

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

MINGUS ANTHONY CHAVARRIA,

Defendant and Appellant.

E082074

(Super.Ct.No. INF065609)

OPINION

APPEAL from the Superior Court of Riverside County. John D. Molloy, Judge.

Affirmed.

Patricia J. Ulibarri, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Lance E. Winters, Chief Assistant Attorney General, Charles C. Ragland, Assistant Attorney General, Arlene A. Sedival and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

In 2009, defendant and appellant Mingus Anthony Chavarria and his codefendant, Concepcion Rodriguez, were charged with first degree murder. The complaint alleged that the murder was committed during the commission of a kidnapping (Pen. Code¹, § 190.2, subd. (a)(17)(B)), that Rodriguez personally discharged a firearm (§ 12022.53, subd. (d)), defendant acted as a principal in the commission of the murder for the benefit of a criminal street gang (§ 12022.53, subd. (e)), and defendant and Rodriguez committed the murder to benefit a criminal street gang (§ 186.22, subd. (b)). Defendant entered a plea agreement in which he agreed to testify against Rodriguez in exchange for a second degree murder conviction, the dismissal of the special circumstance allegation, and a 15- year-to-life sentence. He subsequently testified at Rodriguez’s preliminary hearing and jury trial.

In 2018, the Legislature enacted Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill 1437), which, among other things, amended the definition of murder (§§ 188, subd. (a)(3), 189, subd. (a)) and added a new provision to the Penal Code, which establishes a procedure for vacating murder convictions predating the amendment if they could not be sustained under the amended definition of murder. (Former § 1170.95.)²

¹ All further statutory references will be to the Penal Code unless otherwise indicated

² This provision was renumbered without substantive change to section 1172.6, effective June 30, 2022. (See *People v. Strong* (2022) 13 Cal.5th 698, 708, fn. 2.) This opinion will use the statutory designation in effect at the time defendant filed his petition where appropriate and the new statutory designation for events occurring after the change in the law.

In 2019, defendant filed a petition for resentencing under former section 1170.95. The trial court issued an order to show cause and, after the evidentiary hearing, denied the petition, concluding that defendant was a major participant in the kidnapping and acted with reckless indifference to human life.

Defendant now appeals the denial of his resentencing petition, contending substantial evidence does not support the court's finding that he was a major participant who acted with reckless indifference to human life. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND³

In May 2006, defendant and Rodriguez were both members of a criminal street gang. Defendant had known Rodriguez for approximately 15 years. On May 13, 2006, Rodriguez called defendant and said he "needed some assistance." Defendant responded right away and rode his bike to Rodriguez's apartment. Rodriguez said they "were going to meet somebody." Defendant did not know who they were going to meet, but he was "willing to go anywhere" since Rodriguez was his friend.

Defendant and Rodriguez got into a car with a female (the female) and drove to the victim's apartment. The victim was not there, so they waited for him to arrive. As they waited, defendant observed that Rodriguez had a gun in his waistband and that he was "making loops" out of zip ties. Defendant later testified, "That's when I know [*sic*] the situation was serious."

³ Because defendant pled guilty pursuant to a plea agreement, the factual background is taken from defendant's testimony at the preliminary hearing in Rodriguez's case. The trial court relied upon the preliminary hearing transcript in denying defendant's petition.

When the victim arrived, Rodriguez and the victim went into a laundry room on the side of the apartment building. Defendant stood outside the laundry room and could hear them yelling back and forth. Rodriguez then led the victim outside, and defendant observed the victim's hands were tied together in front of him with zip ties. Defendant heard Rodriguez tell the victim, "You raped my girlfriend." The victim did not respond. The three of them walked back to the car. Defendant sat with the victim in the back seat, while Rodriguez sat in the front passenger seat, and the female drove them back to Rodriguez's apartment.

Defendant, Rodriguez, and the female walked the victim into Rodriguez's apartment. The female stayed in the living room, while defendant, Rodriguez, and the victim went into a bedroom and closed the door. The victim stood in the middle of the room, and defendant stood facing him with Rodriguez behind him. Rodriguez continued to accuse the victim of raping his girlfriend, and the victim continued to deny it. Rodriguez confronted the victim for 30 minutes, and the situation escalated.

Rodriguez said he was going to get his girlfriend and left defendant in the room with the victim, telling defendant to "watch him." Rodriguez returned a few minutes later with his girlfriend. She started crying and asked the victim, "Why did you do this to me?" The victim continued to deny raping her. Defendant saw that Rodriguez was getting more angry and that he had a gun in his hand. Rodriguez told his girlfriend to leave, and she did. At that point, defendant confronted the victim and said he needed to

tell Rodriguez the truth about the rape because “this is serious.” The victim still denied it.

