

Filed 8/17/06 P. v. Noordman CA4/2

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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.

KINZIE GENE NOORDMAN,

Defendant and Appellant.

E038123

(Super.Ct.No. FRE 006600)

OPINION

APPEAL from the Superior Court of San Bernardino County. Michael A. Smith, Judge. Affirmed.

Martha L. McGill, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Marvin E. Mizell and Pat Zaharopoulos, Deputy Attorneys General, for Plaintiff and Respondent.

Defendants Kinzie Gene Noordman (defendant) and Damien Matthew Guerrero (Damien), who is not a party to this appeal, were jointly tried with separate juries for the

murder of Kelly Laurel Bullwinkle (Kelly). Defendant appeals from judgment entered following a jury conviction for first degree murder (Pen. Code, § 187, subd. (a)<sup>1</sup>). The jury also found true the enhancement allegation that in the commission of the murder, defendant personally and intentionally discharged a handgun (§ 12022.53, subd. (c)). The jury rejected the lying-in-wait allegation. The trial court sentenced defendant to 25 years to life in prison for murder, plus 20 years for the gun enhancement.

Defendant contends there was insufficient evidence to support the gun enhancement because Kelly was already dead when defendant shot her. Defendant also argues there was a reasonable probability the jury's murder verdict was based on the theory defendant fired the fatal shot and there was insufficient evidence of this. In addition, defendant claims the trial court committed instructional error by not giving sua sponte CALJIC No. 3.02 on aider and abettor liability under the "natural and probable consequences" theory.

We conclude there was no reversible error and affirm the judgment.

#### 1. Facts

On Friday, September 12, 2003, the night before Kelly's murder, defendant and Damien dug a shallow grave, 76-inches long, 13-inches deep at one end, and about two inches deep at the other end. They left the shovel at the gravesite, which was located in a remote part of San Timoteo Canyon.

The next day, defendant invited Kelly to go with her to San Timoteo Canyon after

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<sup>1</sup> Unless otherwise noted, all statutory references are to the Penal Code.

Kelly got off work around 4:00 p.m. They drove to the canyon in Kelly's car. Damien was going to meet them there. They waited for him for about two hours, talking and smoking "weed."

Meanwhile, Damien left work around 5:00 p.m. and went to see his girlfriend, Elody Romero. After about an hour and a half, he left Elody's home and drove to San Timoteo Canyon. He told Elody he was going to dinner and a movie with defendant, a close friend.

Damien met defendant and Kelly at San Timoteo Canyon. Damien told them he wanted to see what was back in the canyon. The three drove back into the canyon, parked their cars, walked around, and ended up at the hole, which defendant and Damien had dug the night before. What happened at this point is in dispute.

#### **Defendant and Damien's Version of the Incident**

According to defendant and Damien, when they got to the gravesite, they proceeded to carry out a joke they had intended to play on Kelly. The plan was that Damien would pull out a gun, point it at Kelly, and tell her they were going to kill her and bury her in the hole. Defendant and Damien would then tell Kelly it was a joke.

Defendant and Damien claimed that, in furtherance of this scheme, while the three were at the gravesite, Damien pulled out a handgun and the gun accidentally fired, shooting Kelly in the back of the head. Kelly fell to the ground. She moved her legs and moaned.

Defendant claimed she panicked and told Damien to shoot Kelly a second time but he said he could not do it. Defendant took the gun and shot Kelly in the head so Kelly

would not suffer any more. Kelly then stopped moving. Damien put Kelly's body in the shallow grave and covered it with dirt and an abandoned couch. Defendant drove Kelly's car to the Ontario Mills mall and left it there. Damien picked up defendant there around 8:00 p.m. and they went out to dinner and to a movie. After the movie, Damien went to Elody's house. He did not mention Kelly to Elody and Elody thought his behavior seemed normal.

### **Murder Investigation**

Kelly, who at the time of her murder was 18 years old, lived with her mother, Diana Bullwinkle, and a roommate, Laura Williams. Kelly worked at Baker's Restaurant.

At the time, Damien and defendant both worked at Damien's mother's real estate business and were "soul mates and best friends." They both liked and frequently watched the movie, "Natural Born Killers." They had memorized lines from it and wore snake rings like the rings worn by the main characters, who were serial killers.

Although defendant was Damien's "soul mate," Elody was Damien's girlfriend at the time of the murder and had been on and off for about two years. Kelly had also had a physical relationship with Damien but he had broken up with her and had gone back to Elody. Kelly, however, still loved Damien and had been persistently calling him. Elody told Kelly to leave Damien alone and confronted Damien about Kelly. He admitted he had had a relationship with Kelly. In September 2003, he told Kelly to leave him alone and Kelly became upset.

During the weekend of the murder, Williams was out of town. When she returned

home, Monday, September 15th, she noticed the lawn had not been watered, the trash had not been taken out, the dog appeared not to have been fed, and there were messages on the answering machine from Saturday and Sunday, including a message from defendant on Sunday (after the murder), in which defendant asked if Kelly wanted to “hang out” with her. Williams notified the police that Kelly was missing, prepared a missing-person flier, and emailed Kelly’s mother, who was working on a ship off the coast of Costa Rica. Williams asked Mrs. Bullwinkle if she had heard from Kelly.

