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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

RAFAEL ALVAREZ,

Defendant and Appellant.

B227279

(Los Angeles County  
Super. Ct. No. BA350976)

APPEAL from a judgment of the Superior Court of Los Angeles County,  
Judith Champagne, Judge. Affirmed with directions.

John P Dwyer, 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, Assistant Attorney General, Linda C. Johnson  
and Theresa A. Patterson, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant and appellant, Rafael Alvarez, appeals the judgment entered following his conviction for second degree murder with firearm use, gang, and prior serious felony conviction findings. (Pen. Code, §§ 187, 12022.53, 186.22, subd. (b)(1), 667, subd. (a)-(i).)<sup>1</sup> He was sentenced to state prison for a term of 60 years to life.

The judgment is affirmed.

### **BACKGROUND**

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

#### *1. Prosecution evidence.*

On the night of December 31, 2008, Wendy Cervantes went to Amy Contreras's apartment on Occidental Boulevard near Third Street. They were planning to attend a New Year's Eve party with David Mendez. That afternoon, Cervantes had spoken to her ex-boyfriend, Christopher Ruiz, and invited him to the party too.

Ruiz arrived at Contreras's apartment in a Lexus being driven by defendant Alvarez. Cervantes came down to the street and told Ruiz she was still waiting for Mendez to arrive. Ruiz said he and Alvarez would go pick up another friend and come back.

Mendez arrived at Contreras's apartment shortly thereafter in a Nissan. Contreras got into the Nissan while Cervantes waited on the street for Ruiz and Alvarez to return. Alvarez drove up a few minutes later. Ruiz was now in the back seat with two other men and there was a third man sitting in the front passenger seat. Neither Contreras nor Cervantes recognized the three new people. Cervantes approached the Lexus and spoke to Ruiz. Because she did not know the location of

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise specified.

the party, she told them to follow Mendez's Nissan. Someone in the Lexus asked if Mendez belonged to a gang and Cervantes said he did not.

Cervantes returned to the Nissan. Mendez stopped for a red light at Third Street and Alvarez pulled up right behind him. While they were waiting for the light to change, Mendez asked if the occupants of the Lexus were gang members. When Contreras said Alvarez was from the Temple Street gang, Mendez replied, "[W]e don't get along with Temple Street." Because Cervantes knew Mendez was planning to pick up a friend who belonged to the Mara Salvatrucha gang, she got out and walked back to the Lexus to talk to Ruiz. Cervantes said, "Please don't start any problems, because [Mendez] is going to pick up a homie from M.S." Ruiz replied "they weren't going to start any problems because it was New Year's."

Cervantes returned to the Nissan. Three or four seconds later, Alvarez pulled the Lexus up right next to the driver's side of the Nissan and stopped. The man in the front passenger seat of the Lexus pointed a gun out the window and fired four or five shots, hitting Mendez twice. One bullet entered his left upper back and exited his right upper back. The other bullet entered his left arm, went through his chest and lodged in the right side of his back. The second bullet was fatal. The Lexus sped off.

Two days later, the police spotted the Lexus and arrested Alvarez.

Los Angeles Police Officer Hugo Ayon testified as a gang expert. He said both Alvarez and Ruiz were members of the Temple Street gang, which had about 200 members and claimed the territory where Mendez was shot. The primary activities of this gang included burglary, robbery, assault, murder and vandalism. Temple Street's rivals included the Mara Salvatrucha gang. Ayon testified there would be problems if rival gang members attended the same party, including assaults or shootings. Answering a hypothetical question based on the facts of this case, Ayon opined Mendez's shooting had been committed for the benefit of the Temple Street gang.

## 2. *Defense evidence.*

Ruiz testified about Cervantes inviting him to the New Year's Eve party. After speaking to her in front of Contreras's apartment, he and Alvarez went to pick up some people Ruiz didn't know. Ruiz moved to the back of the Lexus to make the front passenger seat available to one of the newcomers, who was pretty big. Alvarez then drove back to Contreras's apartment, where they met up with the others and Alvarez started following Mendez's Nissan to the party.

