Filed 1/13/15 P. v. Prado CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. EFRAIN PRADO et al., Defendants and Appellants.	B243204 (Los Angeles County Super. Ct. No. KA088341)

APPEALS from judgments of the Superior Court of Los Angeles County, Robert J. Perry, Judge. Reversed in part, affirmed in part, and remanded.

Stephen Temko, under appointment by the Court of Appeal, for Defendant and Appellant Efrain Prado.

Victor J. Morse, under appointment by the Court of Appeal, for Defendant and Appellant Ralph Alfaro.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson, Shawn McGahey Webb and Gary A. Lieberman, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

A jury convicted defendants, Efrain Prado and Ralph Alfaro, of first degree murder. (Pen. Code,[1] § 187, subd. (a).) The jury further found true firearm use by a principal and criminal street gang allegations. (§§ 186.22, subd. (b)(1)(C); 12022.53, subds. (d), (e)(1).) Defendants were each sentenced to 50 years to life in state prison. In an opinion issued on March 6, 2014, we affirmed the judgments. (*People v. Prado* (Mar. 6, 2014, B243204) [nonpub. opn.].) On June 2, 2014, however, our Supreme Court issued its opinion in *People v. Chui* (2014) 59 Cal.4th 155 (*Chui*). In *Chui*, our Supreme Court held: "[An] aider and abettor may not be convicted of first degree *premeditated* murder under the natural and probable consequences doctrine. Rather, his or her liability for that crime must be based on direct aiding and abetting principles. [Citation.]" (*People v. Chui, supra*, 59 Cal.4th at pp. 158-159.) Our Supreme Court remanded this matter to us for reconsideration in light of *Chui*. We reverse defendant's first degree murder convictions. Upon remittitur issuance, the prosecution may retry defendants for first degree murder if it wishes to do so. If the prosecution chooses not to retry defendants for first degree murder, they will stand convicted of second degree murder. Because defendants will either be retried or resentenced, we do not reach Mr. Prado's challenges to the sufficiency of the evidence to support a first degree murder conviction. We also do not reach Mr. Prado's cruel and unusual punishment assertions.

II. THE EVIDENCE

A. The Assault and Murder

The African-American victim, Marquis LeBlanc, attended a party held in a Hispanic gang's territory in Pomona. The gang was known for its hatred of African-

---

[1] Further statutory references are to the Penal Code except where otherwise noted.

Americans. A sect of the Hispanic gang was identified by a Spanish term meaning African-American killers. Mr. LeBlanc's attempts to dance with some of the girls at the party led to a verbal confrontation with gang members. Mr. LeBlanc then brandished a gun. He said, "Who wants to fuck with me now?" A brawl ensued during which as many as 20 individuals chased and viciously assaulted Mr. LeBlanc. The beating was accompanied by gang references and shouts of, "Get that nigger," and "Fuck that nigger up." Mr. LeBlanc was beaten unconscious, fatally stabbed in the heart, and then shot in the head. Although defendants both participated in the aggravated assault, there was no evidence either defendant personally stabbed or shot Mr. LeBlanc.

Mr. Alfaro was 17 years old at the time of the murder. He was a member of the African-American-hating sect of the Hispanic gang. Mr. Alfaro admitted to participating in the beating. Mr. Alfaro both punched and kicked Mr. LeBlanc. At one point during the assault, Mr. LeBlanc broke free and ran. Mr. Alfaro chased Mr. LeBlanc. Mr. Alfaro "dropped" Mr. LeBlanc to the ground. At that point the fatal assault resumed. Mr. Alfaro was angry at Mr. LeBlanc. Mr. LeBlanc had pulled a gun on Mr. Alfaro. The next day, Martin Haro sent several text messages one of which stated: "Me and [Mr. Alfaro] were the first ones to fuck him up . . . . When he was running down the street we ran behind him, then [Mr. Alfaro] and me started socking him until he fell . . . ."