Monday morning, on September 15th, Kelly’s car was towed from the Ontario Mills parking lot. It had been ticketed during the early morning hours of Saturday and Sunday. Defendant’s fingerprints were found on a cigarette case in the car, and defendant and Kelly’s DNA were found on the car steering wheel.

On September 17, 2003, Sheriff Deputy Gary Cupersmith went to Kelly’s home to investigate the missing-person report. Defendant was there. Defendant said she was Kelly’s best friend and told the officer she and Kelly periodically used cocaine and meth. They bought the drugs from someone at Baker’s. Defendant also suggested Cupersmith contact Kelly’s father because he had sold her drugs and had used them with defendant and Kelly.

Mrs. Bullwinkle returned home the following Friday, on September 19th, as soon as she was able to get off the ship. Mrs. Bullwinkle asked defendant, whom Mrs. Bullwinkle believed was Kelly’s best friend, where Kelly was and defendant said she did not know. Kelly’s disappearance was publicized through the police and media. Defendant assisted in distributing missing-person posters. Neither defendant nor Damien

told the police about the murder.

Monday, September 22, defendant went to Kelly's home and told Mrs. Bullwinkle she "wanted to come clean" with her about what defendant and Kelly had been doing. Defendant told Mrs. Bullwinkle they had "been doing coke and meth." Defendant also suggested that perhaps Kelly had gone to her father's home in Texas.

Two boys, who were playing paint ball in San Timoteo Canyon, discovered Kelly's decomposed body on October 4, 2003. They noticed a foul odor and saw a decomposing human leg protruding from under an abandoned couch. The rest of the body was covered with dirt. The boys reported their discovery to the police. A shell casing was found eight inches from Kelly's right leg.

Forensic pathologist Frank Sheridan testified at trial that the cause of Kelly's death was a gunshot wound to the head. There were two gunshot wounds. One was a graze wound along the surface of Kelly's scalp. The wound was not fatal. The other gunshot wound was from a bullet that went through Kelly's brain and caused her death in a matter of seconds. The bullet entered the rear, right side of the skull. There was no exit wound. According to the pathologist, the fatal shot traveled from right to left, slightly forward and downward. This wound would have rendered Kelly incapable of any meaningful voluntary movement. The graze wound traveled from below, upward and was not life threatening. It would not have knocked Kelly down. Dr. Sheridan testified that he was unable to determine which of the two shots was fired first.

While the investigating criminalist was at the murder site on October 9, 2003, he saw defendant and four others building a memorial to Kelly. He thought defendant's

behavior was peculiar. She was more cheerful than one would expect of someone who had lost her best friend.

The murder investigation revealed that in 2002, Joshua Curtis sold the gun used in the murder to Damien's brother, Josh Guerrero. Josh Guerrero gave the gun and ammunition to Damien sometime in 2003. The gun was a .25-caliber semi-automatic pistol. The police recovered three shells in Curtis's backyard where he had tested the gun. The shells matched the shell found at the murder site and were determined to have been fired from the same gun. Also, the bullet recovered from Kelly's autopsy could have been fired from the gun. Curtis testified the trigger had to be pulled each time the gun was fired and it took a lot of pressure to pull the trigger. He said he never had a problem with the gun misfiring.

Bullets of the same type were found in Damien's bedroom. They matched the casings found at Curtis's home and at the murder site. Damien told Detective Moore that he had discarded the gun in a sewer drain during the summer of 2003 because he feared it would be stolen. The gun was not found there.

On October 16, 2003, during a police interview, Damien told Officer Merriman that he had been dating Elody, broke up with her, saw Kelly for a short period, broke up with Kelly, and went back to Elody. After that, Kelly became annoying with her persistent telephone calls and emails. Damien denied ever possessing a gun. Later, he admitted having a gun, which he shot once and then threw in a drain.

The day after interviewing Damien, Merriman interviewed defendant. She told him that on the night of the murder, September 13, 2003, Damien picked her up at 7:00,

and they ate out and went to a movie at 8:00. Damien drove her home around 11:00 p.m. The police, however obtained the food order and defendant's movie stub, which indicated defendant and Damien's dinner was ordered at 8:37 p.m. and they paid for their movie tickets at 9:05 p.m.

During a police interview on November 4, 2003, defendant told the police she suspected "Mike" and "Eric" killed Kelly. Defendant had bought drugs from them a couple times at Baker's, and they had tried to get defendant and Kelly to buy drugs and sleep with them. Defendant also said it was possible Kelly was killed by accident while she was "high" and did something stupid. Someone also might have accidentally killed her while trying to calm her down during one of her episodes when she became psychotic from drinking and taking drugs. It was also possible Elody and her friend tried to scare Kelly and accidentally killed her. They did not like Kelly. Kelly was obsessed with Damien and had tried to get back in his life. Defendant had told Kelly to stop "stalking" Damien. Defendant further told the officer that she had planned to spend time with Kelly after Kelly got off work on September 13th, and then meet Damien afterwards, but she canceled her plans to see Kelly. Defendant claimed she was not involved in Kelly's murder. She was Kelly's best friend.

