

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHEENA SANTOS,

Defendant and Appellant.

B234810

(Los Angeles County
Super. Ct. No. VA106410)

APPEAL from a judgment of the Superior Court of Los Angeles County, John A. Torribio, Judge. Affirmed with directions.

Joanna McKim, 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, Steven D. Matthews, Supervising Deputy Attorney General, and Zee Rodriguez, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted Sheena Santos of first degree murder, and the trial court sentenced her to 26 years to life in state prison. Santos appeals. We remand for the trial court to exercise its discretion as to the restitution fine and to award custody credits for time served, and otherwise affirm the judgment.

BACKGROUND

An information filed July 9, 2009 charged Santos and her codefendant Jimmy Gonzalez with one count of murder of Mikko Brooks, in violation of Penal Code¹ section 187, subdivision (a). The information also alleged as to Santos that a principal was armed with a firearm (a rifle), pursuant to section 12022, subdivision (a)(1). Santos pleaded not guilty and denied the allegations. Gonzalez and Santos were tried together, with separate juries.

The following statement of facts is taken in large part from *People v. Gonzalez* (2012) 210 Cal.App.4th 724, in which we affirmed Gonzalez's conviction.

The murder of Mikko Brooks

At trial, Dayanara Barrett testified that shortly after 6:30 a.m. on January 9, 2008, she received a phone call from her friend Mikko Brooks. Brooks told Barrett it was an emergency, and asked Barrett to come over to Brooks's apartment in Bellflower. Barrett could hear music and other voices in the background.

Barrett dropped her son off at school and at about 8:00 a.m. went over to Brooks's apartment. Barrett noticed that the gate and the door to the apartment were open, and a computer keyboard was on the floor about four to five feet inside the door—that was unusual—as Brooks kept the door and gate locked and kept a very tidy house. Barrett entered the apartment and saw that the cabinets were open and the apartment looked as if it had been ransacked. She found Brooks in her bedroom, tied up in the corner of the room; when Barrett called out Brooks's name, she did not answer or move. Barrett immediately dialed 911 on her cell phone and ran out of the building, waiting with the neighbors until the police arrived five minutes later.

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

Marni Hernandez testified that at 8:30 a.m. on the same day, January 9, 2008, she was sitting in a car outside a medical office next to the apartment complex. Through her rearview mirrors, she saw a man with a shaved head come out of the apartment complex, wearing a black short-sleeved shirt. She could not see his face, but thought the man was young. She saw the man a second time, carrying a computer monitor. Hernandez then saw the man a third time, leaving the apartment complex carrying what looked like a VCR. A young woman was walking next to him; Hernandez could not see her face. Hernandez did not see where the man went. Hernandez saw Barrett walk into the apartment building about 10 minutes after she last saw the man walk out. Barrett came out yelling and asked someone for help; Hernandez stayed where she was, and later told the police what she had seen. At the preliminary hearing, Hernandez had testified that the woman and man were tall, and the woman was close to six feet tall, with long black hair.

Chasity Phillips testified that Brooks, the victim, was her cousin. Brooks had a young Hispanic girl living with her. Phillips met the woman (who was with a man) at Brooks's apartment about three days before Brooks's murder. Phillips recognized the woman as looking like someone in the courtroom. Brooks called Phillips later and told her she had put the girl out. To the police, Phillips had identified a photograph labeled exhibit 6 as the woman, and a photograph labeled exhibit 7 as the man.² Brooks was not a gang member, although she had some problems in her life, and when she was younger Brooks had hung out with the Rolling 20's. She was street smart and could hold her own in a fight. Brooks had told her she let the woman stay in the apartment because she was pregnant. The woman did not look pregnant.

² Asked to identify who in the courtroom looked most like the person who lived with Brooks, Phillips identified a juror. Phillips then said that she had no doubt that the photograph marked exhibit 6 was the woman who was living with Brooks. In closing argument, the prosecutor identified exhibit 6 as a photograph of Santos, and exhibit 7 as a photograph of her boyfriend, Luis Sandoval or "Gumby."