Rodriguez walked over to the stereo and turned the volume up loud. He began walking around the victim and raised the gun to the level of the victim’s head. Rodriguez walked a full circle around the victim, stopped behind him, and shot him about three times. The victim stumbled into the closet, and defendant and Rodriguez moved out of the way. The victim then fell to the ground and slumped over. Rodriguez left the room and told defendant to wait there. Defendant watched the victim and did not try to help him. When Rodriguez returned, he told defendant to move the victim’s body to another room, and defendant grabbed the victim’s torso and moved him to another bedroom.

Then Rodriguez told defendant they were going to leave the body there and go get another vehicle. Rodriguez, his girlfriend, and defendant drove to another woman’s house, where a woman and a man named Turtle were located. Rodriguez asked to borrow the woman’s pickup truck, so she drove the truck with Rodriguez, defendant, and Turtle and returned to Rodriguez’s apartment.⁴ Rodriguez asked defendant and Turtle to help him load the victim’s body into the truck. As defendant moved the victim’s body, the victim was not breathing and appeared to be deceased. On his own, defendant then went into an unoccupied apartment to look for something to cover the victim’s body, and he grabbed a blanket. He brought the blanket to the truck and covered the victim’s body with it.

⁴ The record does not indicate if Rodriguez’s girlfriend returned with them.

Rodriguez told defendant to take the truck and dispose of the body. Defendant drove the truck for a block or two and the truck ran out of gas. He went back to Rodriguez's apartment, so Rodriguez took a container and walked to a gas station to fill it with gas, while defendant waited. Rodriguez returned with the gas, put it into the truck, and defendant drove the truck with Rodriguez. Rodriguez directed him to drive to a dirt lot. Once there, defendant got out of the truck and disposed of the body in the lot and covered it with the blanket. Then Rodriguez drove himself and defendant back to Rodriguez's apartment. Defendant walked away, and Rodriguez told him not to discuss what they did with anyone.

Defendant's Resentencing Petition

On March 14, 2019, defendant filed a petition for resentencing under former section 1170.95.

The People filed an opposition to defendant's petition, arguing that Senate Bill 1437 was unconstitutional and, in the alternative, that defendant was not entitled to relief since he was a major participant who acted with reckless indifference to human life.

On August 27, 2021, the court issued an order to show cause. The parties submitted briefing. The People attached a copy of defendant's testimony at Rodriguez's preliminary hearing to its motion. The People argued that defendant was not entitled to relief since he was a major participant who acted with reckless indifference to human life, citing *People v. Banks* (2015) 61 Cal.4th 788 (*Banks*) and *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*). Defendant contended there was no evidence he knew the victim

was going to be killed, and there was no evidence he “knowingly did anything to create a grave risk of death.”

After reviewing the evidence, the trial court concluded that defendant was a major participant in the kidnapping who acted with reckless indifference to human life. It noted that defendant observed Rodriguez had a gun and was preparing zip ties “in a handcuff fashion,” that the victim’s hands were zip-tied when he got into the car, and that defendant sat in the backseat next to the victim. The court noted it was clear, at that point, that a kidnapping was occurring. Furthermore, defendant knew Rodriguez was angry at the victim because Rodriguez believed the victim had raped his girlfriend. The court then noted that after they arrived at Rodriguez’s house, Rodriguez left the room and left defendant to stand guard. Moreover, defendant was in the room when Rodriguez drew his gun and started walking around the victim. Defendant did not act surprised when Rodriguez shot the victim three times. The court stated that “there was no question” before the shots were fired that defendant knew this was more than a kidnapping. It stated that defendant did not try to help the victim, even after he was shot. Instead, he “load[ed] the body, unceremoniously” onto the bed of a truck. The court found that the level of callousness shown by defendant was extraordinary, that he “was indeed a substantial participant, and that he acted with what amounts to a bone-chilling disregard for the safety of others.” The court thus denied the petition.

DISCUSSION

There Was Sufficient Evidence That Defendant Was a Major Participant and Acted with Reckless Indifference to Human Life

Defendant contends there was insufficient evidence to support the court’s findings that he was a major participant in the kidnapping and acted with reckless indifference to human life. He specifically argues that it was solely Rodriguez’s plan to kidnap and kill the victim, and defendant “didn’t know why he was there.” Defendant asserts that Rodriguez just said he needed help, and defendant wanted to help his friend. Defendant claims his personal involvement was “minuscule,” and he did not act with reckless indifference to human life. We conclude the evidence supports the court’s findings that defendant was a major participant who acted with reckless indifference to human life.

