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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. CARLOS MIGUEL IRAHETA, Defendant and Appellant.	B173223 (Los Angeles County Super. Ct. No. YA053907)

APPEAL from a judgment of the Superior Court of Los Angeles County, John V. Meigs, Judge. Affirmed.

Larry Pizarro, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Lance E. Winters and J. Michael Lehmann, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and appellant, Carlos Miguel Iraheta, appeals the judgment entered following his conviction, by jury trial, for second degree murder with firearm use findings (Pen. Code, §§ 187, subd. (a), 12022.53).[1] Sentenced to state prison for 40 years to life, Iraheta claims there was trial error.

The judgment is affirmed.

FACTUAL BACKGROUND

Viewed in accordance with the usual rule of appellate review (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206, we find the evidence established the following.

1. *Prosecution evidence.*

On December 20, 2002, a man stared hard at Noe Martinez as they stood in line at an Inglewood liquor store. Two hours later, Martinez passed the liquor store while riding in his car and saw the same man standing outside. The man was talking to some people in a car being driven by defendant Iraheta. After the man pointed at Martinez, Iraheta began following Martinez's car. Martinez became concerned and asked his friend Michael Orozco, who was driving, to stop at the side of the road. Orozco did and Martinez got out of the car. Iraheta pulled up next to Martinez's car, produced a revolver, reached across the front passenger seat and fired one shot out the window. The shot hit Orozco in the neck, killing him.

The police apprehended Iraheta shortly thereafter. A firearms expert determined that a revolver found in Iraheta's car had fired the fatal bullet.

2. *Defense evidence*.

Iraheta testified he was not a gang member, but that he carried a handgun for protection because he had been beaten up earlier that year. On the day of the incident, Iraheta was out driving with his girlfriend and his brothers when he stopped at the liquor store to see his friend, Herman. Herman said the occupants of a passing white car had given him problems. Herman did not, however, direct Iraheta to shoot the people in the

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[1] All further statutory references are to the Penal Code unless otherwise specified.

white car. After Iraheta left the liquor store, he found the white car stopped in the middle of the street in front of him. Martinez was standing next to the car. As Iraheta slowly maneuvered around the white car, one of his brothers said, "[K]eep moving; he's got a gun." Orozco was sitting in the driver's seat with something in his hand, which Iraheta thought was a small handgun. Iraheta reached for his own gun, fired one shot out the passenger-side front window of his car, and sped away.

Although there was testimony from a number of other defense witnesses, including Iraheta's girlfriend and his brothers, none of it shed any further light on what occurred at the exact moment of the shooting. However, the general tenor of this other defense evidence contradicted the prosecution theory that Iraheta had aggressively gone after the white car in order to assault its occupants.

PROCEDURAL BACKGROUND

On December 12, 2004, Iraheta's appellate counsel filed an opening brief contending the trial court had erred by giving inadequate jury instructions on imperfect self-defense and by coercing a verdict from the jury. The Attorney General filed a responsive brief, but Iraheta's attorney did not file a reply brief or ask for oral argument. On January 26, 2006, this court issued an unpublished opinion rejecting Iraheta's contentions and affirming his conviction. There was no petition for rehearing or petition seeking review by the California Supreme Court. We issued the remittitur on March 30, 2006.

On February 6, 2007, this court received a letter from Iraheta. He inquired about the status of his case, indicating that his retained appellate attorney, who had agreed to file a reply brief and present oral argument, had not been in touch with him. On April 16, this court, acting sua sponte, issued an order recalling the remittitur, vacating the opinion, reinstating the appeal and directing the appointment of new counsel on appeal. This order stated: "[I]t appears that appellant's retained counsel on appeal . . . abandoned the representation of [appellant] prior to the conclusion of the appeal by failing to communicate with [appellant] or participate in the litigation of the appeal after the filing of the appellant's opening brief."

Newly appointed appellate counsel filed a new opening brief raising different issues than the ones briefed by Iraheta's previous attorney.

CONTENTIONS

1. The Attorney General contends the remittitur should not have been recalled.
2. Iraheta contends he was improperly convicted of second-degree felony murder.

DISCUSSION

1. *Recall of the remittitur was not improvidently granted.*

The Attorney General contends the appeal should be dismissed because recall of the remittitur was improvidently granted. He argues that, by recalling the remittitur, this court has improperly granted Iraheta a second appeal, thereby allowing him "to take advantage of this Court's opinion in *People v. Bejarano* (2007) 149 Cal.App.4th 975, without having to establish that it retroactively applies to him." We disagree.

