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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. MARIO FRANKIE ARRIAGA, Defendant and Appellant.	B233990 (Los Angeles County Super. Ct. No. KA087810)

APPEAL from a judgment of the Superior Court of Los Angeles County. Bruce F. Marrs, Judge. Affirmed as modified.

Deborah L. Hawkins, 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, Susan Sullivan Pithey and Blythe J. Leszkay, Deputy Attorneys General, for Plaintiff and Respondent.

Appellant Mario Arriaga was convicted, following a jury trial, of the murder of Job Gonzalez in violation of Penal Code[1] section 187, subdivision (a) and one count of evading an officer with willful disregard for safety in violation of Vehicle Code section 2800.2, subdivision (a). The jury deadlocked on the charge that appellant attempted to murder Elith Hernandez, Mr. Gonzalez's companion. The jury found true the allegations that the murder was committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(4) and the allegations that a principal personally used and intentionally discharged a firearm in the commission of the murder within the meaning of section 12022.53, subdivisions (b), (c), (d) and (e)(1). The trial court sentenced appellant to a total term of 50 years to life in state prison.

Appellant appeals from the judgment of conviction, contending that the trial court erred in instructing the jury on aiding and abetting and voluntary manslaughter and in admitting evidence from Pablo Martinez. Appellant further contends that there is insufficient evidence to support the gang allegation, that section 12022.53, subdivision (e) violates equal protection, and that his custody credits were incorrectly calculated. We order appellant's custody credits corrected, as set forth in the disposition. We affirm the judgment of conviction in all other respects.

Facts

On August 9, 2009, about 2:30 a.m., Pablo Martinez and his wife arrived at their apartment complex on Cogswell and Ferris in El Monte. Mrs. Martinez went to the apartment while Mr. Martinez went to the front gate area to get the mail. As he was starting to return to his apartment, he heard the sound of a car with a loud exhaust. The car had a "little wing" on the back. Later, Mr. Martinez testified that the back of this car looked like the back of appellant's car, which had a modified muffler that looked like a wing. A Mexican man came in through the gate, pointed a gun at Mr. Martinez and asked him where he was from. Mr. Martinez replied: "I'm not from nowhere." The man

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

kept the gun pointed at Mr. Martinez for a few more seconds, then turned and left. The man was wearing a blue sweater, blue hat, black gloves and glasses. Throughout this time, the car with the wing had been parked in front of the apartment building by the front door.

Mr. Martinez went back to his apartment. He told his wife what had happened. About five to ten minutes later, Mr. Martinez heard four or five gunshots outside. They sounded nearby. Mr. Martinez said, "That could have been me." He believed that the man he had seen was probably involved. Mr. Martinez did not call the police because gunshots were common in his neighborhood and he did not want to get involved.

Later, after Mr. Martinez was arrested for spousal battery and was facing time for a probation violation, he told detectives what had happened on August 9. He hoped to get help on his case, but did not. Mr. Martinez did not want to testify in this case. He was arrested once for failing to appear.

Also in the early morning hours of August 9, Elith Hernandez and Job Gonzalez rode their bicycles down Lansdale toward Cogswell. Mr. Hernandez rode on the sidewalk on the south side of the street while Mr. Gonzalez rode on the sidewalk on the north side of the street. A car turned right from Cogswell onto Lansdale. The car turned into a driveway in front of Mr. Hernandez and cut him off.

There were two men in the car. The passenger was a young Latino wearing dark clothes. Mr. Hernandez did not see him wearing glasses. Mr. Hernandez did not see the driver. The passenger asked Mr. Hernandez where he was from. He spoke in English, and Mr. Hernandez did not know what he meant. Mr. Hernandez did not reply.

Mr. Gonzalez rode his bicycle across the street, toward Mr. Hernandez. Mr. Gonzalez was dressed in baggie clothes, like a "cholo" or gang member. He stopped about six feet from the car. Mr. Hernandez did not initially tell police that Mr. Gonzalez had a screwdriver in his hand. He testified at the preliminary hearing both that Mr. Gonzalez had a screwdriver in his hand, and that he did not see if Mr. Gonzalez had a screwdriver in his hand, and testified at trial that at first he did not see Mr. Gonzalez with the screwdriver and that later he did.