Ruiz testified that, when Cervantes walked back to the Lexus to say Mendez was going to pick up someone from Mara Salvatrucha, he replied: "[Y]ou know what, it's New Year's. I don't want no drama, man. Let's just get out of here." Alvarez started to turn left onto Third Street and suddenly Ruiz heard gunshots. Prior to that, no one in the Lexus had said anything about committing a drive-by shooting and Ruiz had no idea anyone was carrying a gun. In fact, when the gunfire erupted, Ruiz thought someone was shooting *at* the Lexus and he instinctively ducked down. Alvarez drove off and nobody said anything about the shooting.

Ruiz was arrested the next day. When the police asked him to identify the driver of the Lexus, he lied and said he did not know who had been driving.

## **CONTENTIONS**

1. There was insufficient evidence to sustain Alvarez's conviction for second degree murder.
2. [By the Attorney General] A clerical error in the abstract of judgment should be corrected.

## **DISCUSSION**

1. *There was sufficient evidence Alvarez aided and abetted the murder.*

Alvarez contends there was insufficient evidence to sustain his murder conviction because he had merely been an innocent driver with no idea that one of his passengers was planning to commit a drive-by shooting. This claim is meritless.

a. *Legal principles.*

“In assessing a claim of insufficiency of evidence, the reviewing court’s task is to review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The federal standard of review is to the same effect: Under principles of federal due process, review for sufficiency of evidence entails not the determination whether the reviewing court itself believes the evidence at trial establishes guilt beyond a reasonable doubt, but, instead, whether, after viewing the evidence in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. [Citation.] The standard of review is the same in cases in which the prosecution relies mainly on circumstantial evidence. [Citation.] ‘ “Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citations], it is the jury, not the appellate court[,] which must be convinced of the defendant’s guilt beyond a reasonable doubt. ‘ “If the circumstances reasonably justify the trier of fact’s findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment.” ’ [Citations.]” ’ [Citation.]” (*People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

“ ‘An appellate court must accept logical inferences that the [finder of fact] might have drawn from the circumstantial evidence.’ [Citation.] ‘Before the judgment of the trial court can be set aside for the insufficiency of the evidence, it must clearly appear that on no hypothesis whatever is there sufficient substantial evidence to support the verdict of the [finder of fact].’ [Citation.]” (*People v. Sanghera* (2006) 139 Cal.App.4th 1567, 1573.) “Perhaps the most fundamental rule of appellate law is that the judgment challenged on appeal is presumed correct, and it is the appellant’s burden to affirmatively demonstrate error. [Citation.] Thus,

when a criminal defendant claims on appeal that his conviction was based on insufficient evidence of one or more of the elements of the crime of which he was convicted, we *must* begin with the presumption that the evidence of those elements *was* sufficient, and the defendant bears the burden of convincing us otherwise. To meet that burden, it is not enough for the defendant to simply contend, ‘without a statement or analysis of the evidence, . . . that the evidence is insufficient to support the judgment[] of conviction.’ [Citation.] Rather, he must *affirmatively demonstrate* that the evidence is insufficient.” (*Ibid.*)

Under California law, all persons concerned in the commission of a crime are principals whether they commit the act constituting the offense, or merely aid and abet in its commission. (§ 31.) “[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime.” (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) “Among the factors which may be considered in determining aiding and abetting are: presence at the crime scene, companionship, and conduct before and after the offense.” (*In re Juan G.* (2003) 112 Cal.App.4th 1, 5.)

b. *Discussion.*

Alvarez does not dispute the Attorney General’s assertion his driving had the *effect* of facilitating the shooting of Mendez. That is, by pulling up alongside the Nissan at the stoplight, Alvarez enabled the gunman to get a clear shot at the victim. That Alvarez had a motive for facilitating this crime was shown by the evidence the occupants of the Lexus had just learned there was some connection between Mendez and Mara Salvatrucha, a rival gang. Alvarez’s immediate post-shooting

conduct, i.e., fleeing the crime scene at high speed, demonstrated consciousness of guilt.<sup>2</sup>