"The legal principles applicable to the recall of remittiturs are fairly well settled. 'Other than for the correction of clerical errors, the recall may be ordered on the ground of fraud, mistake or inadvertence. The recall may not be granted to correct judicial error. . . . [A] decision is inadvertent if it is the result of oversight, neglect or accident, as distinguished from judicial error.' [Citation.] '[W]hile the general rule is that an appellate court loses all control and jurisdiction over a cause after remittitur has been issued, a mistake or an improvident act which results in prejudicial error or miscarriage of justice may nevertheless be corrected upon a recall of remittitur.' " (*Pacific Legal Foundation v. California Coastal Com.* (1982) 33 Cal.3d 158, 165-166; see *Rowland v. Kreyenhagen* (1864) 24 Cal. 52, 60 [remittitur properly recalled if "the order or judgment had been *irregularly* made; that is, made upon a false suggestion, or under a mistake as to the facts of the case"];

Thus, in *People v. Hickok* (1949) 92 Cal.App.2d 539, the remittitur was recalled to save a criminal appeal that had been dismissed when confusion between newly retained and former counsel led to a failure to file the opening brief: "[T]he appellant, the real party in interest, was not at fault. He was incarcerated and was doing all that he could to protect his rights, and thought that he had done so. . . . In a proper case the court . . . has

power to recall a remittitur inadvertently or improperly issued. [Former California Rules of Court, r]ule 25(d) provides that 'A remittitur may be recalled by order of the reviewing court on its own motion, on motion after notice supported by affidavits, or on stipulation setting forth facts which would justify the granting of a motion.' This is an inherent power of the court and was recognized long before the above rule was adopted. [Citations.] Under these cases, and others that could be cited, and under the rule, one of the grounds for exercising the power is that the court has been induced to decide the case under a misapprehension of the true facts. That rule is applicable here." (*Id*. at pp. 540-541.) The current version of rule 25(d) is California Rules of Court, rule 8.272(c)(2), which provides: "On a party's or its own motion or on stipulation, and *for good cause*, the court may stay a remittitur's issuance for a reasonable period or order its recall." (Italics added.)

In the case at bar, this court was operating under the mistaken belief Iraheta was being actively represented by counsel when, in fact, he was not. Iraheta's attorney filed an opening brief, but then failed to carry out promises to file a reply brief and appear for oral argument. Subsequently, the attorney failed to inform Iraheta that his appeal had been denied. Our docket indicates the clerk of court twice sent Iraheta's attorney a copy of our former opinion in this matter, and that twice the opinion was returned to the clerk as undeliverable. These facts established good cause for recalling the remittitur.

The Attorney General complains that recalling the remittitur has improperly allowed Iraheta to take retroactive advantage of our decision in *People v. Bejarano* (2007) 149 Cal.App.4th 975. Not so. As will be explained below, *Bejarano* did not purport to establish any new law; it merely applied a line of California Supreme Court cases holding the prosecution cannot pursue a felony murder theory if the predicate crime was an intentional assault. Even if *Bejarano* had never been decided, our analysis in this case would have been exactly the same as set forth below.

Hence, we reject the Attorney General's contention that recall of the remittitur was improvidently granted.

2. *Iraheta was properly convicted of second degree felony murder*.

The jury in this case was instructed on three possible second degree murder theories: (1) an intentional killing where the evidence was insufficient to prove premeditation and deliberation; (2) an unintentional killing resulting from a dangerous act performed with conscious disregard for human life; and, (3) second degree felony murder based on a killing committed while violating section 246 (shooting at an occupied motor vehicle). Iraheta contends his second degree murder conviction must be reversed because the felony-murder instruction should have been excluded by the merger doctrine set forth in *People v. Ireland* (1969) 70 Cal.2d 522. This claim is meritless.[2]

a. *Legal principles*.

As we recently explained in *People v. Bejarano*, *supra*, 149 Cal.App.4th at pp. 982-983, fn. omitted:

"Prior to *Ireland*, the 'merger' doctrine developed in other jurisdictions as a shorthand explanation for the conclusion that the felony-murder rule should not be applied in circumstances where the only predicate felony committed by the defendant was assault. [Citation.] 'The name of the doctrine derived from the characterization of the assault as an offense that "merged" with the resulting homicide.' [Citation.]

"In *Ireland*, . . . a husband shot his wife and the [trial] court instructed on second degree felony murder based on the predicate felony of section 245, assault with a deadly weapon. [*Ireland*] refused to extend the second degree felony-murder rule to that case because it would extend the rule beyond any rational purpose it was intended to serve. The court stated: 'To allow such use of the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein

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[2] Iraheta also contends the entire concept of second degree felony murder violates both due process and the power of the Legislature to establish crimes and punishments. But Iraheta also acknowledges that, despite continued criticism of the second degree felony-murder doctrine, it remains the law of the land in California (see *People v. Robertson* (2004) 34 Cal.4th 156, 174-175 (conc. opn. of Moreno, J.)), which we are required to follow (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455).

homicide has been committed as a result of a felonious assault – a category which includes the great majority of all homicides.' [Citation.] The court concluded that a trial court may not instruct the jury with second degree felony murder when the instruction is 'based upon a felony which is an integral part of the homicide and which the evidence produced by the prosecution shows to be an offense included *in fact* within the offense charged.' [Citation.]