The passenger looked at Mr. Gonzalez with a startled expression. He pulled out a gun and shot Mr. Gonzalez seven times, killing him.

Mr. Hernandez ran away. As he ran, he heard and felt bullets going by him. He threw himself on the ground. The car drove away. Mr. Hernandez ran toward his home, but was stopped by a police officer along the way.

Officer Snook was driving a marked patrol car on Valley Boulevard about 2:30 a.m. when he noticed a blue Honda Civic ahead of him. The car was in the number one lane driving about 25 or 30 miles per hour with its lights off. After Officer Snook passed the Honda, it slowed down even more. Officer Snook turned his patrol car around to investigate. The Civic pulled to the center median and made a sharp left turn. Officer Snook followed.

The street dead-ended. The Civic slowed down and a man climbed out of the passenger side window. The man was wearing a backwards black baseball cap and was carrying a black or dark blue sweater. He began to climb over a chain link fence.

The Civic made a U-turn and accelerated directly at Officer Snook's car. Officer Snook got out of the way and appellant drove past. Officer Snook made a U-turn, activated his lights and sirens and followed the Civic. After a high-speed chase, the Civic crashed. Appellant got out and fled on foot. Officer Snook pursued him and eventually stopped him.

A search of appellant's car uncovered four nine-millimeter shell casings. On the back seat of the car was a radio scanner programmed with the frequencies of local law enforcement agencies.

Seven nine-millimeter shell casings were found on the ground where Mr. Gonzalez was shot. The shell casings from the car and the casings on the ground were fired by the same gun.

El Monte Police Department Detective Ralph Batres testified as a gang expert that El Monte Flores was the largest gang in the El Monte area. The area around the shooting was El Monte Flores's territory. The Eastside Bolen Parque gang was a Baldwin Park gang. Eastside Bolen Parque is a rival of El Monte Flores.

Baldwin Park Police Department Detective Esteban Mendez also testified as a gang expert. Baldwin Park borders El Monte to the east. Detective Mendez testified that the Eastside Bolen Park gang was a criminal street gang. Their color was blue. In the past a member of that gang had driven into rival gang territory and shot at a group of people standing in front of a gang member's house. He killed one person. Another Eastside gang member robbed a florist of money and property on Mother's Day. Appellant was a member of the Eastside Bolen Parque gang.

Detective Mendez explained that gang members sometimes go into the territory of a rival gang on a "mission" to commit a crime. Gang members get ahead within the gang by committing crimes to benefit the gang. Generally, such crimes benefit the gang by instilling fear in the community and in other gangs. This makes it easier for the gang to commit crimes without fear of being reported to the police. Crimes committed in a rival gang's territory against rival gang members would gain much more respect for the gang than ones committed in the gang's own neighborhood.

Given a hypothetical of the crimes here, Detective Mendez opined that the crimes were committed for the benefit of, at the direction of, or in association with a criminal street gang.

The only defense evidence was a stipulation that Mr. Gonzalez had a blood alcohol level of 0.06 to 0.07 and had recently ingested marijuana.

Discussion

1. CALJIC No. 3.00

Appellant contends that the trial court erred in instructing the jury with CALJIC No. 3.00 on aiding and abetting because that instruction states that "[e]ach principal, regardless of the extent or manner of participation, is equally guilty." He contends that this instruction permits the jury to convict an aider and abettor of the same crime as the perpetrator, even if the aider and abettor does not have the mental state required for the crime. Specifically, he contends that the instruction permitted the jury to convict him of first degree murder without finding that he personally premeditated and deliberated.

Respondent contends that appellant has forfeited his claim by failing to object in the trial court and/or request clarification or modification. Appellant contends that we can review the instruction without objection because it involves a question of law. He also contends that it can be reviewed pursuant to section 1259. We review the claim pursuant to section 1259.

CALJIC No. 3.00 provides in pertinent part: "Persons who are involved in committing . . . a crime are referred to as principals in that crime. Each principal, regardless of the extent or manner of participation is equally guilty. Principals include: [¶] 1. Those who directly and actively commit or attempt to commit the act constituting the crime or [¶] 2. Those who aid and abet the commission or attempted commission of the crime."

