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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. AMON MORRISON, Defendant and Appellant.	B235563 (Los Angeles County Super. Ct. No. BA357645)

APPEAL from a judgment of the Superior Court of Los Angeles County, Ronald S. Coen, Judge. Reversed in part and remanded for resentencing, otherwise affirmed.

Roberta Simon, 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, Paul M. Roadarmel, Jr., and William N. Frank, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Amon Morrison guilty, under an aiding and abetting theory of liability, of two counts of attempted murder and one count of shooting from a motor vehicle. On appeal, Morrison contends there was insufficient evidence he aided and abetted the crimes. He also contends that the prosecutor failed to comply with disclosure requirements and that his sentence constitutes cruel and unusual punishment. Because Morrison was a juvenile when he committed the crimes, we agree, under recent United States and California Supreme Court authority, that his sentence, which makes him ineligible for probation until he is in his 80's, is cruel and unusual. We reverse and remand for resentencing on that ground only and reject Morrison's remaining contentions.

FACTUAL AND PROCEDURAL BACKGROUND

I. Factual background.

On the morning of June 8, 2009, Robert Baker and Autumn Christian were walking to a grocery store. On Rimpau, near 17th Street, a black Jeep or Toyota RAV4 was going in the same direction as Baker and Christian. It turned around, stopping four to five feet from them. There were three people in the car: the driver, who Baker identified at trial as Morrison, and a front and rear passenger.[1] According to Baker, Morrison yelled, " 'Where you from?' " Christian heard the front passenger, later identified as Leonard Curtis, say " 'Where are you from?' " Christian testified that Morrison also said, " 'This is 20 Bloods, fuck crabs.' " Baker, who wasn't a gang member, said he didn't bang, but Morrison and Curtis yelled, " 'Rollin' 20's Blood, fuck crabs.' " Curtis fired shots, and Christian was hit in the leg. With Baker helping Christian, they ran.

The same morning Christian was shot, Jose Ramirez was picking up a delivery on or near Rimpau when he heard two to three gunshots. After the shots were fired, a black Toyota RAV4 with two people, a driver and front passenger, drove past him.

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[1] Neither Christian nor Baker could describe the rear passenger, except to say that he had a hood on.

On June 9, 2009, the day after Christian was shot, officers followed a Toyota RAV4, which had been reported stolen and matched the description of the car involved in the shooting. When officers turned on their police lights and sirens, the car did not pull over, and instead tried to evade them. The car crashed into a truck and three people got out, including Morrison and Curtis. Curtis immediately surrendered, but Morrison ran and was detained later.

To the police, Baker described his assailants as a "light-skinned dude, curly, short hair" and a "dark-skinned dude with a black hoodie on." Morrison, the "light-skinned" man, was the driver, and the passenger, who Baker identified at trial as Curtis, was the shooter. Baker also identified Morrison and Curtis from photographic six-packs. Christian identified Curtis as the shooter from photographic six-packs and at trial. She was not, however, able to identify Morrison at trial.

Detective John Shafia testified that he interviewed Morrison, who admitted crashing the car into the truck.[2] He also admitted driving the car on June 8, 2009. There was a passenger in the car with him. As he slowed to stop at a sign, he heard " 'bam' " and a series of shots. Scared and unsure where the shots were coming from and not wanting to get shot, he drove away. Although he would not name the shooter, Morrison said the man he was with on the day he crashed the car was the same man he was with during the shooting the day before.

Officer John Maloney, the People's gang expert witness, testified that Morrison and Curtis are Rollin 20's gang members. Rollin 20's is a Bloods gang. A rival Crips gang controls the area in which the shooting occurred. In the officer's opinion, Morrison committed the crimes for the benefit of his gang.

II. Procedural background.

On August 2, 2011, a jury found Morrison guilty of counts 1 and 2, the willful, deliberate and premeditated attempted murders of Christian and Baker (Pen. Code,

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[2] Morrison also testified at trial that he was not the driver of the car involved in the June 8 shooting. He denied he was a member of the Rollin 20's gang.