Los Angeles County Deputy Sheriff Lorena Rodriguez testified that she responded to a radio call on January 9, 2008, arriving at Brooks's apartment at 8:30 a.m. The security door was open, and Barrett was crying and talking to another deputy who had arrived earlier. Deputy Rodriguez noticed that the apartment was "messed up," and in the bedroom she found Brooks lying on her stomach, with her ankles bound to her wrists with a telephone cord. Brooks had a gray towel on top of her head, and there was blood where her head rested. The room had been ransacked. After determining that Brooks was dead, the deputies left the apartment and waited for homicide detectives.

Deputy Sheriff Boyd Zumwalt testified that as one of the investigating officers from the homicide bureau, he went to Brooks's apartment on January 9, 2008. He saw no signs of forced entry. A keyboard, CD or DVD cases, a cable television control box, and a DVD player were on Brooks's living room couch. In the bedroom was Brooks's body, trussed up. An expended cartridge case was in the corner of the room. Brooks had wounds to her face and a gunshot wound through her head. Brooks had a "20 Crip" tattoo, meaning the Rolling 20's gang out of Long Beach.

The entertainment center near Brooks's head was stained with blood, and an expended bullet was inside. A cushion of the bedroom couch also had blood stains on it, and there was blood on the towel on Brooks's head. When Brooks was rolled over, a misfired .30-caliber M1 carbine round was found stuck to her shirt. On a shelf of the entertainment center were a computer modem and mouse, and cables indicating that a computer had been there. The kitchen trash can contained a beer can and liquor bottles.

Santos's fingerprint was found on the interior front door of the apartment. No other fingerprints at the crime scene or on any other evidence were matched to anyone. Detective Zumwalt found Brooks's cell phone in her bedroom; she had received a call from Santos at 5:56 a.m. on January 9, 2008. A custodian of records for the cell phone company testified that Santos's cell phone made a two minute call to Brooks's cell phone at 12:40 p.m. on January 8, 2008, and made another call to Brooks's phone at 5:56 a.m. on January 9 for one minute. There were hundreds of calls made from Santos's phone to Brooks's phone before January 9.

The forensic pathologist in the coroner's office who conducted Brooks's autopsy determined that Brooks suffered multiple contusions and lacerations to the head, and she had died from a gunshot wound that entered the left back of her head, traveled upwards, and exited through the right top of her head. The wound was consistent with Brooks being shot by a rifle while on the ground, while the shooter stood back. The marks on Brooks's body from the ligatures used to tie her hands behind her back showed that Brooks was alive when she was tied up. Toxicology tests showed Brooks had alcohol and methamphetamine in her system.

The murder weapon and stolen items

Two or three days after Brooks's murder, Gonzalez's cousin Steven Puentes was at home in Long Beach when Gonzalez came over with Santos, whom Puentes had not met before. Puentes identified a photograph as showing Gonzalez as he appeared at the time, with his head shaved. Gonzalez carried an item about three feet long and wrapped in a towel into Puentes's bedroom, leaving it there. Gonzalez did not tell Puentes what the item was, or what he should do with it. Gonzalez then went out and brought Santos inside. She appeared to be about five feet two inches, and did not appear to be pregnant. Puentes, Gonzalez, and Santos sat around for about four hours, and then Gonzalez and Santos left together, saying, "we'll be back." Puentes found the item wrapped in a towel in his clothes hamper; he moved the towel and saw it was a rifle, with a magazine in it. Puentes took the rifle with him when he moved to Paramount, leaving it in the clothes hamper.

In March 2008, Detective Zumwalt recovered the rifle (wrapped in a jacket) and a magazine (wrapped in a sock) from Puentes's hamper. There were no bullets in the gun but there were bullets in the magazine.

A Los Angeles County Sheriff's firearms expert testified that the rifle, a semi-automatic .30 M1 carbine, was operable. The bullets found at the scene and the expended cartridge found stuck to Brooks's body had been cycled through the M1 carbine. The shooter had fired through the towel found at the scene, from more than two feet away.

