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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

VINCENT SMITH,

Defendant and Appellant.

2d Crim. No. B233544
(Super. Ct. No. NA074807)
(Los Angeles County)

Vincent Smith appeals a judgment following conviction of first degree murder and burglary, with findings of commission of murder during the burglary, commission of the crimes to benefit a criminal street gang, discharge of a firearm by a principal during commission of the crimes causing death, one prior serious felony strike conviction, and service of two prior prison terms. (Pen. Code, §§ 187, subd. (a), 189, 459, 190.2, subd. (a)(17), 186.22, subd. (b)(4), former 12022.53, subds. (b)-(e), 667, subd. (a)(1), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)¹ We modify the judgment to strike the stayed parole revocation restitution fine, and to award Smith an additional 31 days of presentence actual custody credit, but otherwise affirm. (§§ 1202.45, 2900.5, subd. (a).)

¹ All further statutory references are to the Penal Code unless otherwise stated.

FACTS AND PROCEDURAL HISTORY

In the late evening of October 26, 2006, John Ibrahim was killed during "a running gun battle" inside his San Pedro condominium. Smith, Derrick Taylor, and Jarrett Myers, members of the "Santana Blocc Crips" criminal street gang, went to Ibrahim's residence to obtain marijuana.² Taylor carried a firearm in his back pocket for "protection." During the ensuing firefight, Smith received a gunshot wound to the neck and Ibrahim received three gunshot wounds, two of which were immediately fatal.

Ibrahim owned a restaurant in Gardena and sold large quantities of "high grade" marijuana from his restaurant and from his condominium. His brother Justin stayed at the condominium several nights a week and knew that Ibrahim was dealing drugs. Justin owned a .45 caliber semiautomatic handgun that Ibrahim sometimes kept by his nightstand.

Ibrahim was friendly with Serena Bell and her erstwhile roommate, Tamika Young. They used marijuana together at Bell's residence or at Ibrahim's condominium. Ibrahim provided the marijuana and sometimes bought gifts for Bell. Ibrahim and Bell had planned to take a Hawaiian vacation on October 29, 2006, Ibrahim's 29th birthday.

In October 2006, Young saw Taylor, a longtime friend, and invited him to Bell's residence. Ibrahim arrived later with a large amount of marijuana in his backpack, and the group smoked marijuana together. Ibrahim mentioned his Hawaiian vacation as they smoked. That evening, Taylor informed Young that he needed money because he was "broke," and asked if she knew someone with money or marijuana. He also asked where Ibrahim lived and suggested that he could take Ibrahim's marijuana when he was not at home. Young testified that she attempted to discourage Taylor and stated that he "shouldn't do that" because Ibrahim was "a nice person."

Several days before the shooting, Taylor asked Young to drive him to Ibrahim's condominium. She agreed because she was "not thinking clear at the time."

² Taylor was convicted separately of first degree murder with a special circumstance, burglary, and related gang, firearm, and recidivist enhancements. We affirmed the judgment in *People v. Taylor* (Nov. 29, 2012, B233797) [nonpub. opn.].

Young then drove Taylor and pointed out Ibrahim's condominium. Taylor asked Young when Ibrahim would be in Hawaii and she replied "the weekend." Later, Young attempted to discourage Taylor from taking Ibrahim's marijuana, but Taylor responded that he "needed money." At trial, Young conceded that she knew Taylor was a "gangbanger[]."

Taylor informed fellow Santana Blocc Crips gang members Myers and Smith of Ibrahim's marijuana stash. On October 26, 2006, the three men drove to and entered Ibrahim's condominium where a gun battle ensued. Ibrahim shot Smith in the neck, but Taylor shot Ibrahim several times.

Following the sounds of gunshots, a neighbor investigated and found Ibrahim wounded and propped up in the bushes near the stairway. Other neighbors summoned emergency medical assistance and the police. Los Angeles Police Officer William Manlove arrived quickly and found Ibrahim unresponsive and moribund, with a gunshot wound in his chest. Paramedics arrived but were unable to resuscitate Ibrahim. A Los Angeles County medical examiner later performed an autopsy on Ibrahim's body and concluded that he died from three gunshot wounds, two of which entered the back of his body, passing through to the front.