On November 4, 2003, after meeting with police detectives, Elody went to Damien's home and told him and his family that the police had matched bullet casings from Damien's gun with casings found at the gravesite and had video surveillance of his car and possibly him at Ontario Mills. Damien took Elody out on the front porch and told her he had to turn himself in "[b]ecause I did it." He told Elody he shot Kelly in the

back of the head. They then went inside and Damien told his family he and defendant had killed Kelly. He claimed it was an accident. He added that, when defendant saw that Kelly was shot in the head, she thought Kelly was dead, but Kelly's body moved. Defendant "freaked out" and shot Kelly again so Kelly would not suffer. They put her body in the grave and then defendant drove Kelly's car to Ontario Mills and left it there. Damien met defendant there and drove the two back in his car.

Later, during the evening of November 4, 2003, defendant called Ryan Guy, who was a friend and ex-boyfriend. She told him she and Damien had killed Kelly. It was meant to be a joke but it had gone wrong and Damien had accidentally shot Kelly in the head.

The following day, on November 5th, during a police intercepted telephone call, defendant repeated what she had told Guy to another friend and ex-boyfriend, Peter Kovalsky. She also told him that after Damien shot Kelly, he gave the gun to defendant, who shot Kelly in the head while Kelly was lying on the ground moaning. The police arrested defendant on November 5th.

Defendant did not testify at trial.

Damien testified that defendant suggested he and defendant scare Kelly with a gun after digging a shallow hole. On September 12th, he and defendant dug a hole. The next day, he, defendant and Kelly, walked to the hole. The gun was in his pocket. Believing the gun had to be cocked to fire, he did not think the gun would accidentally fire. When they got to the hole, Damien, who was five feet behind Kelly, took out the gun. It accidentally fired. Damien dropped the gun. Kelly was on the ground, moving and

making noises. Defendant picked up the gun and fired it at Kelly's head. Damien put Kelly in the hole and covered her body with dirt. Defendant left Kelly's car at Ontario Mills. Damien picked up defendant there and they went to dinner and to a movie. They both changed their clothes. Damien had lied to the police that he had thrown the gun in the drain. He did not know whether the shot he fired was the graze wound or the fatal bullet. Damien claimed that, apart from defendant, he was Kelly's best friend.

## 2. Gun Enhancement

Defendant argues there was insufficient evidence to support the firearm-discharge enhancement because she shot Kelly after she was dead. We conclude that defendant shot Kelly "in the commission of" the murder and therefore the enhancement was proper. (§ 12022.53, subd. (c).<sup>2</sup>)

### A. **Background facts**

At the close of the prosecution's case, the trial court granted defendant's section 1118 motion to dismiss the firearm enhancement under section 12022.53, subdivision (d). A section 12022.53, subdivision (d)<sup>3</sup> enhancement requires a finding that the defendant "personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death." (§ 12022.53(d).) The court concluded there was not substantial evidence that defendant fired the fatal shot. The trial court

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<sup>2</sup> Hereinafter referred to as "section 12022.53(c)."

<sup>3</sup> Hereinafter referred to as "section 12022.53(d)."

found that Damien fired the first shot, which was fatal, and then after Kelly was dead, defendant fired a second shot which grazed Kelly's head.

Although the trial court dismissed the section 12022.53(d) enhancement, the court permitted the prosecution to amend the information to add the firearm use and discharge enhancements, subdivisions (b) and (c) of section 12022.53, as lesser included allegations of the section 12022.53(d) enhancement. The section 12022.53, subdivisions (b) and (c) enhancements do not require personal infliction of death or great bodily injury. The jury found true the section 12022.53(c) enhancement.

## **B. Discussion**

The firearm-discharge enhancement, section 12022.53(c), provides enhanced punishment when, "Notwithstanding any other provision of law, any person who, *in the commission of* a felony specified in subdivision (a), personally and intentionally discharges a firearm."<sup>4</sup>

Defendant challenges the section 12022.53(c) enhancement on the ground defendant did not shoot Kelly "in the commission of" the murder because the murder was already complete when defendant shot her. A crime is complete when all of its elements are satisfied. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164, fn. 7.) Thus, a murder ends when the victim *dies*. (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1395, 1397.) In *Esquivel*, the court explained: "Although a robbery continues with the asportation of the loot, a murder ends with the death of the victim. As the *Cooper* court,

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<sup>4</sup> Italics added.

stated, 'It is legally and logically impossible to both form the requisite intent and in fact aid, promote, encourage, or facilitate commission of a crime after the commission of that crime has ended.' [Citation.]" (*People v. Esquivel* (1994) 28 Cal.App.4th 1386, 1397, quoting *Cooper, supra*, at p. 1164.)