Mr. Prado was 20 years old at the time of the murder. Eyewitnesses saw Mr. Prado participate in the beating. One witness heard Mr. Prado say, "Get the myate," which means, "nigger." Another witness saw Mr. Prado forcibly stomping Mr. LeBlanc who was on the ground. Mr. Prado admitted to detectives twice kicking Mr. LeBlanc in the legs. Mr. Prado said, "[Mr. LeBlanc] was crawling [on the ground] and then I don't know I was just like helping them out and I just gave him like two kicks . . . ." Mr. Prado denied seeing anyone with a knife. But Mr. Prado had accompanied a fellow gang member, Adam Delgado, to the party. Mr. Delgado was armed with a knife. And there was evidence it was Mr. Delgado who fatally stabbed Mr. LeBlanc. Witnesses saw Mr. Delgado making jabbing motions towards Mr. LeBlanc's chest. This occured as Mr. LeBlanc lay unconscious on the ground.

B. The Gang Evidence

Detective Greg Freeman testified for the prosecution concerning the Latino gang as follows. Latino gangs are turf oriented. They defend and protect their territory from rival gangs and from people who disrespect them. The present incident involved the largest of several Pomona gangs. The gang had over 200 active members and associates and controlled a large area. "Tagging" or" banging crews" are the "minor leagues" of the gang. They are younger gang members who commit lesser crimes. The gang controls and generally recruits from the tagging or banging crews. As noted above, the gang involved in the present murder had tagging or banging crews including one known by a derogatory Spanish term meaning African-American killers. The gang's "signature crimes" were: vandalism; narcotics sales; carrying concealed weapons; carjacking; car theft; robbery; armed robbery; assault; firearm assault; attempted murder; murder; and witness intimidation.

Detective Freeman further testified concerning prior interactions with Mr. Alfaro. Mr. Alfaro was a member of the African-American-hating tagging crew if not a full member of the gang. Moreover, according to Detective Freeman, the present murder was committed for the benefit of the gang. Detective Freeman testified: if a gang member attending a party in the gang's territory quarrels with a non-gang member, fellow gang members will protect one another; they will jump the outsider if they perceive that stranger to be disrespecting the gang; it would be disrespectful of the gang for an outsider to dance with neighborhood girls; given the gang's profound racism, an African-American who did so would most certainly be noticed; that action by an African-American attending a dance with Latinos and Latinas could very well be considered an act disrespectful of the gang; an African-American male at the party would be given very little leeway and his behavior would be more likely to be perceived as disrespectful than the same conduct by a Latino. Detective Freeman explained: "When an individual disrespects members of a neighborhood, they're going to be dealt with. And this is . . . [the gang] responding and their associates responding that this is what will happen if

[you] disrespect us in our neighborhood, this is what we're going to do. It shows all the people in the community and the surrounding gang this is what you're going to end up being if you disrespect us in our neighborhood." Detective Freeman further observed the fact the assault occurred in the presence of a large number of people benefited the gang: "Word gets out on the streets real fast on what happened. And again, through the respect, through the strength, through the intimidation, through the fear, that makes [the gang] that much bigger, stronger of a gang." Detective Freeman described Mr. LeBlanc's beating as "extreme."

III. DISCUSSION

A. Joinder

Defendants each join in the other's arguments. (See Cal. Rules of Court, rule 8.200(a)(5); *People v. Bryant* (2014) 60 Cal.4th 335, 363-364; *People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11.) We accept the joinder only to the extent one defendant's argument accrues to the benefit of the other. We reject the purported joinder where evidentiary insufficiency is asserted and the defendant purporting to join has not articulated how the evidence was insufficient as to him. (See *People v. Bryant, supra,* 60 Cal.4th at pp. 363-364; *People v. Nero, supra,* 181 Cal.App.4th at p. 510, fn. 11.)