A police search of Ibrahim's condominium revealed a .45 caliber semiautomatic handgun lying on the floor, nine shell casings and 10 spent bullets throughout the residence, blood stains, and 366 grams of marijuana. A window screen near the front door was damaged, suggesting a forced entry. Another window screen in Ibrahim's bedroom window was broken. The parties stipulated at trial that Smith's blood was in bloodstains recovered in the bedroom.

Officer Manlove testified that based upon the number and location of bullet holes and shell casings in Ibrahim's condominium, "[a] running gun battle" had occurred with people "running through the [condominium] shooting at each other." A police firearms examiner compared the expended bullets and casings recovered from the condominium with the .45 caliber handgun found lying on the floor. He opined that seven bullets had been fired from the handgun and that three bullets had been fired by a .38, .357, or nine-millimeter revolver.

Following Ibrahim's death, Young suddenly moved from Bell's residence. A day or two following Ibrahim's death, Young saw Taylor with a lacerated arm and noticed that he had cut his shoulder-length braids.

Nearly eight months later, police officers interviewed Smith. Following advisement of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, Smith waived his rights and spoke with police officers. Initially, he denied knowledge of or involvement with Ibrahim's death. Later, Smith stated that he merely drove Myers and Taylor to purchase marijuana from Ibrahim but that they were "short" on money. Taylor carried a silver revolver in his pocket as "protection," and led the way to Ibrahim's condominium. When Ibrahim opened the door, he appeared "shocked," "high," and "jittery," as he pulled a gun from his back pocket. Ibrahim and Taylor shot "simultaneously" as the gun battle ensued. Smith, Taylor, and Myers then jumped from the bedroom window and fled. Smith stated that he, Taylor, and Myers were members of the Santana Blocc Crips criminal street gang.

The police interview with Smith was recorded. At trial, the prosecutor played the recording which was also received into evidence.

Los Angeles County Sheriff's Detective Richard Sanchez testified regarding the criminal activities of the Santana Blocc Crips criminal street gang, including home invasion robberies, murders, and transportation of narcotics. Sanchez had known Taylor and Myers for many years, and opined that they, as well as Smith, are "high status" members of the Santana Blocc Crips gang who are "really dug into the gang." Sanchez opined that the three men committed the crimes against Ibrahim to benefit their gang, with one man acting as the driver, one as the "muscle" or trigger man, and one as backup.

The jury convicted Smith of first degree murder and burglary, and found that he committed the murder during commission of the burglary. (§§ 187, subd. (a), 189, 459, 190.2, subd. (a)(17).) It also found that Smith committed the crimes to benefit a criminal street gang, and that a principal discharged a firearm during commission of the crimes causing death. (§§ 186.22, subd. (b)(4), former 12022.53, subds. (b)-(e).) In a separate proceeding, the trial court found that Smith suffered a prior serious felony conviction and

served two prior prison terms. (§§ 667, subd. (a), 667, subds. (b)-(i), 1170.12, subds. (a)-(d), 667.5, subd. (b).)

The trial court sentenced Smith to life without the possibility of parole, plus a consecutive life term for the gang enhancement, plus a consecutive term of 30 years to life pursuant to former section 12022.53, subdivisions (d)-(e) and section 667, subdivision (a)(1). Pursuant to section 654, the court imposed but stayed sentence regarding the burglary conviction and its related firearm and gang enhancements. It also imposed a \$10,000 restitution fine, a \$10,000 parole revocation restitution fine (stayed), an \$80 court security fee, and an \$80 criminal conviction assessment. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a)(1); Gov. Code, § 70373.) The court awarded Smith 1,396 days of actual presentence custody credit.

Smith appeals and contends that: 1) the trial court erred by precluding evidence of Ibrahim's possible marijuana intoxication; 2) the court erred by not instructing sua sponte that Young was a accomplice; 3) there is insufficient evidence that he aided and abetted a burglary; 4) there is insufficient evidence that he aided and abetted a murder; 5) there is insufficient evidence to support the finding of crimes committed to benefit a criminal street gang; and 6) the court committed sentencing errors regarding fines and the award of presentence custody credit.

DISCUSSION

I.

Smith argues that the trial court erred by precluding evidence of Ibrahim's possible marijuana intoxication as relevant to Ibrahim's misperception that the three gang members posed a threat to him. He asserts that the court improperly refused to allow him to question the medical examiner regarding Ibrahim's toxicology report. Smith contends that this prejudicial error denied him his federal and state constitutional rights to a fair trial and to due process of law.