". . . . . .

"In *People v. Mattison* (1971) 4 Cal.3d 177 . . . , the Supreme Court . . . formulate[d] a new test with regard to the *Ireland* merger rule. The court found the *Ireland* merger rule did not apply and the defendant could be convicted of second degree felony murder based on the predicate felony of a violation of section 347 [mixing poison or harmful substance with food or drink], because he committed the predicate felony with a collateral and independent felonious design. When a defendant intends to commit the very assault which results in death, such as when death results from the commission of assault with a deadly weapon, the *Ireland* merger rule applies. However, when the defendant has a collateral and independent purpose in committing the predicate felony, the *Ireland* merger rule does not apply and the defendant may be convicted of second degree felony murder."

As the Supreme Court explained in *People v. Robertson* (2004) 34 Cal.4th 156: "In *Mattison* the defendant was a prison inmate who furnished methyl alcohol to a fellow inmate, causing the latter's death. We held that the trial court properly instructed on second degree felony murder based on the furnishing offense. We explained that *the merger doctrine does not apply when death results from defendant's commission of a felony with an independent purpose, that is, when the felony that provides the basis for the felony-murder conviction 'was not done with the intent to commit injury which would cause death*.' [Citation.] We rejected the defendant's claim that the offense of furnishing poisonous alcohol merged with the resulting homicide; there was no merger, because the felony-murder verdict was based upon defendant's commission of a felony with a

‘ “collateral and independent felonious design.” ’ [Citation.]” (*Id*. at p. 170, italics added.)

b. *Discussion*.

Preliminarily, the Attorney General argues “there is no [*Ireland*] merger between shooting at an occupied vehicle [§ 246] and murder *regardless of whether* the shooter had [a] collateral and independent felonious purpose.”[3] (Italics added.) As authority, the Attorney General cites the statement in *People v. Hansen* (1994) 9 Cal.4th 300, 312, that *Ireland* merger only applies to “felonies involving assault or assault with a deadly weapon” because “[o]ur court . . . has not extended the *Ireland* doctrine beyond the context of assault, even under circumstances in which the underlying felony plausibly could be characterized as ‘an integral part of’ and ‘included in fact within’ the resulting homicide.” However, the Supreme Court subsequently did just that in *People v. Randle* (2005) 35 Cal.4th 987, when it applied *Ireland* merger to the predicate felony of discharging a firearm in a grossly negligent manner (§ 246.3) where the defendant admitted shooting at the victim. Section 246.3 is not an assaultive crime; it “was enacted primarily to deter the dangerous practice that exists in some communities of discharging firearms into the air in celebration of festive occasions.” (*People v. Robertson, supra,* 34 Cal.4th at p. 167.) *Robertson* ultimately concluded *Ireland* merger did not apply to the facts of that case because the defendant claimed he had not been trying to shoot the victims.

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[3] Currently pending before the California Supreme Court in *People v. Chun*, review granted December 19, 2007, S157601), is the issue of whether the offense of discharging a firearm at an occupied vehicle in violation of section 246 merges with a resulting homicide under *Ireland* if there is no admissible evidence of an independent and collateral criminal purpose other than to commit an assault. In this regard, the Attorney General here cited *People v. Jones* (2007) 157 Cal.App.4th 580, but the Supreme Court has since granted review in that case and ordered briefing deferred pending the decision in *Chun*.

As we indicated in *Bejarano*, the key factor for determining if the *Ireland* merger doctrine applies to a particular case is whether or not, in committing the underlying dangerous felony, the defendant intended to assault the victim. That explains why *Ireland* merger applied in *Randle*, but not in *Robertson*, even though the predicate felony in both cases was section 246.3. As *Randle* explained: "The defendant in *Robertson* claimed he fired into the air, in order to frighten away several men who were burglarizing his car. [Citation.] However, the testimony of a neighbor, as well as ballistics evidence, indicated defendant shot at the victim. [Citation.] This court held the merger doctrine did not apply because the defendant, by his account, had a 'collateral purpose' in firing his weapon. . . . [¶] Here, unlike *Robertson*, defendant admitted, in his pretrial statements to the police and to a deputy district attorney, he shot *at* [the victim]. . . . [¶] The fact that [Randle] admitted shooting at [the victim] distinguishes *Robertson* and supports application of the merger rule here." (*People v. Randle, supra*, 35 Cal.4th at p. 1005.)