While there was substantial evidence Damien fired the fatal shot before defendant shot Kelly, there also was evidence that defendant, rather than Damien, fired the shot that killed Kelly. Damien testified he accidentally discharged the gun and did not know if the shot grazed Kelly's head or entered her head and killed her. Damien also said he thought both shots entered Kelly's head and that he did not see any blood on the ground until after defendant fired the second shot. According to Damien, Kelly was still moving her legs and moaning after defendant shot her, but after defendant shot Kelly, she stopped moving.

Pathologist, Dr. Sheridan, testified he could not determine which shot was fired first, or who fired which shot. Dr. Sheridan did not agree with Dr. Hiserodt's statement in his report that the non-fatal shot was fired when Kelly was on the ground. Dr. Sheridan concluded that such a determination could not be made.

Elody testified that, although she had said Damien initially told her he fired at Kelly first, Elody acknowledged she may have been incorrect. She may have confused an account she read in the newspaper with Damien's initial statement.

In addition, there was evidence the fatal bullet was fired downwards, from above Kelly, indicating Kelly was on the ground, and the nonfatal grazing bullet was fired upwards, indicating Kelly was standing. This supports a finding that Damien fired the

first shot while Kelly was standing and it grazed Kelly's head. The second shot, which killed Kelly, was fired downwards by defendant after Kelly was on the ground.

The jury could have disbelieved defendant and Damien's version of the facts and reasonably concluded from Damien's testimony and the evidence of the trajectory of the bullets that Damien fired the grazing shot while Kelly was standing; Kelly fell down and moaned while on the ground; and defendant then fatally shot Kelly. These circumstances support the finding Kelly was alive when defendant shot her and thus in turn support the firearm-discharge enhancement.

Even assuming defendant shot Kelly after Damien fatally shot Kelly, defendant shot Kelly during the commission of the murder within section 12022.53(c). In making this determination, we look to case law construing other statutes containing the phrase, "within the commission of" or similar wording: "We presume that the Legislature, in drafting the provisions, was aware of our long-standing judicial construction of the phrase 'in the commission of' as used in other Penal Code statutes and intended to incorporate it." (*People v. Jones* (2001) 25 Cal.4th 98, 109.) In construing the phrase, the critical consideration generally has been whether the relationship between the underlying offense and another crime or enhancement is sufficiently close to justify enhanced punishment.

In *People v. Jones, supra*, 25 Cal.4th 98, the California Supreme Court addressed the issue of whether the use of a deadly weapon *after* the completion of a sex offense occurred "in the commission of" the offense within the meaning of the weapons-use enhancement, section 12022.3, and the special circumstance provision, section 667.61.

(*Jones, supra*, at p. 100.) In *Jones*, right after the defendant finished committing the sexual offenses, the defendant put a knife to the victim's face. The victim pleaded with the defendant not to harm her and the defendant then left.

The court in *Jones* rejected the defendant's contention that the weapons-use enhancement under section 12022.3 must be reversed because the defendant used the knife after the final sexual offense was completed. The court stated that "the use of a deadly weapon after completion of sexual offenses occurred 'in the commission of' such offenses, within the meaning of Penal Code sections 12022.3, subdivision (a) and 667.61, subdivision (e)(4), if the offenses posed a greater threat of harm *because* the defendant used a deadly weapon to threaten or maintain control over his victim." (*People v. Jones, supra*, 25 Cal.4th at p. 101.)

Here, defendant's discharge of the gun arguably did not serve the purpose of threatening or maintaining control over the victim since Kelly had already died. However, the evidence reveals that defendant did not know Kelly had already died and therefore defendant shot her again to ensure she was dead. Defendant's use of the gun thus posed a greater threat of harm because, had the first shot not been fatal, shooting Kelly once more increased the likelihood of defendant succeeding in killing Kelly.

The section 12022.3 weapons-use enhancement considered in *Jones* is similar to the section 12022.53(c) weapons-use enhancement, although the section 12022.53(c) enhancement requires "discharge" of a firearm, rather than "use," of a firearm or deadly weapon. Section 12022.3 enhances a sentence for committing or attempting to commit specified sex offenses "if the person uses a firearm or a deadly weapon *in the commission*

of the violation.”<sup>5</sup> (§ 12022.3, sub. (a).) Section 667.61, subdivision (e)(4), also considered in *Jones*, contains similar language. It provides for a life sentence if “[t]he defendant personally used a dangerous or deadly weapon or firearm *in the commission of* the present offense in violation of Section 12022, 12022.3, 12022.5, or 12022.53.”<sup>6</sup> (§ 667.61, subd. (e)(4).) According to *Jones*, the phrase, “in the commission of,” has the same meaning in both sections 12022.3 and 667.61. (*People v. Jones, supra*, 25 Cal.4th at p. 108, fn. 4.)

