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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. ANTHONY MARTIN GARCIA, Defendant and Appellant.	B233194 (Los Angeles County Super. Ct. No. VA107868)

APPEAL from a judgment of the Superior Court of Los Angeles County, Thomas I. McKnew, Jr., Judge. Affirmed in part, reversed in part and remanded.

Susan K. Shaler, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Scott A. Taryle and Eric J. Kohm, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Anthony Martin Garcia of first degree murder and shooting at an occupied motor vehicle and found true special allegations supporting firearm-use and criminal-street-gang enhancements. On appeal, Garcia challenges the sufficiency of the evidence to support the shooting-at-an occupied-vehicle conviction and the accompanying criminal-street-gang enhancement. Garcia further contends the trial court was required sua sponte to instruct on the lesser included offense of negligently discharging a firearm (Pen. Code, § 246.3).[1] After requesting and receiving supplemental briefing on a specific issue concerning the sufficiency of the evidence, we conclude the conviction for shooting at an occupied vehicle must be reversed.

FACTUAL AND PROCEDURAL BACKGROUND

1. *The Charges*

Garcia was charged by information with first degree murder (Pen. Code, § 187, subd. (a), count 1)[2] with special allegations that he personally and intentionally discharged a firearm causing death or great bodily injury (§ 12022.53, subds. (b)-(d)) and that a principal personally discharged a firearm within the meaning of this section. (§ 12022.53, subds. (b)-(e).) Garcia was also charged with shooting at an occupied vehicle (§ 246, count 3).[3] As to each count the information specially alleged the offense was committed for the benefit of a criminal street gang (§§ 186.22, subds. (b)(1)(C) & (b)(4)).

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[1] Garcia contends, the People acknowledge and we agree the trial court erred in denying him an award of presentence custody credit. A defendant convicted of murder is entitled to presentence custody credit for the actual number of days in confinement up to the date of sentencing but may not receive worktime or conduct credits. (Pen. Code, §§ 2900.5, subd. (a); 2933.2; *People v. Taylor* (2004) 119 Cal.App.4th 628, 645-647.) It is undisputed Garcia spent 946 actual days in custody prior to sentencing. On remand, the abstract of judgment should be modified to reflect 946 days of presentence custody credit.

[2] Statutory references are to the Penal Code.

[3] There was no count 2 charged in the information.

2. *Summary of Trial Evidence*

At approximately 7:30 p.m. on January 23, 2004, Garcia, a Rivera 13 gang member, was driving fellow gang members, Raymond Gallegos and Robert Armijo, on Rosemead Boulevard in Pico Rivera.[4] As Garcia drove by Ed's Liquor Store at the corner of Rosemead Boulevard and Carron Drive, he noticed John Juarez, Jr., a member of the rival Pico Nuevo gang, standing outside. Juarez was using a pay phone in the liquor store parking lot. Garcia pulled over on Carron Drive, intending to confront Juarez. Armijo waited behind the wheel, while Garcia and Gallegos walked up to Juarez. Garcia was armed with a semiautomatic pistol; Gallegos was armed with a revolver. Juarez was unarmed.

In the meantime, Louie Duarte was traveling on Rosemead Boulevard in his pickup truck. He drove by Ed's Liquor store and then made a U-turn from Rosemead Boulevard onto the frontage road that bordered one side of the liquor store and its parking lot. When Duarte completed his turn, he heard gun shots and felt something hit his truck. Duarte did not see anyone firing the shots or standing in the parking lot. At this point, Duarte was on the frontage road, "immediately behind" the public telephones in the liquor store parking lot. Duarte did not stop; he drove to the sheriff's station to report what had occurred. Deputies found a bullet hole in Duarte's truck and, from the passenger door, they subsequently retrieved a bullet that was either a .357 Magnum or a .38 special caliber bullet, fired from either a .357 or .38-caliber revolver, but not from an automatic pistol.