On January 12, 2008, three days after Brooks was killed, a Long Beach police officer pulled over a blue Chevy Cobalt for speeding and running two stop signs. Santos was the driver, and Gonzalez was the passenger. The car was impounded. Detective Zumwalt searched the car and found a computer monitor behind the right passenger seat, and under the carpet in the trunk was a computer tower registered to Brooks.

Santos interview

Detective Zumwalt and another investigator interviewed Santos during the investigation, on February 6, 2008, with a hidden recorder. The jury heard the audio of the recording and received a copy of a written transcript. Detective Zumwalt testified that Santos was a little nervous, but “cool,” during the interview.

During the interview, Santos gave a Long Beach address, and said that she understood she was not under arrest. She told the investigators that she had no idea why they would want to talk to her. When they replied that they were investigating the murder of Mikko Brooks, Santos said she had heard her name on the news, but had never met her, been in her house, or lived with her. Santos also said she had never been in the city of Bellflower. Santos had met and gone out with “Gumby” recently, after she had broken up with another boyfriend, Alberto Lerma. She did not know Gumby’s last name, although she had visited him twice in jail the week before. Santos was arrested on January 5, 2008 while she was with Gumby, but was released a day later. Told that the investigators were looking for someone from Long Beach named Sheena, who was in Bellflower, lived briefly in Brooks’s apartment, and could help with the murder investigation, Santos said that was not her. Santos said she drove a Chevy Cobalt.

Gang evidence

Long Beach Police Detective Sean McGee testified that he worked with the department’s gang intelligence team. The West Side Longos were enemies of the Insane Crips and the Rolling 20’s Crips. The Insane Crips and the Rolling 20’s Crips were also rivals, although sometimes they worked together against their common enemy the West Side Longos. The hostility between the gangs heated up in the mid-1990’s, as a result of racial tension. The hostility led to shootings (including killings), fistfights, and general

disrespect between the gangs. A killer of a member of an enemy gang would gain respect. Detective McGee opined that if a Rolling 20's member could live peacefully with a Hispanic gang member, there would not be hostility between them. On cross-examination, Detective McGee gave details of other local gangs and the conflicts between them.

Detective McGee testified that exhibit 55 was a photograph of a West Side Longo gang tattoo that would signify that the wearer was a member of the gang. Exhibit 55 was apparently previously introduced into evidence against Gonzalez, but not before the Santos jury. A jailhouse informant, Roberto Andrade, had testified before the Gonzalez jury only that Gonzalez was a West Side Longo member, and the tattoo in exhibit 55 looked like one on Gonzalez's head. (*People v. Gonzalez, supra*, 210 Cal.App.4th at p. 731.)

Exhibit 63, a handwritten note (stipulated to be found on Santos's person) had marks and writing consistent with West Side Longo, and a person writing in that manner would be a member of the West Side Longos gang. A Pittsburgh Steelers flag was found on the floor in Brooks's living room, and the team was associated with the Rolling 20's gang. It would be expected that a West Side Longo member would help a fellow member do what was needed, for example, getting rid of evidence.

In Santos's defense, Gary Brown testified that he rented the Bellflower apartment and Brooks had been his roommate. He had moved out, and Brooks stayed there. He had never seen Santos. Brooks had a big heart, and liked to share, although she kept to herself. She used methamphetamines. The parties stipulated that Santos's father would have testified that she was five feet three inches tall, weighed 125 pounds, and as far as he knew had never been pregnant.

The jury found Santos guilty of first degree murder and found true the allegation that a principal was armed with a firearm. The trial court sentenced Santos to 26 years to life in state prison, imposed fines and fees, and ordered Santos to pay a \$7,637.73 restitution fine, \$7,637.73 in restitution to the victim, and \$7,637.73 in parole revocation restitution. Santos filed this timely appeal.

DISCUSSION

I. The trial court did not abuse its discretion in admitting gang testimony.

Santos argues that her right to due process and a fair trial were violated when the trial court allowed gang evidence at trial, because the evidence was more prejudicial than probative. We review for an abuse of discretion whether the trial court erred in allowing gang evidence under Evidence Code section 352. (*People v. Brown* (2003) 31 Cal.4th 518, 547.)