In construing the language, “in the commission of,” the court in *Jones* considered other statutes containing the same or substantially similar language, such as sections 189 and 190.2, subd. (a)(17).<sup>7</sup> (*People v. Jones, supra*, 25 Cal.4th at p. 108.) Section 189, which defines felony-murder, refers to murder “*committed in the perpetration of*” enumerated felonies. Section 190.2(a)(17), the felony-murder special circumstance provision, refers to murder “committed while the defendant was engaged in . . . the commission of” enumerated felonies.

The *Jones* court noted that, with regard to the language in section 189, the California Supreme Court long ago rejected the assumption that the killing must have “occurred “while committing,” “while engaged in,” or “in pursuance” of the named felonies, and that the killing must have been “a part of” the felony or attempted felony “in

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<sup>5</sup> Italics added.

<sup>6</sup> Italics added.

<sup>7</sup> Hereinafter referred to as “section 190.2(a)(17).”

an actual and material sense.” [Citation.] Thus, *a murder may be determined to have been committed in the perpetration of a felony if it occurred after the felony*, e.g., during the attempt to escape or for the purpose of preventing discovery of the previously committed felony.” (*People v. Jones, supra*, 25 Cal.4th at pp. 108-109, italics added.)

In concluding this, the *Jones* court relied on the felony-murder case, *People v. Chavez* (1951) 37 Cal.2d 656, in which the court stated there was “no requirement that the homicide occur ‘while committing’ or ‘while engaged in’ the felony, or that the killing be ‘a part of’ the felony, other than that the two acts be parts of one continuous transaction.” (*Id.* at p. 670.) Here, even if defendant shot Kelly after Damien did, defendant discharged the gun during one continuous transaction. Immediately after Damien shot Kelly, defendant shot Kelly to end her suffering, according to defendant.

In construing the phrase, “in the commission of,” the *Jones* court noted that in the felony-murder case, *People v. Hernandez* (1988) 47 Cal.3d 315, the California Supreme Court “reiterated that determining whether a killing occurred during the commission of a felony enumerated under Penal Code section 189 is not “a matter of semantics or simple chronology.” Instead, ‘the focus is on the relationship between the underlying felony and the killing.’” (*People v. Jones, supra*, 25 Cal.4th at p. 109, quoting *Hernandez, supra*, at p. 348.) In *Hernandez*, the defendant raped and sodomized his victims. Then he killed them when they screamed and struggled to get away. The court in *Hernandez* concluded that even though the sexual offenses were over, the killings were “a direct product of the sexual assaults and to silence the victims.” (*Hernandez, supra*, at p. 348.)

The murders thus occurred “in the commission of” the sex crimes. (*Ibid.*; see also *Jones, supra*, at p. 109.)

Here, the same reasoning supports the conclusion that defendant’s discharge of the gun occurred in the commission of Kelly’s murder. Even assuming defendant fired the gun after Damien had already shot and killed Kelly, defendant fired the second shot as a direct product or result of the first shot, during one continuous transaction. It appeared to defendant Kelly was still alive so defendant intended to finish the job.

In construing the phrase, “in the commission of,” the *Jones* court also relied on *People v. Guzman* (1988) 45 Cal.3d 915, in which the defendant raped the victim and then killed her. In *Guzman*, the court addressed the issue of whether, under the felony-murder special circumstance provision, section 190.2(a)(17), the killing occurred “during the commission of” the rape. The *Jones* court noted that in *Guzman*, the California Supreme Court “rejected the defendant’s argument therein that the special circumstance requires that the murder have occurred at the same time as the rape or “no later than the moment such acts are completed.” [Citation.] Rather, we held that the dispositive question is whether the relationship between the rape and another crime was sufficiently close to justify an enhanced punishment. [Citation.] We concluded that a jury could reasonably determine that a rape had not terminated ‘so long as the victim had not been disposed of or confined.’” (*People v. Jones, supra*, 25 Cal.4th at p. 109.)

Here, the Damien’s act of fatally shooting Kelly and defendant’s act of shooting her again were sufficiently close to justify imposing the weapons-discharge enhancement.

It appeared to defendant that Kelly had not been completely “disposed of” so defendant shot Kelly again.

In *People v. Carroll* (1970) 1 Cal.3d 581, the court similarly construed the language, “in the course of commission of” in imposing an increased sentence under former section 213.<sup>8</sup> The California Supreme Court once again construed such language broadly to include acts directly flowing from the underlying offense.

In *People v. Carroll, supra*, 1 Cal.3d 581, the defendant was convicted of robbery and assault with intent to murder. The court also found true the allegation that the defendant intended to inflict great bodily injury (GBI) upon the victim “in the course of the commission of” the robbery under section 213. Former section 213 provides increased punishment “in any case in which defendant committed robbery, and *in the course of commission of the robbery*, with the intent to inflict such injury, inflicted great bodily injury on the victim of the robbery.”<sup>9</sup>

The defendant in *Carroll* demanded the victim’s wallet at gunpoint while the victim was in a bar bathroom. When the defendant discovered the wallet did not have any money, he threw it in the sink. The victim slammed one of the restroom doors in the defendant’s face and ran from the restroom back to the bar. The defendant hid behind the bar. Later, defendant went to the cash register behind the bar and found the victim on the floor hiding. When the victim threw a case of empty beer bottles at the defendant, the

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<sup>8</sup> This provision has been replaced by section 12022.7.