B. Jury Instructions

1. Jury Instruction on Natural and Probable Consequences

The jury was instructed defendants could be guilty of aiding and abetting the murder on two distinct theories. Either a defendant directly aided and abetted the murder, or he directly aided and abetted the assault, the natural and probable consequence of which was murder. We turn now to the natural and probable consequences instructions.

The trial court instructed the jury it could find a defendant guilty of *first degree* murder as a natural and probable consequence of the aggravated assault. But the trial court also required the jury to conclude that in committing the murder, the *perpetrator* must act willfully, deliberately and with premeditation. In other words, the instructions required the jury to find only that murder was a natural and probable consequence of the aggravated assault. The instructions did not require that premeditated murder was a natural and probable consequence of the aggravated assault. If the jury relied on the natural and probable consequences theory, it convicted defendants of first degree murder because that was the degree of murder it found the *perpetrator* had committed. That instruction was in error. (*Chui, supra,* 59 Cal.4th at pp. 158-159, 161-167.)

We must determine whether the error was harmless. As our Supreme Court explained in *Chui, supra,* 59 Cal.4th at page 167: "When a trial court instructs a jury on two theories of guilt, one of which was legally correct and one legally incorrect, reversal is required unless there is a basis in the record to find that the verdict was based on a valid ground. (*People v. Guiton* (1993) 4 Cal.4th 1116, 1128-1129; *People v. Green* (1980) 27 Cal.3d 1, 69-71. [A defendant's] first degree murder conviction must be reversed unless we conclude beyond a reasonable doubt that the jury based its verdict on the legally valid theory that [the] defendant directly aided and abetted the premeditated murder. (*People v. Chun* [(2009)] 45 Cal.4th [1172,] 1201, 1203-1205.)" We cannot so conclude as to defendants.

At issue is whether there is a basis to conclude beyond a reasonable doubt defendants were convicted of first degree murder based on the theory they directly aided and abetted the perpetrator. Our Supreme Court has explained: "Under section 31, '[a]ll persons concerned in the commission of a crime, . . . whether they directly commit the act constituting the offense, or aid and abet its commission, . . . are principals in any crime so committed.' '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. Cooper* (1991) 53 Cal.3d 1158, 1164.)" (*People v. Delgado* (2013) 56 Cal.4th 480, 486, fn. omitted.) To be guilty of premeditated murder committed by another, an aider and abettor must know and share the perpetrator's murderous intent. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118.) As Division Two of the Court of Appeal for this appellate district explained in *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165, "[T]he prosecution's burden in proving the aider and abettor's guilt of first degree murder [is to prove] (1) intent, (2) willfulness, (3) premeditation and (4) deliberation . . . ." In other words, the aider an abettor must know of another's intent to murder, decide to aid in accomplishing that crime, and in fact aid and abet the commission of the crime. (*People v. Samaniego, supra*, 172 Cal.App.4th at p. 1166; CALCRIM No. 401.)

The present record does not support a conclusion *beyond a reasonable doubt* the first degree murder verdicts were based on the theory defendants directly aided and abetted the killing. The record shows the jury may have based its decision on the natural and probable consequences theory. The prosecutor argued defendants were guilty as direct aiders and abettors. But the prosecutor also urged the jury to convict defendants of first degree murder as the natural and probable consequence of the assault. Moreover, the prosecutor argued applying the natural and probable consequences doctrine was the best way to decide the case: "You don't have to rely [on direct aiding and abetting] because you have natural and probable consequences as the best way to decide this case. That law fits this situation. That's why we have that law. It fits this situation." And during deliberations the jury asked for, "Clarification regarding the difference between first and second degree murder with regard to an aid[er] [and] abettor and/or natural and probable consequences." The trial court responded by rereading and discussing the relevant instructions. In these circumstances, we cannot say beyond a reasonable doubt that the jury based its first degree murder verdicts on the theory defendants directly aided and abetted the killing. Therefore, the prosecution must either accept a reduction of defendants' convictions to second degree murder or retry them for first degree murder. (§ 1260; *Chiu, supra,* 59 Cal.4th at p. 168; *People v. Kelly* (1992) 1 Cal.4th 495, 528.)