Counsel for Santos sought to exclude her note with writing consistent with West Side Longos membership. The court replied that “the gang is a motive in this case,” and took the motion to exclude under submission. Santos and Gonzalez later joined in a motion to exclude any evidence of gang activity, including the testimony of the gang expert, as irrelevant and unduly prejudicial under Evidence Code section 352. As to Gonzalez, the prosecutor argued that the gang evidence was relevant to Gonzalez’s motive, to explain that he shot Brooks because he was a member of a gang that hated the rival gang with which Brooks was affiliated. The prosecutor pointed out that Andrade, the jailhouse informant who testified before the Gonzalez jury, testified that Gonzalez told Andrade that he shot Brooks for that reason.

The court reviewed the transcript of jailhouse informant Andrade’s testimony, in which Andrade stated that Gonzalez told him Brooks had seen the Longos tattoo on Gonzalez’s head and then tried to get him to leave, after which Gonzalez shot Brooks because she was related to the Crips. Noting “this evidence is only before the Gonzalez jury,” the court added, “I think we . . . have to exclude the Santos jury.” The prosecutor then brought up the Santos note, which the gang expert would testify was indicative of membership in West Side Longos. The trial court responded that the expert could not opine on “anything regarding Miss Santos based on the testimony of Mr. Andrade. That is not in her trial.” The prosecutor agreed that he would not mention Andrade’s testimony before the Santos jury, but the relevance of the gang testimony “would be to establish facts that would give her a reason, along with her membership or affiliation with the gang . . . why she would be aiding and abetting this.”

The court denied the motion to exclude the gang evidence, “because it would show her association and affiliation with the gang, with Mr. Gonzalez, not for purposes of smearing her, or tainting her, but to show why she was there, and what was going on. That this further corroborates that she’s there.” Santos’s counsel pointed out that there was other evidence that Santos knew Gonzalez, and submitted.

The court ruled that the gang evidence “comes in as part of the whole act, the whole *res gestae*” and “the taint is outweighed by the probative value.” The prosecutor would not use any of the Andrade testimony in his questions for the gang expert. Counsel for Santos again objected to any testimony by the expert regarding the conflict between the rival gangs.

Before the giving of jury instructions, Santos’s counsel renewed the objection that evidence of her possible affiliation with West Side Longos was not relevant to her possible motive. The court stated: “I would agree if Miss Santos was here as a sole defendant and there were no other perpetrators involved that in fact were gang members. . . . Just because someone is an affiliate and not a made member or has friends, certainly the argument is that you really are painting them with the broad bursh [sic] at that point. [¶] But her liability in this case as [the prosecutor] has tried this case is derivative. Her liability comes through her connection with Mr. Gonzalez.” There was no evidence that she was the shooter, but “this is one of the great problems with aiding and abetting is that the person who is less culpable in conduct shares fully in the blame.”

Santos’s counsel argued that the evidence before the Santos jury—unlike the evidence before Gonzalez’s jury, including Andrade’s testimony—was not sufficient to establish Gonzalez’s motive, “whether he had a gang motive.” If the evidence as to the principal was not sufficient, then the evidence as to the aider and abettor was insufficient. Counsel had read portions of Andrade’s testimony, but that was not before Santos’s jury. Counsel asked the court to prohibit the prosecution from arguing “gang membership by Jimmy Gonzalez and affiliation or association with that same gang and with Mr. Gonzalez by Miss Santos.”

The trial court ruled that both juries heard the testimony of the gang expert, which was relevant to the prosecution's theory that Santos aided and abetted in the killing of Brooks because Brooks was a member of a rival gang. "I think the People properly asked the court to admit the gang evidence to show a reason for an otherwise completely senseless crime, random, with no rhyme or reason I think it is a fair argument and if it's a fair argument, I should give the jury instruction." Concluding that the probative value outweighed the prejudice, the court overruled the objection.

The jury was instructed on aiding and abetting liability, and was also instructed that it may consider evidence of gang activity only to decide whether Santos had a motive to commit the murder and not for any other purpose.