<sup>9</sup> Italics added.

defendant shot the victim in the abdomen. The defendant then took money from the cash register and left.

The defendant argued in *Carroll* that the trial court erred in increasing his sentence under section 213 because the robbery had already been completed when the defendant shot the victim and therefore the shooting incident did not occur in the commission of the robbery. The court in *Carroll* disagreed, not only because the robbery was not complete since the defendant had not yet escaped to a place of temporary safety, but also because the robbery and shooting “constituted one indivisible transaction, with the shooting flowing directly from the taking of the wallet.” (*People v. Carroll, supra*, 1 Cal.3d at p. 585.)

Once again the California Supreme Court in *Carroll* broadly construed the phrase, “in the commission of” to encompass not only the underlying offense but acts directly related to and flowing from the offense. In the instant case, defendant’s act of shooting Kelly either before or after Damien shot Kelly was part of an indivisible transaction in which both defendant and Damien intended to kill Kelly.

Regardless of whether Kelly was brain-dead when defendant shot Kelly, the trial court appropriately found that defendant shot Kelly in the commission of the murder within the meaning of section 12022.53(c). Even though murder is not a “continuing” offense, as is robbery, the language, “in the commission of,” extends beyond the instant the victim dies, and includes a defendant’s activities directly related to carrying out the murder, including conduct committed when the defendant does not know the victim has already died and continues to attempt to kill the victim. We thus conclude that in the

instant case “the commission of” the murder did not end, within the meaning of the section 12022.53(c) enhancement, at the very instant Kelly died from the first shot, but rather continued while defendant, who was apparently unaware Kelly was dead, shot defendant once more to ensure she was dead.

The dispositive question as to whether defendant’s discharge of the gun occurred “in the commission of” the murder is whether the relationship between the murder and the weapons-discharge enhancement was sufficiently close to justify enhanced punishment. (*People v. Guzman* (1988) 45 Cal.3d 915, 951; *People v. Jones, supra*, 25 Cal.4th at p. 109.) We answer this question in the affirmative. Otherwise, defendant’s strict construction of the temporal relationship between the killing and defendant’s discharge of the gun would lead to absurd results. It would preclude imposition of the weapons-discharge enhancement under circumstances in which both defendant and Damien shot Kelly with the intent to kill but unbeknownst to defendant and Damien, Kelly was already dead by the time defendant fired the second shot. We are not compelled to give statutory language a literal meaning if doing so would result in absurd consequences that the Legislature could not have intended. (*People v. Ledesma* (1997) 16 Cal.4th 90, 95.) Both defendants were equally culpable regardless of whether Kelly was brain-dead when defendant fired the second shot.

This result is consistent with the legislative purpose underlying section 12022.53 enhancement, in which the clear intent of the Legislature is to impose greater punishment on felons who use firearms in the commission of crimes, in order to protect our citizens and to deter violent crime. (*People v. Garcia* (2002) 28 Cal.4th 1166, 1172.) Here,

imposing the weapons-discharge enhancement serves not only as a deterrent against violent crime but as a deterrent against multiple defendants shooting a victim to ensure the victim is dead. We conclude the trial court properly imposed the section 12022.53(c) weapons-discharge enhancement regardless of whether defendant shot Kelly before or after Kelly had already died from the first shot.

### 3. Sufficiency of Evidence of Murder

The prosecutor argued two alternative first degree murder theories: (1) defendant fired the shot that killed Kelly and, alternatively, (2) defendant aided and abetted in the murder committed by Damien, who fired the fatal shot. The trial court did not instruct the jury that it had to agree on whether defendant or Damien was the actual perpetrator or an aider and abettor. The general verdict does not reveal which of the two theories the jury relied upon.

Defendant contends there was insufficient evidence supporting her murder conviction because there is a reasonable probability the jury based its verdict on the unsupported theory that she fired the fatal shot. Defendant notes that, because the trial court found there was insufficient evidence that she fired the fatal shot, the trial court dismissed the section 12022.53(d) enhancement. The section 12022.53(d) enhancement requires a finding that the defendant “personally and intentionally discharges a firearm and proximately *causes great bodily injury . . . or death.*”<sup>10</sup> (§ 12022.53(d).)

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<sup>10</sup> Italics added.

### **A. Applicable Law**

As our high court in *People v. Guiton* (1993) 4 Cal.4th 1116, explains, “if the inadequacy of proof is purely factual, of a kind the jury is fully equipped to detect, reversal is not required whenever a valid ground for the verdict remains, absent an affirmative indication in the record that the verdict actually did rest on the inadequate ground.” (*Guiton, supra*, at p. 1129.)