2. Attempted Murder as a Lesser Included Offense Instruction

Mr. Prado argues the trial court should have instructed the jury on attempted murder as a lesser included offense. Our Supreme Court has held: "Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. (E.g., 1 Witkin & Epstein, Cal. Criminal Law (3d ed. 2000) Elements, § 53, pp. 262–263; see, e.g., *People v. Swain* (1996) 12 Cal.4th 593, 604-605.)" (*People v. Lee* (2003) 31 Cal.4th 613, 623; accord, *People v. Perez* (2010) 50 Cal.4th 222, 224.) Mr. Prado argues the jury reasonably could have found he committed only attempted murder.

Mr. Prado reasons the jurors could find the kicking occurred without knowledge someone else would stab or shoot Mr. LeBlanc. It is true, as Mr. Prado contends, that a trial court must sua sponte instruct the jury on any lesser included offense that is supported by substantial evidence. (*People v. Whalen* (2013) 56 Cal.4th 1, 68; *People v. Waidla* (2000) 22 Cal.4th 690, 733.) However, the duty does not exist where there is no evidence the offense was less than that charged. (*People v. Smith* (2013) 57 Cal.4th 232, 240; *People v. Breverman* (1998) 19 Cal.4th 142, 154, 162.) As our Supreme Court has held, "[T]he existence of '*any* evidence, no matter how weak' will not justify instructions on a lesser included offense, but such instructions are required whenever evidence that the defendant is guilty only of the lesser offense is 'substantial enough to merit consideration' by the jury. ([*People v. Flannel* (1979)] 25 Cal.3d 668, 684, fn. 12, original italics; see also *People v. Bacigalupo* (1991) 1 Cal.4th 103, 127; *People v. Ramos* (1982) 30 Cal.3d 553, 582.) 'Substantial evidence' in this context is '"evidence from which a jury composed of reasonable [persons] could . . . conclude[ ]"' that the lesser offense, but not the greater, was committed. ([*People v.*] *Flannel, supra,* [25 Cal. 3d] at p. 684, quoting *People v. Carr* (1972) 8 Cal.3d 287, 294; accord, [*People v. Barton* (1995)] 12 Cal.4th 186, 201, fn. 8 ['evidence that a reasonable jury could find persuasive'].)" (*People v. Breverman, supra,* 19 Cal.4th at p. 162; accord, *People v. Smith, supra,* 57 Cal.4th at p. 239.)

Here, Mr. Prado's actions, which went far beyond merely kicking Mr. LeBlanc, were consistent with an intent to kill. There was no substantial evidence he took only *ineffectual acts* towards doing so. There was no substantial evidence from which a reasonable jury could conclude Mr. Prado was guilty of attempted murder but not of murder. In any event, any alleged error was harmless. In a noncapital case, we review jury lesser included instructional error to determine whether there is a reasonable probability of a different result. (Cal. Const., art. VI, § 13; *People v. Breverman, supra,* 19 Cal.4th at pp. 149, 178; *People v. Watson* (1956) 46 Cal.2d 818, 836.) It is undisputed Mr. LeBlanc died. This is no basis for concluding Mr. Prado took only ineffectual acts in the events leading up to Mr. LeBlanc's death. There is no reasonable probability of a different result had the jurors been instructed on the included offense of attempted murder.