In closing, the prosecutor argued that Santos and Gonzalez were teammates, with Gonzalez the shooter and Santos an aider and abettor who acted to help Gonzalez kill Brooks. Brooks knew Santos, whose fingerprint was on the apartment door, and Brooks would have let her and Gonzalez inside. Santos was with Gonzalez when he disposed of the weapon, and Brooks's computer tower was found hidden in the trunk of Santos's car. The common goal of "teammate[s]" Santos and Gonzalez was "killing the enemy." Brooks had a Rolling 20's tattoo, and the Santos note had West Side Longo gang writing disrespecting the Rolling 20's. Santos set up Brooks for Gonzalez as part of the "common thread" of rivalry between the Rolling 20's and the Longos.

Santos's counsel argued that Santos knew Gonzalez was a member of a gang she was associated with ("there's a picture with a big old tattoo on the back of his head"), which was why she lied to the detectives, to cover up her involvement at least as an accessory after the fact.

"[A]dmission of evidence of a criminal defendant's gang membership creates a risk the jury will improperly infer the defendant has a criminal disposition and is therefore guilty of the offense charged." (*People v. Williams* (1997) 16 Cal.4th 153, 193.) Evidence of gang membership in a case not involving a gang enhancement is potentially prejudicial and "should not be admitted if its probative value is minimal. [Citation.]" (*People v. Albarran* (2007) 149 Cal.App.4th 214, 223.) Nevertheless,

“evidence of gang membership is often relevant to, and admissible regarding, the charged offense. Evidence of the defendant’s gang affiliation—including evidence of the gang’s territory, membership, signs, symbols, beliefs and practices, criminal enterprises, rivalries, and the like—can help prove identity, motive, modus operandi, specific intent, means of applying force or fear, or other issues pertinent to guilt of the charged crime. [Citations.]” (*People v. Hernandez* (2004) 33 Cal.4th 1040, 1049.)

The gang evidence was probative of Santos’s motive for aiding and abetting Gonzalez in shooting and killing Brooks. The prosecution’s theory was that the note showed that Santos associated with the Longo gang. Brooks opened the door to Santos and Gonzalez because Santos was her former roommate, and after they partied, Gonzalez shot and killed Brooks. The evidence of the rivalry between the Longos and the Rolling 20’s Crips was evidence of a motive for Santos to aid and abet Gonzalez in Brooks’s murder, and the court gave an instruction telling the jury it could consider the gang evidence only as to Santos’s motive. We presume that the jury so limited its use of the evidence. (*People v. Carey* (2007) 41 Cal.4th 109, 130.)

Santos points out that her jury did not hear the testimony of Andrade, the jailhouse informant who testified before Gonzalez’s jury, which established that Gonzalez was a Longo member with a gang tattoo on the back of his head, and provided evidence for the Gonzalez jury that Gonzalez also had a gang-related motive for the murder of Brooks, who had been associated with the Rolling 20’s.³ There was, however, other evidence of gang involvement. Phillips testified that Brooks had hung out with the Rolling 20’s; Detective Zumwalt testified that Brooks had a Rolling 20’s tattoo; and Detective McGee testified that Santos’s note was consistent with affiliation with the Longos, with whom the Rolling 20’s had a longstanding rivalry. Even without the evidence that Gonzalez

³ The only reference made before the Santos jury of Gonzalez’s Longo membership and tattoo was, as described above, during closing argument not by the prosecution, but by Santos’s attorney, in an attempt to argue that Santos’s and Gonzalez’s common gang association explained her involvement in disposing of the weapon and the property, and her lies to the detectives in the interview.

was a Longos member, the gang evidence as to Santos provided support for the prosecution's theory that Santos's motive was gang related.