§§ 187, subd. (a), 664),[3] and of count 3, shooting from a motor vehicle (§ 12034, subd. (c)). As to counts 1 and 2, the jury found true principal gun-use allegations (§ 12022.53, subds. (b), (c), (d), (e)(1)). As to count 3, the jury found true a principal gun-use allegation (§ 12022.53, subds. (d), (e)(1)). As to all counts, the jury found true gang allegations (§ 186.22 subd. (b)(1)).

On August 25, 2011, the trial court sentenced Morrison, on count 1, to life plus 25 years to life for the gun allegation (§ 12022.53, subds. (d), (e)(1)). On count 2, the court sentenced him to a consecutive life term plus 25 years to life for the gun allegation (§ 12022.53, subds. (d), (e)(1)). The court imposed but stayed the sentence on count 3 and on the remaining enhancements.

DISCUSSION

I. Substantial evidence supports the attempted murder convictions.

Morrison contends there was insufficient evidence to support his convictions for aiding and abetting the attempted murders and shooting from a motor vehicle. We disagree.

In assessing the sufficiency of the evidence to support a conviction, "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 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.] . . . '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

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[3] All further undesignated statutory references are to the Penal Code.

hypothesis whatever is there sufficient substantial evidence to support" ' the jury's verdict. [Citation.]" (*People v. Zamudio* (2008) 43 Cal.4th 327, 357.)

The prosecution's theory of liability as to Morrison was he aided and abetted the crimes. A person who aids and abets the commission of a crime is a principal in the crime, and thus shares the guilt of the actual perpetrator. (*People v. Prettyman* (1996) 14 Cal.4th 248, 259; *People v. McCoy* (2001) 25 Cal.4th 1111, 1116-1117; § 31.) A person aids and abets the commission of a crime when he or she, (i) with knowledge of the unlawful purpose of the perpetrator, (ii) and with the intent or purpose of committing, facilitating or encouraging commission of the crime, (iii) by act or advice, aids, promotes, encourages or instigates the commission of the crime. (*People v. Atkins* (2001) 25 Cal.4th 76, 92; *People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1158; *People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) "The 'act' required for aiding and abetting liability need not be a substantial factor in the offense. ' "Liability attaches to anyone 'concerned,' however slight such concern may be, for the law establishes no degree of the concern required to fix liability as a principal." [Citation.]' [Citation.]" (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743; *People v. Garcia* (2008) 168 Cal.App.4th 261, 273.)

Factors that may be taken into account when determining whether a defendant aided and abetted a crime 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.) Lookouts, getaway drivers, and persons present to divert suspicion are principals in the crime. (*People v. Swanson-Birabent, supra,* 114 Cal.App.4th at p. 743.) But mere presence at the scene of a crime, knowledge of the perpetrator's criminal purpose, or the failure to prevent the crime do not amount to aiding and abetting, although these factors may be taken into account in determining a defendant's criminal responsibility. (*People v. Garcia, supra,* 168 Cal.App.4th at pp. 272-273; *People v. Campbell, supra,* 25 Cal.App.4th at p. 409.) " 'Whether defendant aided and abetted the crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences

must be resolved in favor of the judgment.' [Citation.]" (*Campbell*, at p. 409; *In re Juan G.*, at p. 5.)