3. Defense Instruction Concerning Youthfulness

Mr. Alfaro argues the jury should have been instructed on the subject of his youthfulness as follows: "Some of the defendants in this case may have been under 18 years old at the time of the acts charged in this case. Children are not held to the same standards of care as adults. In accessing [*sic*] whether the prosecution has proved whether a defendant under the age of 18 is guilty of any crimes, when the jury instructions refer to 'a reasonable person' or 'a person of average disposition,' [the jury] must consider that 'person' to be a 'reasonable child' or 'child of average disposition' of like age, experience, and development who was facing a similar situation to that of that minor defendant." Mr. Alfaro requested the foregoing instruction in the trial court. The trial court denied the request. On appeal, Mr. Alfaro contends it was reversible error to fail to so instruct. We disagree. No such instruction is required. Mr. Alfaro cannot set up his own standard of conduct based on his age. (See *People v. Steele* (2002) 27 Cal.4th 1230, 1253; *People v. Morse* (1969) 70 Cal.2d 711, 735.) No statutory or decisional

authority required the trial court to apply a reasonable juvenile standard in the present case.

C. Mr. Alfaro's Confession

Two detectives, Jennifer Turpin and Michael Lange, interviewed Mr. Alfaro at the police station almost two months after the murder. Mr. Alfaro admitted participating in the attack on Mr. LeBlanc. Mr. Alfaro contends it was reversible error to admit that confession into evidence. He argues the interview with the detectives was custodial, hence he should have been advised of his rights pursuant to *Miranda v. Arizona* (1966) 384 U.S. 436, 444. At oral argument, Mr. Alfaro's counsel expressly stated defendant was not raising a voluntariness issue.

There is no evidence showing how Mr. Alfaro arrived at the police station. Mr. Alfaro's suppression motion in the trial court related: "[O]n the day of his first interview . . . , defendant was a minor student who was ordered out of his classroom to the principal's office, where he was forced to see Det[ectives] Turpin and Lange . . . . [Mr. Alfaro] was removed from all familiar surroundings, driven to the police station by police in a police car, brought up stairs, and isolated in the same tiny interview room he was later taken on the day of his arrest." However, these unsworn allegations made in a document prepared by defense counsel are not evidence. (*People v. Solomon* (2010) 49 Cal.4th 792, 815, fn. 10; *In re Zeth S.* (2003) 31 Cal.4th 396, 414, fn. 11 [facts asserted by an attorney in letter to the court are not evidence and counsel may not ethically assert matters as facts unless testifying]; *Cole v. Town of Los Gatos* (2012) 205 Cal.App.4th 749, 767, fn. 8 ["It goes without saying that statements in a memorandum of points and authorities are not evidence."].) Courts are obligated to disregard such unsworn statements appearing in the parties' papers. (*Smith, Smith & Kring v. Superior Court* (1997) 60 Cal.App.4th 573, 578; *Calcor Space Facility, Inc. v. Superior Court* (1997) 53 Cal.App.4th 216, 224.)

It is undisputed Mr. Alfaro was 17 years old at the time he was interviewed. The interview was video-recorded. We have viewed the video of Mr. Alfaro's interview. He was placed in a small interview room with a table and three seats. The room was approximately 5 feet wide and 10 feet in depth and contained 2 doors. One door was next to Mr. Alfaro and it remained closed for the entirety of the interview. A second door could only be seen when it was completely open. During the actual interview, it is clear this second door was partially open because other voices and boisterous laughter can be heard. The voices and laughter emanated from outside the interview room. All of the questioning was polite. As noted and as we shall reiterate, Mr. Alfaro began the interview denying any involvement in the attack on Mr. LeBlanc. After being confronted with the presence of different evidence, Mr. Alfaro would change his story by admitting greater complicity. When Detective Lange raised the other evidence, he did so in a polite and non-confrontational manner. Although 17 years old, Mr. Alfaro appeared older and acted in a materially more mature fashion.

At the outset of the interview, Detective Turpin said, "We appreciate you coming down here." Detective Lange added: "You understand that you're here freely and voluntarily, right? You understand that?" Mr. Alfaro acknowledged that he did. The transcript of the interview states Mr. Alfaro responded to the question of whether he was present voluntarily and freely with the single word, "Huh." The transcript, prepared by the Los Angeles County District Attorney's Office, is in error in that respect. On the video, it is clear Mr. Alfaro said, "Yeah," when asked whether he was present voluntarily and freely.