The trial court may only admit relevant evidence – evidence having "any tendency in reason to prove or disprove any disputed fact that is of consequence to the determination of the action." (Evid. Code, § 210; *People v. Kelly* (1992) 1 Cal.4th 495,

523.) The court's ruling regarding relevancy falls within its broad discretion to decide whether the probative value of particular evidence is outweighed by concerns of undue prejudice, confusion or consumption of time. (Evid. Code, § 352; *People v. Hillhouse* (2002) 27 Cal.4th 469, 496.) "Specifically, the court is not required to admit evidence, such as cocaine or marijuana use, 'that merely makes the victim of a crime look bad.'" (*Hillhouse*, at p. 496.) Moreover, application of this basic rule of evidence does not impair a defendant's right to present a defense. (*Ibid.*)

The trial court properly exercised its discretion by excluding evidence of Ibrahim's toxicology report because it was irrelevant and unduly prejudicial. As the trial judge explained, Smith did not have "an expert psychopharmacologist . . . to testify as to the victim's habit of drug usage, his tolerance, and what level would affect him . . . and none of that is evidence in this trial." "[S]ubstance abuse, without more, would be meaningless to a jury's consideration of the victims' conduct." (*People v. Kelly, supra*, 1 Cal.4th 495, 523.) Consumption of marijuana did not contribute to the cause of Ibrahim's death and his character was not at issue. (*Ibid.*) Absent expert testimony explaining the effects of marijuana use generally and specifically to Ibrahim, evidence of the toxicology report is irrelevant. (*People v. Rocha* (1971) 3 Cal.3d 893, 901 [evidence of narcotics use admissible for impeachment purposes if expert testimony substantiates the effects of such use].)

II.

Smith contends that the trial court erred by not instructing the jury to view Young's testimony with caution because it could have found that she was an accomplice. (§ 1111 ["A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense"].) He points out that Young informed Taylor that Ibrahim had marijuana and that she showed Taylor where Ibrahim lived. Smith asserts that the error is prejudicial because there is insufficient evidence to corroborate Young's testimony.

An accomplice is "someone subject to prosecution for the charged crimes by reason of aiding and abetting or being a member of a conspiracy to commit the charged

crimes." (*People v. Houston* (2012) 54 Cal.4th 1186, 1224.) An accomplice must have guilty knowledge and intent with regard to the commission of the crime. (*Ibid.*) Mere knowledge of a defendant's criminal intent, presence at the scene, or failure to prevent a crime is alone insufficient to establish guilt as an aider and abettor. (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.)

A trial court must instruct sua sponte with accomplice instructions when there is substantial evidence that a witness who has implicated the defendant was an accomplice. (*People v. Houston, supra*, 54 Cal.4th 1186, 1223.) This includes instructing that an accomplice's testimony must be viewed with caution and corroborated by other evidence. (*Ibid.*)

A trial court's error in not instructing regarding accomplice liability is harmless if the record contains "sufficient corroborating evidence." (*People v. Valdez* (2012) 55 Cal.4th 82, 147.) "Corroborating evidence may be slight, entirely circumstantial, and entitled to little consideration when standing alone." (*Ibid.*) Moreover, the corroborating evidence need not be sufficient to establish every element of the charged offense or the precise facts stated by the accomplice. (*Id.* at p. 148.) The evidence is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is truthful. (*Ibid.*)

The evidence here does not establish that Young was an aider or abettor of the burglary of Ibrahim's residence. The evidence establishes that Young pointed out where Ibrahim lived and attempted to discourage Taylor from stealing Ibrahim's marijuana. Taylor already knew that Ibrahim possessed large amounts of marijuana, having joined him in smoking it at Bell's residence. Although Young may have suspected or known of Taylor's criminal intent, the evidence does not establish that she shared that intent. She did not agree to take part in the crime, was not present during the crime, and was not involved in assisting the men to escape or in dividing any loot.

In any event, there is sufficient evidence corroborating Young's testimony. Smith and two Santana Blocc Crips members went to Ibrahim's residence in the late evening, armed with a firearm. During his police interview, Smith stated that the men

were "going to try and see what [they] could get," although they were "short" on funds. Ibrahim shot Smith and Smith's bloodstains were discovered within the condominium. This evidence satisfies the requisite showing of connecting Smith with the crimes as to satisfy the jury that the asserted accomplice was truthful. (*People v. Valdez, supra*, 55 Cal.4th 82, 148 [statement of general rule].)