The core of Alvarez's insufficient evidence claim is that, although it might have looked like he was maneuvering the Lexus in order to position the gunman next to the victim, Alvarez had really just been preparing to make a left turn: "As the prosecution conceded [in closing argument], the passenger/shooter formed his intent to shoot Mendez only after Cervantes approached the Lexus to say that Mendez would be picking up a 'homie from M.S.' Three to four seconds after Cervantes got back into the Nissan, the passenger shot Mendez. During that very brief period of time . . . Alvarez was tethered to the shooter by virtue of being in the same car and sitting in traffic waiting for the light to change. There was no meaningful opportunity for Alvarez to separate himself from the shooter."

However, although this interpretation is arguably reasonable, it is not the only reasonable inference to be drawn from the evidence. As the Attorney General argues: "Assuming appellant merely decided against attending the party, there was no reason for him to pull up alongside Mendez's car at the stoplight, as opposed to merely waiting for the light to [change], and then executing the left turn." There was evidence that this street, northbound Occidental approaching Third, had only one lane of traffic. Although three cars could comfortably fit side-by-side, there were two lanes of parking, one on each side of the street, with only a single center lane for driving. Hence, it seems unlikely Alvarez would have bothered to pull up

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<sup>2</sup> Alvarez's attempt to put an innocent spin on the consciousness of guilt evidence is not persuasive. He argues: "It would be no more than speculation to conclude from this fact that Alvarez knew of the shooter's plan to kill Mendez and that he specifically intended to facilitate that plan. Another scenario, pointing to innocence, is even more likely: Alvarez, shocked by the unexpected shooting, drove away out of concern for his safety." But this argument ignores the fact that, even after reaching safety, Alvarez never went to the authorities. As the prosecutor argued to the jury: "What does the defendant do? He takes off. He leaves. He goes. There is no evidence he did anything, call the police, nothing, until he is stopped by the police a couple days later."

next to the Nissan at the stoplight had his only intention been to make a left turn onto Third Street and stop following Mendez to the party. That's the argument the prosecutor made to the jury: "You recall the testimony from Detective Motto. This area is not designed for two cars to be driving side-by-side down the street. [¶] There is parking both where the island is and parking on the curb where the residences are. There's essentially one lane. The defendant had no reason to be going that direction other than to let his buddy do what he was going to do, which was to shoot and kill the victim."

It does not matter that contrary inferences could have been reasonably derived from the evidence. As our Supreme Court said in *People v. Rodriguez*, *supra*, 20 Cal.4th 1, while reversing a court of appeal finding there was insufficient evidence to sustain an assault conviction because the reviewing court had rejected contrary, but equally logical, inferences the jury might have drawn: "The [Court of Appeal] majority's reasoning . . . amounted to nothing more than a different weighing of the evidence, one the jury might well have considered and rejected. The Attorney General's inferences from the evidence were *no more inherently speculative* than the majority's; consequently, the majority erred in substituting its own assessment of the evidence for that of the jury." (*Id.* at p. 12, italics added.)

There was sufficient evidence to sustain Alvarez's murder conviction.

## 2. *Correct abstract of judgment.*

The Attorney General points out the abstract of judgment erroneously reflects a term of 25 years for the firearm enhancement, rather than 25-years to life as provided for by section 12022.53, subdivisions (d) and (e)(1), and as ordered by the trial court. We will order this error corrected. (See *People v. Mitchell* (2001) 26 Cal.4th 181, 185 [it is proper and important to correct errors and omissions in abstracts of judgment].)



### **DISPOSITION**

The judgment is affirmed. The abstract of judgment is to be amended to correctly reflect a firearm enhancement term of 25 years to life. The clerk of the superior court is directed to prepare and forward to the Department of Corrections and Rehabilitation an amended abstract of judgment.

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KLEIN, P. J.

We concur:

CROSKEY, J.

ALDRICH, J.