Detective Lange told defendant the detectives wanted to know what happened at the party. Detective Lange said several names had come up in the investigation, and Mr. Alfaro's was one of them. Detective Lange assured Mr. Alfaro, "[T]hat's not a bad thing, okay?" Initially, the detectives asked general questions about the party. In response, without incriminating himself, defendant described the events leading up to the attack and murder. The detectives sought more detail. They told Mr. Alfaro they

believed him and they wanted him to be honest. When Mr. Alfaro later was unable to identify any individuals in the group that chased Mr. LeBlanc, the detectives expressed disbelief. Mr. Alfaro was advised: "There's a thing called accessory after the fact, and that's . . . if you withhold information, and that information benefits somebody else that participated in the crime, you are guilty of it."

Several questions later, Mr. Alfaro stated Mr. Delgado approached Mr. LeBlanc. Subsequently, according to Mr. Alfaro, Mr. Delgado chased Mr. LeBlanc out of the party. Detective Lange reiterated that the two detectives believed Mr. Alfaro. Detective Lange encouraged Mr. Alfaro to identify others saying, "[Y]ou've been doing a real good job . . . ." Defendant then identified "Osir," as having been with Mr. Delgado. As to Mr. Delgado, Mr. Alfaro said, "He was hitting him." As to the young man identified only as "Osir," Mr. Alfaro said, "Hitting [Mr. LeBlanc] and kicking him." And Mr. Alfaro heard Mr. Delgado say, "Get that nigger."

Defendant described Mr. LeBlanc's efforts to flee: "The [B]lack guy ran out [of] the party and he started running towards the street. [] . . . I saw him make a right. [] [O]nce they chased him, I was like 'Forget this, I'm done.'" At that point, the detectives encouraged Mr. Alfaro to admit his participation. Detective Lange advised defendant: "I want you to understand something, there is a lot of people that were in a group that participated and then there was other people that went down just to see what was happening because of curiosity, okay? [¶] Everything . . . you've told us so far is consistent, but we also know, okay, that you went down that way, okay? It's not necessarily a bad thing because everything that you've indicated to me is that you are just watching something go down, okay? I need you to continue to be honest and tell me what else you saw, okay?" When asked how many partygoers were chasing Mr. LeBlanc, Mr. Alfaro said there were 15 to 20. At first, Mr. Alfaro said Mr. Delgado hit Mr. LeBlanc. And then, Mr. Alfaro said, Mr. LeBlanc fell to the ground. Detective Lange advised Mr. Alfaro others had said Mr. Alfaro was "right there when this happens . . . ." Detective Lange told Mr. Alfaro: "[T]hat's not necessarily a bad thing, okay? But I need to know, how close do you eventually get?"

Mr. Alfaro again claimed he did not participate in the melee. Detective Lange said: "[I] want you to know we've been doing this ever since this happened. So I also want you to know that we know a lot about you, okay? We know that other people call you [by a gang moniker], okay? And that you're also part of the crew. . . , okay? [¶] Now part of your association with that crew . . . makes it look kinda weird that you were around. So I know that you were either standing there at some point in time, did you hear a gunshot?" Mr. Alfaro admitted he was part of the crew. Detective Lange told Mr. Alfaro they were going to interview more people, including Richard. Detective Lange asked Mr. Alfaro whether Richard was going to tell them anything different. Mr. Alfaro said no.