III.

Smith argues that there is insufficient evidence that he aided and abetted the burglary of Ibrahim's condominium. He asserts that he merely drove Taylor to Ibrahim's residence so that Taylor could purchase marijuana. (E.g., *People v. Rodriguez* (1986) 42 Cal.3d 730, 760-761 [mere presence and inaction at crime scene insufficient to establish liability as a principal].)

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) Our review is the same in prosecutions primarily resting upon circumstantial evidence. (*Ibid.*) "An appellate court must accept logical inferences that the jury might have drawn from the evidence even if the court would have concluded otherwise." (*Ibid.*) Our review does not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60.)

An aider and abettor must act with knowledge of the criminal purpose of the perpetrator and with an intent or purpose of committing, or of encouraging or facilitating commission of the crime. (*People v. Houston, supra*, 54 Cal.4th 1186, 1224.) "[A]n aider and abettor of a specific intent crime shares the perpetrator's specific intent when he or she knows of the perpetrator's criminal purpose and aids, promotes, encourages, or instigates the perpetrator with the intent of encouraging or facilitating the commission of the crime." (*Ibid.*) The trier of fact may consider presence at the crime scene, companionship, and conduct before and after the offense in determining the issue of aiding and abetting. (*People v. Rodriguez, supra*, 42 Cal.3d 730, 760.)

Sufficient evidence and all reasonable inferences therefrom support the finding that Smith aided and abetted the burglary. Smith, Taylor, and Myers were longtime Crips members who appeared in the late evening at Ibrahim's condominium, short of funds, but armed "to try and see what [Taylor] could get." Smith conceded during his police interview that Taylor planned "to scam" Ibrahim. He also stated that Taylor reached for and fired his weapon first, and Ibrahim reacted by firing his weapon. Smith stated that he was surprised by Ibrahim's response because Taylor had assured him beforehand that "it was all good." Thus Smith was more than a mere bystander or a passive participant. The evidence supports the reasonable inference that Smith drove and accompanied Taylor to Ibrahim's condominium with the intent to steal drugs and money. That their criminal mission proved unsuccessful and that Ibrahim shot Smith does not negate Smith's intent to aid and abet Taylor.

IV.

Smith argues that there is insufficient evidence that he committed murder based on a felony-murder aiding and abetting theory of murder committed during the course of a burglary.

Section 190.2, subdivision (d) provides: "[E]very person, not the actual killer, who, with reckless indifference to human life and as a major participant, aids, abets, counsels, commands, induces, solicits, requests, or assists in the commission of a felony enumerated in paragraph (17) of subdivision (a) which results in the death of some person . . . , and who is found guilty of murder in the first degree therefor, shall be punished by death or imprisonment in the state prison for life without the possibility of parole" In the absence of a showing of intent to kill, an accomplice to the underlying felony who is not the actual killer will be sentenced to death or life imprisonment without the possibility of parole only where he or she is found to have acted with reckless indifference to human life and as a major participant in the commission of the underlying felony. (*People v. Estrada* (1995) 11 Cal.4th 568, 575.) A "major participant" is "one of the larger or more important members . . . of a . . . group." (*People v. Proby* (1998) 60 Cal.App.4th 922, 933-934.)

Here Smith acted as the driver and backup to Taylor and Myers when they went to Ibrahim's condominium to "scam" marijuana. Taylor was armed and drew his weapon first. Following the gun battle, Smith fled through the bedroom window and did not assist the victim. (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1117 [defendant failed to assist the gunshot victim or summon emergency assistance].) He knowingly participated in the crime even knowing that Taylor was armed and did not have sufficient money to purchase marijuana. This evidence establishes that Smith was a major participant in the burglary and that he acted with reckless indifference to human life. (*People v. Hodgson* (2003) 111 Cal.App.4th 566, 579-580 [defendant a major participant in robbery who acted with reckless indifference to human life where he held open an electric gate to facilitate codefendant's escape following murder of robbery victim].)

V.