Thus, we disagree with the Attorney General's argument *Ireland* merger does not apply to the predicate felony in this case, section 246 (shooting at an occupied vehicle), regardless of whether Iraheta had an independent and collateral criminal purpose other than to commit an assault.

Iraheta, on the other hand, argues *Ireland* merger did apply to this case because his "defense was that he fired *at Orozco* as Orozco was sitting in the car because he thought Orozco was about to shoot him . . . ." (Italics added.) Iraheta argues that, although he testified he wanted to scare Orozco, "[a]t most, his statements constitute a denial of intent to kill rather than a denial that he shot at Orozco. Indeed, it would have been absurd for appellant to deny that he shot 'at' Orozco given that he fired at him from approximately three feet away. Under these circumstances, there was no independent collateral purpose for the violation of section 246, and the trial court therefore erred by instructing the jury on the second-degree felony-murder theory of liability."

But, as the Attorney General properly points out, Iraheta did not testify he "shot at Orozco" in the sense that he intended to hit Orozco with a bullet. Rather, Iraheta testified he fired in Orozco's direction in order to frighten him, not to hit him.

On direct examination, Iraheta testified about trying to maneuver around the white car without hitting it: "I'm about to hit it, about to hit the back of the car; and I hear my brother tell me that he's got a gun." Iraheta could see Martinez behind him and Orozco right across from him. Martinez, who had his hands in his jacket, did not seem to be a threat: "I didn't think [Martinez] was doing anything. He was just standing there. I am not sure who my brother was talking about." But when Iraheta looked at Orozco: "I saw him, his body facing me with something in his hand."

"Q What was the next thing that happened?

"A I reached out for my . . . gun, and I pointed it out the window.

"Q And then?

"A I tilted my head, I squinted and I let go of the brake and hit the gas; and I pulled the trigger."

Iraheta was asked why he reached for his gun:

"A Because my brother told me they had a gun around my car.

"Q What was going through your head at that time?

"A I was thinking they were going to do something.

"Q *So why did you do what you did?*

"A *I did it so he can get scared so I could have enough time to drive away*.

"Q What else were you thinking?

"A I was thinking they were going to shoot, shoot at us first. They were going to run up to us, shoot us or try to do something." (Italics added.)

"Q How many times did you fire?

"A Once.

"Q *Were you aiming in any particular direction*?

"A *No, just out the window*." (Italics added.)

On cross-examination:

"Q . . . [*Y*]*ou mean you weren't looking at what you were shooting*?

"A *No*. I tilted my head slightly, and I just put my head down and stepped on the gas and pulled a [*sic*] trigger.

"Q *Why would you shoot at something you wouldn't be looking at*?

"A *I was trying to scare them*. Whatever they were thinking, so I could block whatever they were thinking of to give me two or three seconds to get out of there" (Italics added.)

"A I heard my bother say 'gun.'

"Q Did you see a gun?

"A I'm not too sure if it's the guy next to me in the Honda. I'm not sure if he had one. It looked like one, but I don't know why he would pull it and not going to use it. That's why I'm not – I'm not, I don't know if it was intentional.

"Q Why weren't you pointing the gun straight up in the air?

"A Because it would go through my roof.

"Q Why wouldn't you use your other hand and shoot out the other window?

"A Because I'm not left handed. I wasn't thinking of that.

"Q Of all the places you could have aimed that gun, you aimed it right at the victim's head?

"A I didn't even know I hit him at the time."

The clear import of Iraheta's testimony is that he fired in Orozco's direction, not because he was trying to hit him, but only because he wanted to scare Orozco, and Martinez too, in order to give himself a chance to drive away safely.[4]

Hence, the *Ireland* merger doctrine did not bar a second degree felony-murder theory in this case.[5]

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[4] Iraheta argues that "[t]o the extent [his] equivocal testimony might be interpreted to mean that he denied an intent to assault Orozco, that denial was incredible. This Court should hold that it was insubstantial evidence of collateral purpose." We disagree. Iraheta was at the wheel of a moving car and the shooting happened in seconds. His story that he was only trying to scare Orozco was not inherently unbelievable.

[5] Iraheta also argues that even if *Ireland* merger did not apply in this case, the trial court erred by not having the jury decide whether he had a collateral purpose other than assaulting Orozco. But these are just opposite sides of the same coin: *Ireland* merger did

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.

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not apply *because* the evidence showed Iraheta had a collateral purpose. Moreover, it is the trial court, not the jury, that decides which legal theories are warranted by the evidence.