In *Guiton*, the defendant was convicted of selling or transporting cocaine. (Health & Saf. Code, § 11352.) The evidence was insufficient to show he sold cocaine, but sufficient to show he transported it. The court held the inadequacy of proof was purely factual. Thus, absent some affirmative indication to the contrary, it had to be presumed the jury had acted reasonably, rejecting the sale theory and relying on the transportation theory. Consequently, reversal was not required, even though the prosecutor argued both theories (*People v. Guiton, supra*, 4 Cal.4th 1116), and one theory is factually inadequate but the other is not, so long as there is no affirmative evidence that the jury relied on the inadequate theory. (*Guiton, supra*, at p. 1129.)

### **B. Discussion**

Here, there was evidence supporting both theories. In addition, the claimed inadequacy of proof is purely factual. Defendant claims there was insufficient evidence that she fired the fatal shot and, in support of this contention, she cites various evidence establishing that Damien fired the fatal shot. Reversal, however, is not required unless there is evidence that the jury actually relied solely on the theory defendant fatally shot Kelly. There is no showing of this in the record.

There is overwhelming evidence supporting the alternative theory that Damien fatally shot Kelly and defendant aided and abetted him in committing premeditated murder. The prosecution argued this theory to the jury, and the trial court instructed the jury on it.

Defendant argues that the fact the jury found true the weapons-discharge enhancement (§ 12022.53(c)) suggests the jury based its verdict solely on the theory defendant fatally shot Kelly. But, as discussed above, the enhancement did not require a finding defendant killed Kelly. It only required a finding defendant fired the gun in the commission of the murder, and this could have occurred right after Damien shot Kelly.

Furthermore, as defendant acknowledges, some of the jury's notes indicate the jury found defendant shot Kelly after Damien fired the fatal shot. One jury note inquires concerning the law regarding shooting a dead body and another note suggests the possibility defendant shot Kelly out of a rash impulse, after picking up the gun in confusion and panic, believing Kelly would die anyway.

The record thus does not show that, even assuming there was insufficient evidence defendant fatally shot Kelly, there was a reasonable probability the verdict rested solely on that ground. We thus conclude there was sufficient evidence to support the jury's verdict, regardless of whether there was sufficient evidence supporting the theory defendant fired the fatal shot.

#### 4. CALJIC No. 3.02

Defendant contends the trial court erred in not sua sponte giving CALJIC No. 3.02, the instruction on aiding and abetting liability under the "natural and probable

consequences” theory. Defendant claims the error was reversible because there is a reasonable likelihood the jury misapplied the “natural and probable consequences” theory due to not receiving the instruction. The trial court instructed the jury on aiding and abetting (CALJIC Nos. 3.00 and 3.01) and on assault with a firearm (CALJIC No. 9.02), but did not give CALJIC No. 3.02.

#### **A. Applicable Law**

“In determining whether error has been committed in giving or not giving jury instructions, the reviewing court must consider the instructions as a whole. The court must also assume that the jurors are intelligent beings and capable of understanding and correlating all instructions which are given to them. [Citation.] It is the trial court's duty to instruct the jury as to the general principles of law relevant to the issues raised by the evidence. [Citation.]” (*People v. Billings* (1981) 124 Cal.App.3d 422, 427-428, disapproved on other grounds in *People v. Karis* (1988) 46 Cal.3d 612, 642, fn. 22.) In a criminal case, the general principles of the law include all the elements of the charged offense. (*People v. Cummings* (1993) 4 Cal.4th 1233, 1311.)

#### **B. Procedural Background**

Defendant contends the trial court was required to give CALJIC No. 3.02 because there was evidence and the prosecutor argued that the fatal shooting was a natural consequence of Damien assaulting Kelly with a firearm.

During a discussion of the jury instructions, the court noted that the parties and court had just informally discussed CALJIC No. 3.02 and concluded the natural and probable consequences theory required essentially the same analysis as that required for

second degree murder based on the implied-malice theory. Therefore CALJIC No. 3.02 would not be given because it would only serve to complicate the issues. The prosecutor agreed and added that the implied malice instruction, CALJIC No. 8.31, would sufficiently define the conduct. He therefore did not want CALJIC No. 3.02. Defense counsel said he also was not requesting the instruction. Accordingly, the court did not give it.

Thereafter, during closing argument, the prosecutor did not mention the natural and probable consequences theory, but in arguing implied malice, the prosecutor mentioned “natural consequences” in the context of explaining implied malice. The prosecutor stated that murder can occur when someone commits a dangerous act, in which “the natural consequences . . . are dangerous to human life,” and result in death. If the act is done with knowledge it is a dangerous act, there is implied malice murder. The prosecutor further argued that if the jury did not believe Damien intentionally shot Kelly, there was evidence supporting a finding that he shot Kelly when he assaulted her with a firearm and this supported a finding of implied malice murder, based on conscious disregard of the safety of others.

### **C. Discussion**

Defendant argues the implied malice instruction was insufficient because, unlike CALJIC No. 3.02, it does not tie the concept of inherently dangerous conduct to aiding and abetting liability or to the target offense. It also does not explain when an aider and abettor is responsible for unintended consequences arising from committing the target act.