At around 7:30 that night, Stacy Hazuda was in her house on Carron Drive across from Ed's Liquor store and other residences. She heard more than two gunshots coming from the liquor store and saw two men running to a pickup truck parked under her balcony. They climbed into the truck and sped away. Two bullets recovered from Juarez's body and eight cartridge casings recovered at the scene indicated the bullets

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[4] Neither Raymond Gallegos nor Robert Armijo is a party to this appeal.

fired at Juarez were either .22-caliber Long or .22-caliber Long Rifle bullets, which could have been fired from either a revolver or semiautomatic pistol.

Fellow Rivera 13 gang members later implicated Garcia in Juarez's murder. Garcia ultimately admitted shooting Juarez to undercover officers during a recorded jailhouse conversation.

Detective Kevin Lloyd of the Los Angeles County Sheriff's Department, a gang expert, testified, among other things, that Garcia's Rivera 13 gang was a primary rival of Juarez's Pico Nuevo gang. The liquor store where Juarez was killed was located in territory claimed by Pico Nuevo, but close to territory claimed by Rivera 13, which meant that more gang-related murders occurred in the area. Lloyd opined the shooting was committed for the benefit of Garcia's Rivera 13 gang. Lloyd explained it would enhance the reputation of the both the shooter and the gang as well as instill fear among rival gangs and in the community. Garcia neither testified nor presented other evidence in his defense.

3. *Pertinent Jury Argument, Instructions and Verdict*

The prosecution's theory at trial was Garcia and Gallegos aided and abetted each other in killing Juarez. Specifically, the prosecutor argued they acted in concert as "a killing team. A kill squad. They had a common goal, they were working together, they were both shooting at one target."

With respect to the charge of shooting at an occupied motor vehicle the prosecutor argued while there were two shooters and two guns being used at the time, "the bullet hitting [Louis Duarte's truck] as he's driving by, that's shooting at an occupied motor vehicle for the second count" and "this is a shooting that's occurring for the benefit of a criminal street gang. [Duarte] just happened to get caught in the wrong place at the wrong time."

The prosecutor requested and the trial court gave instructions on the principles of aiding and abetting that "[a] person may be guilty of a crime in two ways. One he may have directly committed the crime. I will call that person the perpetrator. Two, he may

have aided and abetted a perpetrator, who directly committed the crime. [¶] A person is guilty of a crime whether he committed it personally or aided and abetted the perpetrator." (CALCRIM No. 400.)

The court also instructed the jury, "To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that: 1. The perpetrator committed the crime; 2. The defendant knew that the perpetrator intended to commit the crime; 3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime; AND 4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime. Someone aids and abets a crime if he or she knows of the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime. If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor. If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor." (CALCRIM No. 401.)

During deliberations, the jury asked the court whether aiding and abetting applied to the count of shooting at an occupied vehicle. After conferring with counsel, the trial court, without objection, told the jury, "Yes."

The jury convicted Garcia as charged and found true the firearm use and gang enhancement allegations.

4. *Sentencing*

The trial court sentenced Garcia to an aggregate state prison term of 65 years to life, consisting of a term of 25 years to life for the first degree murder, plus a consecutive term of 25 years to life for the section 12022.53, subdivision (d) firearm-use

enhancement; and a consecutive term of 15 years to life for the gang-related shooting at an occupied vehicle.

DISCUSSION

We requested supplemental briefing addressing whether there was sufficient evidence to support Garcia's conviction for shooting at an occupied vehicle in light of the fact that the evidence appears to establish that the gun used by Garcia could not have fired the bullet that struck Duarte's truck.