Santos argues that the evidence was more inflammatory than it was probative. We disagree. Detective McGee's testimony outlined the rivalry between the Longos and the Rolling 20's in general terms, without prejudicial detail. Further, the evidence was highly probative, as it was the only evidence of Santos's motive. "Defendant argues even if gang membership was relevant, its probative value was outweighed by its prejudicial effect. We do not agree. The gang evidence . . . in this case was of more than minimal probative value. It tended to establish, among other things, that the victim appeared to be a member of a gang which was a deadly rival of defendant's gang. [Citation.] Nor does defendant argue the gang membership evidence was cumulative to other evidence of motive presented to the jury. [Citation.]" (*People v. Williams, supra*, 16 Cal.4th at p. 194.)

Even if it were an abuse of discretion to allow the gang evidence, Santos has not demonstrated a reasonable probability of a more favorable outcome if the evidence had been excluded. (*People v. Partida* (2005) 37 Cal.4th 428, 439.) There was strong evidence implicating Santos in the murder. There was testimony that Santos knew Brooks; her fingerprint was found in Brooks's apartment; Santos had called Brooks on the morning of the murder, shortly before Brooks called Barrett asking her to come over because there was an emergency, and there were hundreds of other calls between Santos and Brooks; Hernandez saw a woman and man leaving Brooks's apartment carrying property including the computer monitor; Santos accompanied Gonzalez when he disposed of the murder weapon within a day of the murder; and Santos had a computer monitor in her car, as well as Brooks's computer tower hidden in the trunk, a month later. When interviewed by the police, Santos denied ever being in Bellflower or in Brooks's apartment, and denied knowing Brooks at all, which given the evidence of their close association is strong evidence that she was not telling the truth.

The trial court did not abuse its discretion in admitting the gang evidence.

II. The trial court did not abuse its discretion in admitting photographs of Brooks's body.

Santos next argues that the trial court abused its discretion to her prejudice, when, after objection by her counsel, it admitted three photographs of Brooks's body, showing Brooks hogtied in her ransacked bedroom (exhibit 1), a close-up of the back of her head (exhibit 2), and an image of a directional rod going through her head to show the trajectory of the bullet (exhibit 40). Santos contends the photographs were unduly inflammatory, were cumulative, and lacked probative value regarding whether she aided and abetted in Brooks's murder.

““Murder is seldom pretty, and pictures, testimony and physical evidence in such a case are always unpleasant” [citations], and we rely on our trial courts to ensure that relevant, otherwise admissible evidence is not more prejudicial than probative [citation].” (*People v. Gurule* (2002) 28 Cal.4th 557, 624.) We review the decision to admit such photographs for an abuse of discretion. (*Ibid.*)

We see no abuse of discretion by the trial court. Santos was charged with first degree murder. Exhibit 1 showed how Brooks had been restrained before she was killed, and exhibit 2 and exhibit 3 showed the gunshots to Brooks's head, and the way the bullet traveled through her head. The photographs were relevant to establish that Santos aided and abetted in a premeditated, deliberate and intentional killing, and corroborated Barrett's and Detective Zumwalt's testimony that they found Brooks tied up on the bedroom floor. The photographs also clarified the coroner's testimony that Brooks died from a gunshot wound that entered the left back of her head, traveled upwards, and exited the top right of her head, consistent with the killer standing back and shooting Brooks while she was on the ground. (*People v. Cowan* (2010) 50 Cal.4th 401, 475.) “The jury was entitled to see the physical details of the crime scene and the injuries defendant inflicted on his victim[.]” (*People v. Heard* (2003) 31 Cal.4th 946, 975.)

This considerable probative value was not outweighed by the photographs' prejudicial effect. “[T]he “prejudice” . . . in Evidence Code section 352 . . . “characteriz[es] evidence that uniquely tends to evoke an emotional bias against

a party as an individual, while having only slight probative value with regard to the issues. [Citation.]” (*People v. Heard, supra*, 31 Cal.4th at p. 976.) We have examined exhibits 1, 2, and 40, and agree with the trial court that exhibits 1, 2, and 40 are not unduly prejudicial. Our review “convinces us that, although not easy to look at, they are not unduly gory or inflammatory. [Citations.]” (*Id.* at pp. 976–977.) Further, prosecution witnesses provided detailed testimony about the injuries, and so the photographs were not likely to sway the jury. (*Id.* at p. 977.) Even if they were cumulative in their corroboration of facts testified to by witnesses, “cumulative photographic evidence may be admitted if relevant.” (*Id.* at p. 978.)