Under the “natural and probable consequences” doctrine, which originated in common law, a person is criminally liable, not only for crimes that he or she encourages or facilitates (target offenses), but also for any other offense that is a “natural and probable consequence” of the crime aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 260-261.) To apply the “natural and probable consequences” doctrine to aiders and abettors, “[t]he jury must decide whether the defendant (1) with knowledge of the confederate’s unlawful purpose, and (2) with the intent of committing, encouraging, or facilitating the commission of any target crime(s), (3) aided, promoted, encouraged, or instigated the commission of the target crime(s); whether (4) the defendant’s confederate committed an offense *other than* the target crime(s); and whether (5) the offense committed by the confederate was a natural and probable consequence of the target crime(s) that the defendant encouraged or facilitated. Instructions describing each step in this process ensure proper application by the jury of the ‘natural and probable consequences’ doctrine.” (*Id.*, at p. 267.)

CALJIC No. 3.02 explains the “natural and probable consequences” doctrine and therefore is necessary when arguing aiding and abetting liability based on the “natural and probable consequences” doctrine. The instruction requires the jury to determine, rather than assume, whether the unplanned offense, murder, was a natural and probable consequence of the commission of the target crime, assault with a firearm.

While the prosecutor in the instant case did not argue the natural and probable consequence doctrine during closing argument, the evidence supported such theory. There was evidence defendant and Damien intended to assault Kelly with a gun. This

was a dangerous act in which the fatal shooting of Kelly could be found to be a natural and probable consequence of such act.

Assuming the trial court thus erred in not giving CALJIC No. 3.02, such error was harmless. Reversal is required only if it is reasonably probable the jury would have reached a result more favorable to defendant in the absence of the trial court's instructional error. (*People v. Prettyman, supra*, 14 Cal.4th at p. 274.) Under the instructions the trial court actually gave, the jury had at least two means by which to find defendant guilty of first degree murder -- as the actual perpetrator or as an aider and abettor in premeditated murder. The omitted instruction would have provided a third means by which the jury could have determined defendant's guilt -- as an aider and abettor of assault with a firearm of which murder was a natural and probable consequence. Defendant simply could not have been prejudiced by the fact that the trial court's error deprived the jury of an additional basis upon which to find defendant guilty. Quite likely, for this reason defendant did not request CALJIC No. 3.02 on the natural and probable consequences theory.

Moreover, it is not reasonably likely the jury misapplied the "natural and probable consequences" theory due to not receiving the instruction. The prosecutor did not argue the theory and there was far stronger evidence that the murder was premeditated. In order for the jury to rely on the "natural and probable consequences" theory, the jury would have had to have found that neither Damien nor defendant intentionally fired the fatal shot. However, there was extremely persuasive evidence that the fatal shot was intentional. The testimony that pulling the gun trigger required substantial force was

particularly incriminating. It was not likely that Damien accidentally pulled the trigger when he fired directly into the back of Kelly's head.

There also was evidence defendants dug a grave for Kelly the night before, lured Kelly to the remote gravesite, shot her in the back of the head, put her in the grave, covered the grave with a couch, abandoned Kelly's car at Ontario Mills Mall, proceeded to create an alibi by eating out and going to a movie, and acted as if defendants knew nothing about the murder, until it became apparent there was conclusive evidence linking them to the murder.

While the jury could have found that either defendant or Damien fired the fatal shot, it is not reasonably probable the jury found the fatal shot was accidental. We thus conclude that even assuming the trial court erred in not giving the "natural and probable consequences" instruction, CALJIC No. 3.02, it is not reasonably likely that its absence made any difference in the outcome.

5. Disposition

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

s/Gaut  
J.

We concur:

s/Richli  
Acting P. J.

s/Miller  
J.

**PROOF OF SERVICE**

I, Martha L. McGill, declare as follows:

I am over eighteen years of age and not a party to the within action; my business address is 191 Calle Magdalena, Suite 270, Encinitas, CA 92024; I am employed in Encinitas, California. I am readily familiar with my office's practices for collection and processing of correspondence for mailing with the United States Postal Service.

On **September 22, 2006**, I served a copy of **PETITION FOR REVIEW** on the interested parties in the within action by following ordinary business practices and placing for collection and mailing at Encinitas, California, on **September 22, 2006**, a true copy of the above-referenced document(s) enclosed in a sealed envelope which, in the ordinary course of business, will be deposited with the United States Postal Service the same day; and said envelope was addressed as shown below.

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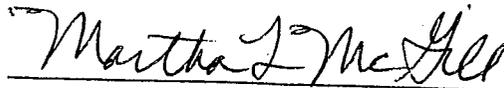
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Kinzie Gene Noordman

Court of Appeal  
Fourth Appellate Dist., Div. Two  
3389 Twelfth Street  
Riverside, CA 92501

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on **September 22, 2006**.



Martha L. McGill