As appellant points out, the Supreme Court has stated that "a defendant charged with murder or attempted murder can be held vicariously liable for the actus reus of an accomplice, but, for murder, a defendant cannot be held vicariously liable for the mens rea of an accomplice. [Citation.]" (*People v. Concha* (2009) 47 Cal.4th 653, 665.) *Concha* involves a conviction for murder under the provocative act doctrine, but the general underlying principle set forth in *Concha* is correct. As a general rule, "an aider and abettor's mental state must be at least that required of the direct perpetrator. 'To prove that a defendant is an accomplice . . . the prosecution must show that the defendant acted "with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense." [Citation.] When the offense charged is a specific intent crime, the accomplice must "share the specific intent of the perpetrator"; this occurs when the accomplice "knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." [Citation.]'" (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.)

The Court in *People v. McCoy, supra,* 25 Cal.4th 1111, held that an aider and abettor may be guilty of a greater crime than the perpetrator. Our colleagues in Division Three of this District Court of Appeal have held that CALJIC No. 3.00 can mislead a jury

into believing that an aider and abettor may not be guilty of a lesser offense than the perpetrator. (*People v. Nero* (2010) 181 Cal.App.4th 504, 518; see *People v. Samaniego* (2009) 172 Cal.App.4th 1148 [considering "equally guilty" language of former version of CALCRIM No. 400].)

We will assume for the sake of argument that CALJIC No. 3.00 can be misleading. We see no prejudice to appellant from this instruction under the facts of this case.

Appellant was a member of the Eastside Bolen Parque gang. He drove his passenger into the territory of a rival gang at 2:30 a.m. Appellant stopped the car when Mr. Martinez was sighted, and waited while his passenger challenged Mr. Martinez at gunpoint. When Mr. Martinez indicated that he was not a gang member, appellant and the passenger drove away. Appellant next pulled his car in front of Mr. Hernandez, and did so in a manner that put his armed passenger next to Mr. Hernandez. The passenger again issued a challenge, asking Mr. Hernandez where he was from. Mr. Hernandez remained silent. Mr. Gonzalez then approached the car, and was dressed like a gang member. Appellant's passenger shot him seven times.

There was expert testimony that in general if a gang member went into the territory of a rival gang, and asked people encountered there about their gang affiliation, it would be "quite common" for there to be a conflict and violence if one of those people was a member of the rival gang. The facts of this case show appellant and his passenger driving around the territory of a rival gang late at night, asking people about their gang membership. When they encountered an individual dressed like a gang member, appellant's passenger shot the individual seven times. These acts show an intent to kill and premeditation and deliberation on the part of the passenger. The evidence as a whole shows that appellant was aware of his passenger's intent and decided to aid him. "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required. [Citation.]" (*People v. Samaniego*,

supra, 172 Cal.App.4th at p. 1166.) Thus, any error in giving CALJIC No. 3.00 was harmless under any standard of review.

2. Voluntary manslaughter instruction

The trial court instructed the jury on voluntary manslaughter based on imperfect self-defense and on heat of passion with CALJIC No. 8.40. Appellant contends that the trial court erred in failing to give the jury CALJIC Nos. 8.42 and 8.44 which define heat of passion.

Respondent contends that appellant has forfeited this claim by failing to request the instructions in the trial court. Appellant replies that the trial court had a sua sponte duty to give the instructions. He further contends that the omission of the instructions can be reviewed pursuant to section 1259. In the alternative, he claims that if the claim is not reviewable, he received ineffective assistance of counsel.

There is no substantial evidence that the passenger acted in the heat of passion. Mr. Hernandez's testimony that the passenger had "a startled expression" on his face when Mr. Gonzalez rode up is not such evidence. Appellant characterizes the passenger's reaction as "surprise" and contends that this emotion is sufficient to show heat of passion. We do not agree. Mere surprise is not sufficient to establish heat of passion.