In any event, we conclude that any error in admitting exhibits 1, 2, and 40 was harmless. “Under the *Watson* standard, the erroneous admission of a photograph warrants reversal of a conviction only if the appellate court concludes that it is reasonably probable the jury would have reached a different result had the photograph been excluded. (*People v. Watson* [(1956)] 46 Cal. 2d [818], 836.)’ (*People v. Scheid* [(1997)] 16 Cal.4th1, 21.)” (*People v. Heard, supra*, 31 Cal.4th at p. 978) Although Santos characterizes the case against her as “not solid,” as we described above, strong evidence implicated her as an aider and abettor in Brooks’s murder. The photographs did not provide any information the jury had not heard through detailed testimony, and it was not reasonably probable that the exhibits affected the jury’s verdict.

Finally, Santos argues that questions asked by the jury showed prejudice. The jury asked two questions of the judge: first, one juror asked, before closing argument, whether fingerprints were found on the weapon or bullets and whether Santos was questioned about the stolen items in her car; and second, the jury submitted a request for the difference between first and second degree murder. The first question was sent by the juror to the clerk, and the court directed counsel to address the issues in their closing argument. The court gave an additional instruction in response to the second question. Santos does not explain, and we do not discern, how these questions or the court’s response demonstrate that the introduction into evidence of the photographs was prejudicial.

III. The evidence was sufficient to support Santos's conviction.

Santos argues that the evidence was insufficient to support the jury's verdict. We review a claim of insufficiency of the evidence by examining the evidence ""in the light most favorable to the judgment,""" and determining whether the ""evidence . . . is reasonable, credible, and of solid value,""" so as to allow ""a reasonable trier of fact [to] find the defendant guilty beyond a reasonable doubt."" (*People v. Prince* (2007) 40 Cal.4th 1179, 1251.) In support of the judgment, we presume the existence of every fact the jury could reasonably have deduced from the evidence. (*People v. Farnam* (2002) 28 Cal.4th 107, 143.) ""Of course, all of the evidence must be examined, but it is not weighed. All of the evidence most favorable to the respondent must be accepted as true, and that unfavorable discarded as not having sufficient verity to be accepted by the trier of fact."" (*In re Gustavo M.* (1989) 214 Cal.App.3d 1485, 1497.)

First degree murder is an unlawful killing with malice aforethought and the additional elements of willfulness, premeditation, and deliberation. (*People v. Chun* (2009) 45 Cal.4th 1172, 1181.) A person aids and abets in the commission of a crime when she knows of the perpetrator's unlawful purpose, intends to help or encourage commission of the crime, and aids or promotes the crime by act or advice. (*People v. Hill* (1998) 17 Cal.4th 800, 851, overruled on another ground in *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13.) "[A]mong the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.)

There was evidence of those factors in this case. Construing the testimony in the light most favorable to the guilty verdict, Santos had lived with Brooks, and called her frequently before the murder. Santos called Brooks for the last time on the morning of the murder; about a half-hour later, Brooks, with voices in the background, called Barrett saying it was an emergency and asking her to come over. Hernandez saw a young man and a young dark-haired woman leaving Brooks's apartment and carrying items including a computer monitor a short time before Barrett arrived. Barrett then discovered Brooks's

hogtied body, and Brooks was dead from a bullet through her head. Santos's fingerprint was found on the inside of Brooks's front door.

Within a day of the murder, Gonzalez and Santos went to Puentes's home, where Gonzalez asked Puentes to hide the murder weapon. A month later, Santos was driving with Gonzalez as a passenger when police found Brooks's computer tower hidden in her car's trunk, and a computer monitor behind the front seat. Santos was affiliated with the Longos gang, which had an ongoing rivalry with the Rolling 20's gang with which Brooks was connected. When questioned by the police, Santos lied and said she did not know Brooks and had never been in her apartment or in Bellflower.