A. Relevant Law

On September 30, 2018, the Governor signed Senate Bill 1437. ““The legislation, which became effective on January 1, 2019, addresses certain aspects of California law regarding felony murder and the natural and probable consequences doctrine by amending Penal Code sections 188 and 189, as well as by adding Penal Code section [1172.6], which provides a procedure by which those convicted of murder can seek retroactive relief if the changes in law would affect their previously sustained convictions.”” (*People v. Nieber* (2022) 82 Cal.App.5th 458, 469 (*Nieber*).)

“By amending sections 188 (defining malice) and 189 (defining the degrees of murder), Senate Bill 1437 changed ‘the felony murder rule and the natural and probable

consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life.” (*Nieber, supra*, 82 Cal.App.5th at p. 469.)

The Legislature also added former section 1170.95. “That section provided that ‘[a] person convicted of felony murder or murder under a natural and probable consequences theory may file a petition with the court that sentenced the petitioner to have the petitioner’s murder conviction vacated and to be resentenced on any remaining counts.’ [Citation.] A petition may be filed when the following three conditions are met: ‘(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine. [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder. [¶] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019.’” (*Nieber, supra*, 82 Cal.App.5th at p. 469.)

“If a petitioner makes a prima facie showing that they’re entitled to relief, the judge must issue an order to show cause and hold ‘a hearing to determine whether to vacate the murder conviction and to recall the sentence and resentence the petitioner on

any remaining counts in the same manner as if the petitioner had not . . . previously been sentenced.” (*People v. Clements* (2022) 75 Cal.App.5th 276, 290-291 (*Clements*).

At the hearing “to determine whether the petitioner is entitled to relief, the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is ineligible for resentencing.” (Former § 1170.95, subd. (d)(3).) Both parties “may rely on the record of conviction or offer new or additional evidence to meet their respective burdens.” (*Ibid.*) If the trial court determines the “petitioner is entitled to relief, [and] murder was charged generically, and the target offense was not charged, the petitioner’s conviction shall be redesignated as the target offense or underlying felony for resentencing purposes.” (Former § 1170.95, subd. (e).)

B. *Standard of Review*

We review the denial of a resentencing petition under former section 1170.95 for substantial evidence. (*Clements, supra*, 75 Cal.App.5th at p. 298.) “Our job on review is different from the trial judge’s job in deciding the petition. While the trial judge must review all the relevant evidence, evaluate and resolve contradictions, and make determinations as to credibility, all under the reasonable doubt standard, our job is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support a rational fact finder’s findings beyond a reasonable doubt.” (*Id.* at p. 290.)

C. *The Evidence Was Sufficient*

In *Banks, supra*, 61 Cal.4th 788, the California Supreme Court articulated several factors to aid in determining whether a defendant is a “major participant.” The list is not

exclusive and includes: (1) the role the defendant had in planning the criminal enterprise that led to a death; (2) his role in supplying or using lethal weapons; (3) his awareness of the dangers posed by the nature of the crime, the weapons used, or experience of the other participants; (4) whether he was present at the scene of the killing, in a position to facilitate or prevent the actual murder, and whether his own actions or inaction play a particular role in the death; and (5) what he did after the killing. (*Id.* at p. 803.) “No one of these considerations is necessary, nor is any one of them necessarily sufficient.”

(*Ibid.*)

The following year in *Clark, supra*, 63 Cal.4th 522, the court “announced related considerations relevant to determining whether a defendant acted with ‘reckless indifference to human life.’” (*In re McDowell* (2020) 55 Cal.App.5th 999, 1007.) These factors include: (1) the defendant’s knowledge of weapons used in the crime, and the number and use of the weapons; (2) the defendant’s physical presence at the scene of the crime and opportunity to stop the killing or aid the victim; (3) the duration of the crime; (4) the defendant’s knowledge of the killer’s propensity to kill; and (5) the defendant’s efforts, if any, to minimize the risks of violence during the underlying crime. (*Clark*, at pp. 616-623.) The Court also explained that “major participation” and “reckless indifference to human life,” “significantly overlap both in this case and in general, for

the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.'" (*Id.* at p. 615.)

1. *Defendant Was a Major Participant in the Kidnapping*

At the outset, we note that "no one of the" *Banks* factors is necessary to make a finding that a defendant was a major participant. (*Banks, supra*, 61 Cal.4th at p. 803.) With that in mind, we note there was no apparent evidence that defendant had a role in planning the kidnapping of the victim or that he supplied or used a lethal weapon. (*Ibid.*) Rodriguez generically asked for defendant's help, and defendant was "willing to go anywhere" with his friend. However, once defendant went with Rodriguez to the victim's apartment, he quickly became aware that Rodriguez had a gun, and he observed Rodriguez "making loops" out of zip ties, while they waited for the victim to return. Defendant admitted that, at that point, he knew "the situation was serious." He also knew that Rodriguez was a gang member.