In response the People asserted, for the first time, the theory of natural and probable consequences, arguing that, because both Garcia and Gallegos were armed and participated together in a shooting on a public street, the jury could have found that it was reasonable for Garcia to have foreseen that "a fellow armed gang member firing a gun might strike something or someone" on the theory of natural and probable consequences. Accordingly, the People urge, "Substantial evidence, therefore, existed from which a reasonable trier of fact could conclude that shooting at an occupied motor vehicle was a natural and probable consequence of the Juarez shooting. As such, the jury was permitted to convict [Garcia] of shooting at an occupied vehicle as an aider [and] abettor, particularly in light of the court's having instructed the jury on such principles of law . . ., the prosecution's advancing this alternative theory during closing argument." The People's position is without merit.[5]

To assess a claim of insufficient evidence in a criminal case, "we review the whole record to determine whether *any* rational trier of fact could have found the essential elements of the crime or special circumstances beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict – i.e., evidence that is reasonable, credible, and of solid value – such that a reasonable trier of fact could find

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[5] The record reflects that the prosecution neither sought jury instructions on, nor argued this theory at the trial. Respondent did not raise this theory in its briefing. Although we could, as a result, conclude the argument has been forfeited, we will nonetheless address it on the merits.

the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] 'Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]' [Citation.] A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict." (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

Shooting at an occupied vehicle is a general intent crime. (*People v. Ramirez* 2009) 45 Cal.4th 980, 985, fn. 6.) However, if an aider and abettor theory of liability is asserted, the People must prove that the aider and abettor harbored the specific intent to encourage and bring about the conduct that is criminal. (*People v. Hernandez* (2010) 181 Cal.App.4th 1494, 1500-1501.) We do not find, nor to the People suggest, any evidence of Garcia's specific intent to aid and abet the shooting of Duarte's pickup truck by Gallegos.

Alternatively, an aider and abettor can be found guilty pursuant to the natural and probable consequences doctrine. In *People v. Medina* (2009) 46 Cal.4th 913, the California Supreme Court explained that an aider and abettor "'is guilty of not only the intended crime [target offense] but also of any other crime the perpetrator actually commits [nontarget offense] that is a natural and probable consequence of the intended crime. The latter question is not whether the aider and abettor *actually* foresaw the additional crime, but whether, judged objectively, it was *reasonably* foreseeable. [Citation.]' [Citation.] Liability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have known that the charged offense was a reasonably foreseeable consequence of

the act aided and abetted.' [Citation.]" (*Id*. at p. 920.) The natural and probable consequences doctrine is embodied in CALCRIM No. 402.[6] However, the trial court never gave this instruction; the prosecutor never requested that the instruction be read to the jury; and the record would not support it. The conviction must be reversed.

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[6] The defendant is charged in Count[s] _____ with _____ <insert target offense> and in Counts[s] _____ with_____ <insert non-target offense>. You must first decide whether the defendant is guilty of _____ <insert target offense>. If you find the defendant is guilty of this crime, you must then decide whether (he/she) is guilty of _____ <insert non-target offense>. Under certain circumstances, a person who is guilty of one crime may also be guilty of other crimes that were committed at the same time. To prove that the defendant is guilty of _____ <insert non-target offense>, the People must prove that: [¶] 1. The defendant is guilty of _____ <insert target offense> ; [¶] 2. During the commission of _____ <insert target offense> a coparticipant in that _____ <insert target offense> committed the crime of _____ <insert non-target offense> ; [¶] AND [¶] 3. Under all of the circumstances, a reasonable person in the defendant's position would have known that the commission of _____ <insert non-target offense> was a natural and probable consequence of the commission of the _____<insert target offense> . A coparticipant in a crime is the perpetrator or anyone who aided and abetted the perpetrator. It does not include a victim or innocent bystander. A natural and probable consequence is one that a reasonable person would know is likely to happen if nothing unusual intervenes. In deciding whether a consequence is natural and probable, consider all of the circumstances established by the evidence. If the _____<insert non-target offense> was committed for a reason independent of the common plan to commit the _____ <insert target offense> , then the commission of _____ <insert non-target offense> was not a natural and probable consequence of _____<insert target offense> . (CALCRIM No. 402.)

DISPOSITION

The conviction on count 3 is stricken; the sentence modified to 50 years to life, and otherwise affirmed. The matter is remanded to prepare a corrected abstract of judgment.

ZELON, J.

We concur:

PERLUSS, P. J.

JACKSON, J.