A jury could reasonably presume from the facts in evidence that Santos called Brooks to set her up and get her to open the apartment door; arrived at the apartment with Gonzalez, who subsequently shot and killed Brooks; left the apartment with Gonzalez, carrying some of Brooks's possessions; and Santos and Gonzalez then went to Puentes' house, where Gonzalez hid the murder weapon. A rational jury could also conclude from the gang evidence that Santos was affiliated with a gang engaged in a rivalry with the gang to which Brooks was affiliated, giving Santos a motive to aid and abet Gonzalez in Brooks's murder. While a jury would not be required so to conclude, the jury in this case found Santos guilty, and we are not free to reweigh the evidence.

IV. Remand is necessary to set the restitution fine and determine custody credits.

Santos argues, and respondent concedes, that the record does not show that the trial court was aware of its discretion in setting the restitution fine pursuant to section 1202.4, subdivision (b). That section provides: "In every case where a person is convicted of a crime, the court shall impose a separate and additional restitution fine, unless it finds compelling and extraordinary reasons for not doing so, and states those reasons on the record." The fine is set at the discretion of the court depending on the seriousness of the crime, but may not be less than a minimum amount. (§ 1202.4, subd. (b)(1).) The statute also provides, in subdivision (f), that the court shall require the defendant to pay restitution to the victim.

At Santos's sentencing hearing, the trial court ordered \$7,500 in restitution. The court then stated: "[I]n view of the \$7500 fine for the restitution to the victim I'm imposing she's ordered to pay \$7500 to the victim's restitution fund, plus \$137.73 to the victim's restitution fund." After some prompting by the clerk, the court stated that it would impose a parole revocation fund fine, and when the clerk interposed, "Judge that has to be the same as the," the court responded, "The \$7500 and the \$137.73."

The minute order and the abstract of judgment reflect that Santos was ordered to pay a restitution fine under section 1202.4, subdivision (b) of \$7,637.73; a parole revocation restitution fine of \$7,637.73 under section 1202.45; and restitution of \$7,637.73 to the victim under section 1202.4, subdivision (f).

The trial court was correct to impose a parole revocation restitution fine in the same amount as the restitution fine under section 1202.4, subdivision (b). (§ 1202.45, subd. (a).) The direct victim restitution under section 1202.4, subdivision (f), however, is to be set according to the loss to the victim. By contrast, the restitution *fine* is to be set at the court's discretion and pursuant to a procedure detailed in subdivisions (b) through (d) of section 1202.4. The court's imposition of exactly the same amount in the restitution fine and in direct restitution does not show an exercise of the required discretion. We therefore remand to the trial court for clarification of its orders regarding the restitution fines.

The trial court also ruled at sentencing that Santos was "not entitled to any time credits," and the abstract of judgment reflects that no credit for time served was given. A probation violation hearing regarding Santos's March 6, 2008 convictions for drug offenses involving a firearm, was scheduled at the same time as the sentencing hearing in this case, and at the end of the hearing the trial court stated that in the other case "probation is revoked. She is sentenced to 16 months in the state prison. She's given credit for 16 months."

As a defendant convicted of a felony, Santos was entitled to credit against a state prison term under section 2900.5 for the actual time she spent in custody before the prison term began, as long as the presentence custody was attributable to the conduct that

led to the conviction. (§ 2900.5; *People v. Duff* (2010) 50 Cal.4th 787, 793.) From the transcript of the sentencing hearing, it does not appear that the court awarded any custody credit for Santos's time spent in custody on the murder charge, and it is not clear what the basis was for awarding the 16 months credit in the other case. The minute order and the abstract of judgment reflect that no credits were awarded. We therefore remand for the trial court to award Santos credit for time served in this case.

DISPOSITION

We remand for resentencing so that the trial court may exercise its discretion in setting the restitution fine under Penal Code section 1204.4, subdivisions (b) through (d), and for the trial court to award Sheena Santos custody credit for time served. In all other respects, the judgment is affirmed.

NOT TO BE PUBLISHED.

JOHNSON, J.

We concur:

ROTHSCHILD, Acting P. J.

CHANEY, J.