There was substantial evidence that Morrison aided and abetted the attempted murders of Baker and Christian and the shooting from a car, and, specifically, that Morrison knew of Curtis's criminal purpose. Curtis and Morrison were in the same Blood gang: the Rollin 20s. They were driving in a rival Crip territory, which suggests they were looking for rival gang members. Equally suggestive of that intent is that Morrison initially drove past Baker and Christian, who were walking. Instead of continuing on, Morrison did a U-turn to go back to them. Morrison then stopped the car a mere four to five feet from Baker and Christian. According to Baker, Morrison asked where Baker was from, a common gang challenge. When Baker said he didn't bang, Morrison and Curtis yelled something to the effect of, " 'This is 20 Bloods, fuck crabs.' " Curtis shot at Baker and Christian. After Christian was shot, Morrison fled with Curtis. The next day, Morrison, instead of disassociating himself from Curtis, was with him again in a Toyota RAV4 similar to the one involved in the shooting the day before. When police tried to pull Morrison over, he evaded them, ultimately crashing the car. On crashing the car, he tried to flee.

This evidence therefore showed that Morrison and Curtis, fellow Blood gang members, went looking for rival gang members in rival Crip territory. Morrison knew of Curtis's criminal purpose, because he drove the car next to the victims and issued a gang challenge to them. (See, e.g., *In re Jose D.* (1990) 219 Cal.App.3d 582, 585 [sufficient evidence defendant aided and abetted a shooting where he, among other things, drove the car and deliberately maneuvered it so that the passenger could point a gun at victims].) After his accomplice shot at the victims, Morrison fled with Curtis, staying with him the next day. This was substantial evidence that Morrison aided and abetted the crimes.

II. The prosecution did not violate the disclosure requirements.

Morrison next contends that the prosecution violated its discovery obligations by failing to disclose it would introduce evidence of his custodial statements and of his prior juvenile adjudication. We disagree.

A. *Additional background.*

On the second day of trial, after most of the People's witnesses had testified, the prosecutor announced that Detective Shafia would testify about Morrison's custodial statement, given when he was a juvenile. Defense counsel objected that Morrison was not advised of his right to have a parent present. Also, the recording device had failed, and the only evidence Morrison was read his rights, was the detective's statement in his report. Out of the jury's presence, Detective Shafia testified that he read Morrison's *Miranda* rights to him from a form and had him sign the waiver form. The trial court found that defendant's waiver was knowing, intelligent, and voluntary.

Detective Shafia then testified, before the jury, that Morrison admitted he was driving the car when Christian was shot, but Morrison also said he didn't know that Curtis was going to shoot at Christian and Baker.

Morrison testified on his behalf. On cross-examination, he said he had never seen Curtis with a gun. When asked if he was saying he never used or had a gun, Morrison answered he had never used a gun, but he had "been to jail for a gun before." The prosecutor then asked Morrison about his 2008 arrest for gun possession and about a Statement Form he signed in which he said he found the gun.

At sidebar, defense counsel objected that the information about the incident should have been provided, because it was impeachment evidence. The trial court disagreed, saying it was not being offered under Evidence Code section 1101, subdivision (b). It was offered to impeach Morrison as to why he ran on another occasion and to show that he previously denied possessing a gun. The court said, "[Y]ou are not entitled to advance notice. This doesn't come under [section] 1054.1, subdivision[s] (a) through (f) . . . ." Defense counsel said, "Well, I have a problem with that, and that's because I didn't make that decision until after she changed her mind and said she was going to put the evidence of the statements." The court ruled, "That's of no moment. There is no—the People had no idea what your client was going to testify. There was no advance notice of such rebuttal evidence that is required."

The People, in rebuttal, called Officer Arnel Asuncion, who testified about the gun incident.

The defense raised this issue in its new trial motion, which was denied.