Detective Turpin advised Mr. Alfaro as follows: "I want you to remember that the outcome of this investigation is gonna change many lives, okay, uhm, it's our opinion that people got caught up in the moment and in the end a lot of people screwed up. It could have been the alcohol, it could have been the weed, whatever, but there was a lot of people involved in this incident, and a lot of people's lives are gonna change. I – I want you to really, really think hard and think of what part of this investigation you're gonna end up on. [¶] 'Cause I know that you've been taught values cause if you had no values, you wouldn't be going to school and you wouldn't be playing baseball. Because only people with heart play baseball and stay in school, so you wanna do the right thing, okay? I don't want to interview five more people and it come down to you being one of those people that pulled the strap or stabbed him or hit him with the board. [¶] Okay, if you were caught up in the mix and you were just being an idiot at that time and you got in that mix with a hit and a kick, we need to know right now."

As noted, Mr. Alfaro immediately responded, "I just hit him and kicked him." He went on to admit, "I was the one who chased him on the street." Moreover, Mr. Alfaro confessed, "I was the one who dropped him." Thus, as noted, Mr. Alfaro admitted chasing, punching and kicking Mr. LeBlanc. Mr. Alfaro denied knowing who had a gun. At the conclusion of the interview, Detective Turpin said: "I'm gonna take you down, your mom's downstairs, okay? Thanks for coming down here."

Whether Mr. Alfaro was in custody when he incriminated himself is a mixed question of law and fact. (*Thompson v. Keohane* (1995) 516 U.S. 99, 112-113; *People v. Ochoa* (1998) 19 Cal.4th 353, 401.) We apply the following standard of review: "'In reviewing constitutional claims of this nature, it is well established that we accept the trial court's resolution of disputed facts and inferences, and its evaluations of credibility, if supported by substantial evidence. We independently determine from the undisputed facts and the facts properly found by the trial court whether the challenged statement was illegally obtained.' (*People v. Cunningham* (2001) 25 Cal.4th 926, 992.)" (*People v. Thomas* (2011) 51 Cal.4th 449, 476-477; accord, *People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1161 ["[W]e accept the trial court's findings of historical fact if supported by substantial evidence but independently determine whether the interrogation was 'custodial.'"].)

Custodial interrogation means, "[Q]uestioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." (*Miranda v. Arizona, supra,* 384 U.S. at p. 444; accord, *People v. Moore* (2011) 51 Cal.4th 386, 394-395.) Our Supreme Court has held: "'[C]ustody occurs if the suspect is physically deprived of his freedom of action in any way or is led to believe, as a reasonable person, that he is so deprived.' ([*People v. Arnold* (1967)] 66 Cal.2d [438,] 448[, overruled on a different point in *Walker v. Superior Court* (1988) 47 Cal.3d 112, 123].)" (*Green v. Superior Court* (1985) 40 Cal.3d 126, 133-134; accord, *People v. Linton* (2013) 56 Cal.4th 1146, 1167.) Whether an interrogation is custodial is an objective inquiry. (*J.D.B. v. North Carolina* (2011) 564 U.S. __, __ [131 S.Ct. 2394, 2402]; *People v. Linton, supra,* 56 Cal.4th at p. 1167.) The United States Supreme Court has held the inquiry involves two discrete questions: "'[F]irst, what were the circumstances surrounding the interrogation; and second, given those circumstances, would a reasonable person have felt he or she was at liberty to terminate the interrogation and leave[?]'" (*J.D.B. v. North Carolina, supra,* 564 U.S. at p. __ [131 S.Ct. at p. 2402]; accord, *Thompson v. Keohane, supra,* 516 U.S. at pp. 112-113; *People v. Ochoa, supra,* 19 Cal.4th at pp. 401-402.)

