They were going to do something else. So they threw her over the fence, and at this point in time, they decided to rape her. And they took her out of public view where she could get help. And that's where those crimes were committed.

In order to find the defendant guilty of any of the following crimes, the murder, robbery, kidnap, kidnap for rape, rape in concert, or rape, sexual penetration/rape by foreign object, a wooden stake in concert, or sexual penetration/rape by a foreign object a wooden stake, not in concert and all three except just one. In this case is responsible for both in concert and doing it himself.

Torture as charged in Counts 1 through 8, you must be satisfied beyond a reasonable doubt that.

1. The crimes, these crimes were committed;
2. That the defendant aided and abetted in any one of those crimes. And in this case the evidence shows that he did them all. He participated in all of these crimes, even the robbery. When he went to the Lorena Market and spent the food stamps.

That the defendant was a co-principal in those crimes, committed any of the following crimes, the murder, robbery, the rape, the kidnapping or [sic] rape, the rape in concert, the sexual penetration with a foreign object, or torture and that any of the following crimes, the ones I just listed, were a natural and probable consequence of the commission of any of those crimes.

So, basically, what that is saying is it is reasonable and logical that after they robbed her, they decided to rape her, and after he raped her, they raped her with a foreign object. It's a reasonable and logical progression as to what was taking place that night. That's what this instruction says, a natural and foreseeable consequence and ultimately they killed her. Which was a natural, rational and probable consequence of forcing her over that fence, because once they forced her over the fence, her life was over.

(11RT 2356-2357.)

The instructions Hardy's jury received were fatally defective in the same way CALCRIM No. 403 was defective in *Chiu*. In *Chiu*, the instructions told the jury it had to determine only three things for aider and abettor liability: (1) whether the defendant was guilty of the target offense; (2) whether a coparticipant committed a murder during the commission of the target offense; and (3) whether a reasonable person would have known murder was a natural and probable consequence of the commission of any target offense. In *Chiu*, there were only two

target offenses, assault and disturbing the peace. Here, there were seven, but the error remains the same. Jurors could convict Hardy of willful, deliberate, and premeditated murder based on the natural and probable consequences doctrine. This was what the instruction told jurors in Hardy's case, and this is what the prosecutor argued. And nothing in the jury instructions prevented the jury from convicting Hardy of Sigler's premeditated, deliberate murder under the natural and probable consequences doctrine.

Chiu explained that the mental state for willful, premeditated, deliberate murder is “uniquely subjective and personal.” (*People v. Chiu, supra*, 59 Cal.4th at p. 166.) “[T]he killer must act deliberately, carefully weighing the considerations for and against a choice to kill before he or she completes the acts that caused the death. [Citations].” (*Ibid.*) In the situation of aider and abettor liability for murder, “the connection between the defendant’s culpability and the perpetrator’s premeditative state is too attenuated to impose aider and abettor liability for first degree murder under the natural and probable consequences

doctrine, especially in light of the severe penalty involved”

(Ibid.)

D. The Erroneous Instruction Violated Hardy's Federal and State Constitutional Rights, and Requires Reversal.

When a trial court instructs a jury on multiple theories of guilt, one of which was legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a legally correct ground. (*People v. Guiton, supra*, 4 Cal.4th at pp. 1128–1129; *People v. Green, supra*, 27 Cal.3d at pp. 69–71.) This record shows the jury may have based its verdict of first degree premeditated murder on the natural and probable consequences theory. Jurors affirmatively rejected that Hardy was “The Actual Killer.” (3CT 597 [verdict form].)

The evidence showed Sigler died of head injuries. (10RT 1976.) The evidence showed that it was Pearson, not Hardy, who personally inflicted the fatal blows. Hardy told police that after Pearson raped Sigler and forced her to perform oral copulation (10RT 2142-2143), Pearson was looking around for something. (10RT 2147; 11RT 2188.) Armstrong returned carrying a stick, and gave it to Pearson. (10RT 2148.) Pearson hit Sigler

numerous times in the face with the stick. (10RT 2148.) Then Pearson stomped Sigler using his boots. 10RT 2148.)