Smith contends that there is insufficient evidence that he committed the crimes to benefit a criminal street gang. (§ 186.22, subd. (b)(1).) Smith asserts that Taylor personally desired the marijuana and cash, he (Smith) fled during the gun battle, and the three men did not obtain any loot from their efforts. (*People v. Albillar, supra*, 51 Cal.4th 47, 60 ["Not every crime committed by gang members is related to a gang"].) Smith relies on *In re Daniel C.* (2011) 195 Cal.App.4th 1350, 1358-1364; *In re Frank S.* (2006) 141 Cal.App.4th 1192, 1199; and *People v. Ramon* (2009) 175 Cal.App.4th 843, 851.

We apply the usual standard of review in assessing whether the gang enhancement is supported by sufficient evidence. (*People v. Albillar, supra*, 51 Cal.4th 47, 59-60.) We view the evidence and draw all reasonable inferences therefrom in favor of the finding. (*Ibid.*) Although the evidence might support a contrary finding, we do not substitute our views for those of the trier of fact. (*Id.* at p. 60.)

Sufficient evidence supports the jury's finding of crimes committed to benefit a criminal street gang. Smith, Taylor, and Myers were entrenched members of the Crips; each sported many gang tattoos. Taylor carried a revolver in his pocket; Smith stated during his police interview that he saw its brown handle. The three men went to Ibrahim's residence late in the evening to obtain marijuana despite being "short" on funds. Gang

expert Sanchez opined that the men had the purpose of obtaining drugs to sell to obtain money to purchase more drugs and weapons: "Maybe, use some of it and further their criminal activity buying guns They get it and distribute it among themselves and among the gang." Sanchez explained that the Crips gang members belonged to "a very tight gang" and that they committed crimes as "a pack." This expert opinion evidence is sufficient to allow the reasonable inference that the crimes were committed to benefit the Santana Blocc Crips. (*People v. Albillar*, *supra*, 51 Cal.4th 47, 62-63.) That the crimes were unsuccessful or that Smith was wounded does not alter what the three men intended by their conduct.

The judicial decisions upon which Smith relies are distinguishable. *In re Daniel C.*, *supra*, 195 Cal.App.4th 1353-1354, involved a gang member throwing a bottle at a store clerk after his fellow gang members left the store. *In re Frank S.*, *supra*, 141 Cal.App.4th 1192, 1199, involved a minor who was alone and carrying a knife. *People v. Ramon*, *supra*, 175 Cal.App.4th 843, 851, involved a defendant and another gang member in possession of a stolen vehicle in gang territory. Here, in contrast, three hardcore gang members, armed with a firearm, paid a late-night visit to a marijuana dealer in his home. The front window screen was broken, suggesting a forced entry. Ibrahim was acquainted with Taylor but did not know Smith or Myers. The men were "short" on funds but wanted marijuana. Gang expert Sanchez testified that Myers was a leader within the Santana Blocc Crips and that each man had high status within the gang. Sufficient evidence supports the gang enhancement.

VI.

Smith argues that the sentencing minute order and the abstract of judgment incorrectly reflect the imposition of a stayed parole revocation restitution fine.

(§ 1202.45.) He adds that the trial court erred by orally imposing an \$80, rather than a \$60, criminal conviction assessment. (Gov. Code, § 70373, subd. (a)(1) ["The assessment shall be imposed in the amount of thirty dollars (\$30) for each misdemeanor or felony"].)

The Attorney General concedes that the parole revocation restitution fine does not apply to Smith's sentence of life without the possibility of parole or to a stayed

determinate sentence. (*People v. McWhorter* (2009) 47 Cal.4th 318, 380.) Also, he points out that the sentencing minute order and the abstract of judgment reflect only a \$60 criminal conviction assessment, and suggests that the transcript misreported the amount of the assessment.

Smith also correctly contends that he is entitled to 1,427 days of actual custody credit. (§ 2900.5, subd. (a) ["when the defendant has been in custody, . . . all days of custody of the defendant . . . shall be credited upon his . . . term of imprisonment"].) The Attorney General agrees.

We order the trial court to amend the abstract of judgment to strike the parole revocation restitution fine (§ 1202.45) and to reflect 1,427 days of actual custody credit, and to forward the amended abstract to the Department of Corrections and Rehabilitation. The judgment is otherwise affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

Joan Comparet-Cassani, Judge
Superior Court County of Los Angeles

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant.

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