Furthermore, defendant was aware of the danger of the situation. He became aware that Rodriguez was angry with the victim because Rodriguez believed the victim had raped his girlfriend, and defendant knew Rodriguez went to the victim's apartment armed with a gun. Once the victim returned home, Rodriguez and the victim went into the laundry room, and defendant heard them yelling at each other. He observed that when they came out of the laundry room, the victim's hands were bound together with the zip ties. Then Rodriguez, the victim, defendant, and the female drove back to Rodriguez's apartment. At that point, it was clear they were kidnapping the victim.

We may infer from the evidence, including defendant's relationship with Rodriguez, and his willingness to go along with this kidnapping, that defendant was aiding in the kidnapping by acting as one of the people who escorted the victim back to car and escorting the victim while in the car by sitting in the backseat next to him. We note that defendant did nothing to help the victim during this period.

Further, when they arrived back at Rodriguez's apartment, defendant, Rodriguez and the female escorted the victim into the apartment. Defendant then accompanied Rodriguez as they escorted the victim into a bedroom and closed the door. Under these circumstances, substantial evidence supports the fact that defendant was aiding in the kidnapping and was not just along for the ride.

Moreover, defendant was present at the scene of the killing and was in a position to prevent it, but did not do so. While in the bedroom, the victim stood in the middle of the room and defendant stood facing him, with Rodriguez behind him. Rodriguez accused the victim of raping his girlfriend for 30 minutes, and the victim denied it. Rodriguez then left defendant alone in the room with the victim and told defendant to "watch him." Rodriguez returned a few minutes later with his girlfriend. The victim continued to deny raping her, even when the girlfriend confronted him. Defendant admitted seeing that Rodriguez was angry and he had a gun in his hand. Defendant then confronted the victim himself, saying the victim needed to tell Rodriguez the truth about the rape because "this is serious." In other words, defendant did not help the victim escape when he was left alone with him; rather, defendant helped Rodriguez by trying to

get the victim to confess and by keeping watch over the victim for Rodriguez . At no point did defendant suggest that Rodriguez not kill the victim.

Further, defendant could have helped the victim before and after the killing, but failed to do so. Rodriguez turned up the stereo and circled around the victim, with a gun raised to the level of the victim's head. Rodriguez shot the victim multiple times, in front of defendant. The victim stumbled into the closet, and defendant just moved out of the way. When Rodriguez left the room, defendant watched the victim again and did not try to render any aid.

Subsequently, defendant helped to load the victim's body onto the truck bed, and on his own, looked for and found a blanket to cover the body. He and Rodriguez drove together to a dirt lot, and defendant got out of the truck, moved the body, disposed of it in the lot, and concealed it with the blanket.

On this record, we conclude substantial evidence supports the trial court's finding that defendant was a major participant.

2. Defendant Acted With Reckless Indifference to Human Life

Major participation and reckless indifference to human life “‘significantly overlap ... for the greater the defendant's participation in the felony murder, the more likely that he acted with reckless indifference to human life.’” (*Clark, supra*, 63 Cal.4th at p. 615.) Further, “[r]eckless indifference ‘encompasses a willingness to kill (or to assist another in killing) to achieve a distinct aim, even if the defendant does not specifically desire that death as the outcome of his actions.’” (*In re Scoggins* (2020) 9 Cal.5th 667, 676-677.)

The evidence was sufficient to show defendant had a willingness to assist Rodriguez in killing the victim.

The evidence shows that defendant knew Rodriguez had a gun, was physically present during the entire kidnapping, and had multiple opportunities to aid the victim. (See *Clark, supra*, 63 Cal.4th at pp. 618-619.) When defendant and Rodriguez transported the victim from his apartment to Rodriguez's apartment, defendant sat in the backseat with him. At that time, he could have released the victim's hands from the zip ties, but did not do so. After Rodriguez confronted the victim in the bedroom, he left the victim alone with defendant. Defendant did not help the victim escape. Moreover, when Rodriguez turned up the stereo and started circling the victim with the gun in his hand, defendant did nothing to stop the killing. After Rodriguez shot the victim, defendant simply moved out of the way as the victim was falling. When Rodriguez left the room, defendant did not try to help the victim. Finally, defendant loaded the victim's body into the truck and then disposed of it in a dirt lot. We agree with the trial court that defendant acted with an extraordinary amount of callousness.

Ultimately, in view of the *Banks/Clark* factors, we conclude there was substantial evidence to support the court's finding that defendant was a major participant in the kidnapping who acted with reckless indifference to the victim's life.

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

FIELDS
J.

We concur:

McKINSTER
Acting P. J.

CODRINGTON
J.