Appellant's reliance on *People v. Bridgehouse* (1956) 47 Cal.2d 406[2] is misplaced. Although Bridgehouse was certainly surprised to see his wife's lover at her grandmother's house, the emotions involved went far beyond surprise. The defendant was "white and shaking" after seeing the lover. (*Id*. at p. 409.) The defendant himself described his reaction as one of "great shock." (*Id*. at p. 411.) Further, the defendant's emotions were not aroused simply by unexpectedly encountering the lover. They were aroused by the fact that the lover was living in his mother-in-law's house, which facilitated the continuing relationship between Bridgehouse's wife and her lover. Further, immediately after seeing the lover, the defendant learned that his small son had arrived at the house by

[2] Overruled on other grounds by *People v. Lasko* (2000) 23 Cal.4th 101.

car. The defendant had previously sought and obtained a restraining order prohibiting his wife from associating or cohabitating with the lover in the presence of defendant's children. Thus, much more was involved in *Bridgehouse* than simply an unexpected encounter which "surprised" the defendant. In this case, there is nothing more.

Since there was no evidence of heat of passion, the trial court had no duty to define heat of passion as related to voluntary manslaughter. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1217.) For the same reason, there was no prejudice to appellant from the absence of CALJIC Nos. 8.42 and 8.44 defining that concept. Appellant's substantial rights were not affected and he did not receive ineffective assistance of counsel.

3. Testimony by Martinez

Appellant contends that the trial court erred in denying his motion for a new trial made on the ground that Martinez's testimony was so unreliable and prejudicial that it undermined his right to a fair trial. Appellant also contends that admission of the testimony violated his constitutional right to due process.

Generally, a trial court's ruling on the admissibility of evidence under Evidence Code section 352 is reviewed for an abuse of discretion. (*People v. Eubanks* (2011) 53 Cal.4th 110, 144-145.) A ruling on a new trial motion is also generally reviewed for an abuse of discretion, but is reviewed de novo when the ruling implicates a substantial constitutional right. (*People v. Albarran* (2007) 149 Cal.App.4th 214, 224 & fn. 7.)[3]

Here, appellant contends that the admission of the testimony violated his constitutional rights. We have assumed for the sake of argument that the ruling had the potential to implicate appellant's substantial rights, have reviewed the denial of appellant's motion de novo, and see no violation of appellant's constitutional rights.

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[3] Respondent contends, without citation to authority, that when the new trial motion merely reiterates the defendant's earlier objections to evidence, the abuse of discretion standard applies. We reject this unsupported contention.

Appellant first contends that Mr. Martinez had a powerful motive to lie, because he came forward as a witness to avoid state prison in another case, involving domestic violence.

Appellant next contends, in effect, that the discrepancies between Mr. Martinez's description of the man who pointed the gun at him, and Mr. Hernandez's description of the killer are so inconsistent that Mr. Martinez could not be describing the same person. We do not agree. Both Mr. Martinez and Mr. Hernandez described their assailants as a young Latino man. According to Mr. Martinez's testimony at trial, the man was wearing a blue sweater and a blue hat. Mr. Hernandez described the shooter as wearing dark clothes. Mr. Martinez stated that the man was carrying a nine-millimeter handgun. Mr. Gonzalez was killed with a nine-millimeter handgun. These descriptions are similar enough to support an inference that the same man was involved in both encounters, particularly given the geographic and temporal proximity of the two encounters. We do not agree with appellant the discrepancies between Mr. Martinez's and Mr. Hernandez's descriptions rendered Mr. Martinez's testimony incredible or meant that they were not describing the same man. Mr. Martinez testified that the man had facial hair and wore glasses and gloves. Mr. Hernandez testified that the shooter did not have facial hair and that he did not see him wearing glasses or gloves. These are minor discrepancies, common among witnesses, and could be due to misrecollection or a failure to notice details during the crime due to the stress of the moment.

Appellant also contends Mr. Martinez's testimony simply describes a Honda Civic, such cars are very common, and there is no probative value to such testimony. The key thing Mr. Martinez noticed about the car was the noise it made and the little wings on the back. Appellant's car had a modified muffler. Appellant does not contend that all Civics match Mr. Martinez's description or that modifications like the one to his car are common.

The description of the car, together with the description of the man with the gun, are sufficient to support an inference that the man who challenged Mr. Martinez was the same man who killed Mr. Gonzalez. Thus, the testimony had probative value.