B. *The record does not show that the prosecution violated its discovery obligations.*

A prosecutor must disclose to the defense, at least 30 days before trial, the name and address of persons he or she intends to call as witnesses at trial. (§§ 1054.1, subd. (a), 1054.7; *In re Littlefield* (1993) 5 Cal.4th 122.) Section 1054.1's disclosure requirements extend to rebuttal witnesses: "[T]he disclosure by the defense of its witnesses under section 1054.3 signals to the prosecution that the defense 'intends' to call those witnesses at trial. It follows that the prosecution must necessarily 'intend' to call any of its witnesses who will be used in refutation of the defense witnesses if called." (*Izazaga v. Superior Court* (1991) 54 Cal.3d 356, 375 (*Izazaga*); see also *People v. Gonzalez* (2006) 38 Cal.4th 932, 955-956; *People v. Hammond* (1994) 22 Cal.App.4th 1611, 1621-1622.) "[T]he requirement that the prosecution disclose the witnesses it 'intends to call at trial' [includes] 'all witnesses it reasonably anticipates it is likely to call. . . .' [Citation.]" (*Izazaga*, at p. 376, fn. 11.) The requirement to disclose rebuttal witnesses extends to the "written or recorded statements of [those] witnesses." (*Id.* at p. 374.) A trial court's ruling on matters concerning discovery are generally reviewed under an abuse of discretion standard. (*People v. Lamb* (2006) 136 Cal.App.4th 575, 581.)

Morrison does not contend that the prosecution failed to disclose either Detective Shafia as a witness or Morrison's custodial statement. He instead contends that the prosecutor, after apparently assuring the defense it would not introduce his custodial statement, changed her strategy and said she would introduce it via the detective. Morrison, however, fails to cite any part of the record showing that the prosecutor agreed not to introduce the statement. In fact, when the prosecutor announced she would introduce the statement, the defense did not object by referring to such an agreement. The penal discovery statutes, although requiring the prosecution to disclose witnesses and

statements it reasonably anticipates will be called (*Izazaga*, *supra*, 54 Cal.3d at p. 376, fn. 11), do not require the prosecution to reveal its strategy.

Nor did the discovery statutes obligate the prosecutor to disclose she would impeach Morrison with evidence of his prior juvenile arrest for gun possession. Under section 1054.3, once the defense discloses the witnesses it intends to call, the prosecution must disclose witnesses it reasonably anticipates calling. (*Izazaga, supra,* 54 Cal.3d at p. 375; *People v. Tillis* (1998) 18 Cal.4th 284, 290.) It appears, however, that the defense first indicated during trial that it would call Morrison. Where the defense does not disclose it intends to call a witness until during trial, the prosecution's failure to identify rebuttal witnesses or evidence may not violate the disclosure requirements. (See *People v. Hammond, supra,* 22 Cal.App.4th at pp. 1623-1624 [when the defendant designated a witness six days before trial, prosecutor did not violate disclosure requirements by failing to identify a rebuttal witness].) As the trial court here noted, because the defense did not disclose it intended to call Morrison, the defense was not entitled to "advance notice" of rebuttal evidence, namely, that the prosecutor would impeach Morrison with evidence of his 2008 gun arrest.

Section 1054.1 also requires the prosecution to disclose (a) the names and addresses of witnesses it intends to call, (b) defendant's statements, (c) real evidence, (d) the existence of a felony conviction of any material witness whose credibility is likely to be critical to the outcome of trial, (e) exculpatory evidence, and (f) relevant written or recorded statements of witnesses or reports of the statements of witnesses whom the prosecutor intends to call at trial. (See also *People v. Tillis, supra*, 18 Cal.4th at p. 294.) Unless the challenged evidence falls under one of these categories, there is no duty to disclose it. (*Ibid.*) Even if the Statement Form that Morrison signed acknowledging he had found a gun and Officer Asuncion's testimony about that gun possession should have been excluded, admitting this evidence was harmless. There was overwhelming other evidence that Morrison previously possessed a gun, including Morrison's admission to that effect.

III. Cruel and unusual punishment.

Morrison, who was 17 at the time the crimes were committed,[4] contends that his sentence constitutes cruel and unusual punishment under the Eighth Amendment of the federal Constitution. We agree.