Significantly, the jury did not reach a true finding that Hardy had personally used a deadly weapon, that is, the stick used to inflict the fatal wounds. The jury was unable to reach findings on the personal use enhancements to the murder count (count 1) or to counts 6 through 8. (12RT 2528-2534; 3CT 597-605.)

The prosecutor's argument also suggests the jury convicted Hardy as an aider and abettor under the natural and probable consequences doctrine. While addressing felony murder, the prosecutor returned to aider and abettor liability, implicitly acknowledging there was no evidence that Hardy inflicted the fatal blow(s) :

You are also to find that he was an aider and abetter. We don't know now, ladies and gentlemen, the coroner couldn't tell us and nobody else could tell us which injury caused her death. It was multiple injuries to the head and blunt force trauma. We don't know who hit the stake, what injury the defendant inflicted, what injury Jamelle Armstrong inflicted. What injuries Kevin Pearson inflicted, and ladies and gentlemen, with 114 injuries they took turns.

(11RT 2364-2365.)

The prosecutor further argued, that because Sigler was killed, Hardy was guilty of “murder in the first degree” because he “with the knowledge of the unlawful purpose, of the perpetrator of the crime, and with the intent or purpose of committing encouraging or facilitating the commission of the events, aids, promotes, encourages or instigates by act or advice its commission” (11RT 2365.)

In sum, the record does not reveal the theory on which the jury found Hardy guilty of murder - - except that the jury concluded Hardy was not the actual killer. The instruction, evidence, and prosecutor’s argument made it highly likely that the guilty verdict was based on an improper theory. Accordingly, Hardy’s conviction for murder and the judgment of death must be reversed.

CONCLUSION

Based on the foregoing, Hardy was denied his Sixth, Eighth, and Fourteenth Amendment rights guaranteed by the United States Constitution. The judgment of guilt on count 1 must be reversed and the judgment of death must be vacated.

DATED: June 30, 2014

Respectfully submitted,

A handwritten signature in black ink, appearing to read 'Susan K. Shaler', written over a horizontal line.

SUSAN K. SHALER
Attorney for appellant

c:\Hardy\hardy.AOB.supp

**CERTIFICATE OF APPELLATE COUNSEL
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I, SUSAN K. SHALER, appointed counsel for appellant hereby certify, pursuant to Rule 8.520(d), California Rules of Court, that I prepared the foregoing brief on behalf of my client. I calculated the word count for the brief in the word-processing program Corel WordPerfect X6. The word count for the brief is 2,737, including footnotes, but not including the cover or tables. Because the brief complies with the rule, which limits the word count to 2,800. I certify that I prepared this brief and this is the word count WordPerfect generated for this brief.

Dated: June 30, 2014


SUSAN K. SHALER

**PROOF OF SERVICE
STATE OF CALIFORNIA, COUNTY OF SAN DIEGO**

I reside in the county of SAN DIEGO, State of California. I am over the age of 18 and not a party to the within action. My business address is: Susan K. Shaler Professional Law Corporation, 991 Lomas Santa Fe Dr., Ste C, #112, Solana Beach, CA 92075.

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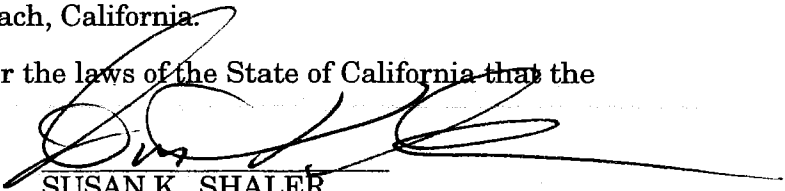
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Executed on July 2, 2014, at Solana Beach, California.

I declare under penalty of perjury under the laws of the State of California that the above is true and correct.


SUSAN K. SHALER