There was nothing inherently prejudicial about Mr. Martinez's testimony. "'Prejudice for purposes of Evidence Code section 352 means evidence that tends to evoke an emotional bias against the defendant with very little effect on issues . . . .'" (*People v. Eubanks*, *supra*, 53 Cal.4th at p. 145.) We see nothing in the testimony which would evoke an emotional bias. Thus the trial court did not err in admitting Mr. Martinez's testimony.

Further, even assuming for the sake of argument that the trial court had abused its discretion in admitting Mr. Martinez's testimony, we would find the error harmless. No one was hurt in the Mr. Martinez incident and no charges arose from that incident. The incident was introduced only to show motive and lack of self-defense. There was other evidence to show both. The jury was instructed on evaluating witness credibility and drawing inferences from circumstantial evidence. Thus, there is no possibility that Mr. Martinez's testimony contributed to the verdict against appellant.

4. Sufficiency of the evidence – gang enhancement

Appellant contends that there is insufficient evidence to show that the murder was committed for the benefit of a criminal street gang with the specific intent to promote the criminal street gang, and so there is insufficient evidence to support the true finding on the gang enhancement. Specifically, appellant contends that the only evidence on this issue was testimony by the expert witness and that this is not sufficient standing alone. Substantial evidence supports the jury's finding.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also

reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59-60.)

Here, the jury found true a gang allegation made pursuant to section 186.22, subdivision (b)(4). That enhancement applies when a defendant "is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members." (*People v. Albillar, supra,* 51 Cal.4th at p. 59.)

The gang expert's testimony did not stand alone. It provided context for the actions of appellant and his passenger. Appellant drove into the territory of a rival gang at night and stopped so that his passenger could ask men on the street about their gang affiliations. When Mr. Gonzalez appeared looking like a gang member, the passenger shot him. It is reasonable to infer that appellant and his passenger were acting with the intent to benefit appellant's gang, particularly since there was no apparent individual benefit to appellant or his passenger from these actions. Even without the expert testimony, the jury could infer that appellant's gang benefitted from the shooting because it would instill fear in the community, making future crimes easier.

Appellant's gang might have benefitted more if appellant or his passenger had made gang signs or called out the name of the gang, but such self-identification is not necessary. The gang challenge alone was sufficient to demonstrate to anyone interested in the shooting that appellant was acting on behalf of a gang. The El Monte Flores gang would know that no one in their gang had committed the murder, and would infer that it was a rival gang.

5. Section 12022.53 enhancement

Section 12022.53, subdivision (e), sets the punishment for an aider and abettor of a gang murder committed with a gun. Appellant contends aiders and abettors of shootings committed to benefit criminal street gangs are similarly situated to aiders and abettors of shootings committed in concert with criminal organizations or groups which are not

defined as a street gang and so section 12022.53 violates equal protection by punishing gang aider and abettors more severely.

Appellant acknowledges that Division Seven of this District Court of Appeal has rejected this claim in *People v. Hernandez* (2005) 134 Cal.App.4th 474. He contends that *Hernandez* is wrongly decided and urges us not to follow it. Specifically, he contends that the decision in *Hernandez* ignores the holding of *People v. Olivas* (1976) 17 Cal.3d 236, 250. We do not agree. We see no error in the reasoning of *Hernandez* and decline appellant's invitation to reject the case.

6. Custody credit

Appellant contends that he is entitled to one additional day of custody credit. Respondent agrees. We agree as well. Appellant was arrested on August 9, 2009 and sentenced on June 21, 2011. That is a period of 682 days. He only received credit for 681 days. Accordingly, we order the custody amount corrected on appeal. (See *People v. Duran* (1998) 67 Cal.App.4th 267, 270.)

Disposition

We order appellant's custody credits corrected to 682 days. The clerk of the superior court is instructed to prepare an amended abstract of judgment reflecting this correction. The judgment of conviction is affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

ARMSTRONG, Acting P. J.

I concur:

MOSK, J.

KRIEGLER, J., Concurring.

I concur in the judgment but would also reach the issue of forfeiture based on defendant's failure to object to CALJIC No. 3.00. I would follow *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1163 and hold the contention was forfeited by the absence of a request to modify the instruction.

KRIEGLER, J.