The trial court sentenced Morrison, on the two counts of premeditated attempted murder, to two consecutive life terms plus two 25 years to life terms for the gun enhancement (§ 12022.53, subds. (d), (e)(1)). Premeditated attempted murder carries a life sentence, with a minimum parole-eligibility period of seven years. (§ 3046; see *People v. Jefferson* (1999) 21 Cal.4th 86, 97.) But where, as here, gang-enhancement allegations are found true, the minimum parole-eligibility period is extended to 15 years. (§ 186.22, subd. (b)(5).) The parties therefore agree that Morrison will not be eligible for parole until he is about 84 years old.[5]

The United States Supreme Court has expressed concern about sentencing juvenile offenders to prison terms that prevent any possibility of rehabilitation and release. This concern is based on, among other things, the " 'lack of maturity' " and " 'underdeveloped sense of responsibility' " more common to youth than to adults; their vulnerability or susceptibility to negative influences and outside pressures; and that the character of a juvenile is not as well formed as an adult's. (*Roper v. Simmons* (2005) 543 U.S. 551, 569-570.) "These salient characteristics mean that '[i]t is difficult even for expert psychologists to differentiate between the juvenile offender whose crime reflects unfortunate yet transient immaturity, and the rare juvenile offender whose crime reflects irreparable corruption.' [Citation.] Accordingly, 'juvenile offenders cannot with reliability be classified among the worst offenders.' . . . [¶] . . . Juveniles are more capable of change than are adults, and their actions are less likely to be evidence of

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[4] Morrison was born on October 3, 1991.

[5] Morrison is also limited to 15 percent of worktime credit. (§ 2933.1, subd. (a).)

'irretrievably depraved character' than are the actions of adults." (*Graham v. Florida* (2010) __U.S. __ [130 S.Ct. 2011, 2026, 176 L.Ed.2d 825] (*Graham*).)

Roper concluded that imposing capital punishment on juvenile offenders violates the Eighth Amendment. Thereafter, *Graham* held that imposing a life-without-possibility-of-parole sentence on a juvenile offender for a nonhomicide offense also violates the Eighth Amendment: "A State need not guarantee the offender eventual release, but if it imposes a sentence of life it must provide him or her with some realistic opportunity to obtain release before the end of that term." (*Graham, supra*, 130 S.Ct. at p. 2034.) Most recently, the United States Supreme Court held that "the Eighth Amendment forbids a sentencing scheme that *mandates* life in prison without possibility of parole for juvenile offenders," even for juvenile offenders found guilty of homicide, although a court might, in its discretion, impose such a punishment. (*Miller v. Alabama* (2012) __ U.S. __ [132 S.Ct. 2455, 2469, 183 L.Ed.2d 407], italics added.)

Based on these cases, our California Supreme Court has concluded that "sentencing a juvenile offender for a nonhomicide offense to a term of years with a parole eligibility date that falls outside the juvenile offender's natural life expectancy constitutes cruel and unusual punishment in violation of the Eighth Amendment." (*People v. Caballero* (2012) 55 Cal.4th 262, 268.) *Caballero* therefore found that a sentence rendering the juvenile defendant, who had committed attempted murder, ineligible for parole for over 100 years was unconstitutional. (See also *People v. Mendez* (2010) 188 Cal.App.4th 47, 50-51 [84-years-to-life sentence was the equivalent of life without parole and therefore cruel and unusual punishment].) A state must provide a juvenile offender " 'with some realistic opportunity to obtain release' from prison during his or her expected lifetime. [Citation.]" (*Caballero*, at p. 268.)

Morrison's sentence of 80 years to life is unconstitutional under *Caballero* because it is the functional equivalent of a life-without-possibility-of-parole sentence for a juvenile in a nonhomicide case. We therefore remand this case to the trial court for reconsideration of his sentence.

DISPOSITION

We reverse in part and remand for the trial court to reconsider Morrison's sentence. The judgment is otherwise affirmed.

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ALDRICH, J.

We concur:

KLEIN, P. J.

KITCHING, J.