A court must consider all of the circumstances surrounding the interrogation. As our Supreme Court explained in *People v. Moore, supra,* 51 Cal.4th at page 395:

"Custody consists of a formal arrest or a restraint on freedom of movement of the degree associated with a formal arrest. (*People v. Leonard* (2007) 40 Cal.4th 1370, 1400; *People v. Boyer* (1989) 48 Cal.3d 247, 271[, disapproved on another point in *People v. Stansbury* (1995) 9 Cal.4th 824, 830, fn. 1].) When there has been no formal arrest, the question is how a reasonable person in the defendant's position would have understood his situation. [*People v. Boyer, supra,* 48 Cal.3d at p. 272.] All the circumstances of the interrogation are relevant to this inquiry, including the location, length and form of the interrogation, the degree to which the investigation was focused on the defendant, and whether any indicia of arrest were present." Further, in cases as here involving juveniles, the custody analysis must include some consideration of the interviewee's age. (*J.D.B. v. North Carolina, supra,* 564 U.S. at p. __ [131 S.Ct. at p. 2405.]) In *J.D.B.,* the United States Supreme Court concluded: "[W]e hold that so long as the child's age was known to the officer at the time of police questions, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test. This is not to say that a child's age will be a determinative, or even a significant, factor in every case. . . . It is, however, a reality that courts cannot simply ignore." (*Id.* at p. __ [131 S.Ct. at p. 2406, fn. omitted]; see *People v. Nelson* (2012) 53 Cal.4th 367, 383, fn. 7.)

The following factors lead us to conclude the trial court did not err in finding Mr. Alfaro was not in custody for purposes of *Miranda v. Arizona, supra,* 384 U.S. at page 444. Mr. Alfaro was not under arrest. (*Stansbury v. California* (1994) 511 U.S. 318, 322 ["a court must examine all of the circumstances surrounding the interrogation, but 'the ultimate inquiry is simply whether there [was] a "formal arrest or restraint on freedom of movement" of the degree associated with a formal arrest.'"]; *California v. Beheler* (1983) 463 U.S. 1121, 1125 [same].) Mr. Alfaro acknowledged he was present in the police station interview room freely and voluntarily. One of the doors to the

interview room was partially open during the discussion and voices and laughter of other people can be heard during the interview. (*Green v. Superior Court*, *supra*, 40 Cal.3d at p. 136 ["Notwithstanding the lock on the interview room door, the evidence does not compel the conclusion that defendant could not have left whenever he had wanted during the interview."].) Defendant was not handcuffed nor otherwise restrained in the interview room. (*People v. Stansbury*, *supra*, 9 Cal.4th at p. 834.) Mr. Alfaro was never told he was under arrest, in custody or a suspect. (*Green v. Superior Court*, *supra*, 40 Cal.3d at p. 135.) The fact no warnings were given is circumstantial evidence Mr. Alfaro was not a suspect. (*People v. Holloway* (1990) 50 Cal.3d 1098, 1115, disapproved in part by *People v. Stansbury*, *supra*, 9 Cal.4th at p. 830, fn. 1; see *People v. Aguilera*, *supra*, 51 Cal.App.4th at p. 1163, fn. 6.) Mr. Alfaro was repeatedly told the fact others had said he was present when the killing occurred was not necessarily a bad thing. The two detectives never expressed any belief Mr. Alfaro was guilty nor did they ask questions in an accusatory, aggressive or confrontational way. (*People v. Stansbury*, *supra*, 9 Cal.4th at p. 834; *People v. Spears* (1991) 228 Cal.App.3d 1, 25.) The detectives politely indicated they wanted Mr. Alfaro to tell the truth. And when Mr. Alfaro denied much specific knowledge about the killing, the detectives said they wanted him to tell the truth and provide more information. Once the interview was completed, after a brief delay, Mr. Alfaro left the police station with his mother.

The fact that after a while, the two detectives politely expressed skepticism with some aspects of Mr. Alfaro's statements, was not conclusive evidence he was in custody. (*People v. Moore*, *supra*, 51 Cal.4th at pp. 403-404.) Further, the fact the interview occurred at a police station is not dispositive. (*Howes v. Fields* (2012) 565 U.S. ___, ___ [132 S.Ct. 1181, 1188] [an advisement of rights is not required "'simply because the questioning takes place in the station house, or because the questioned person is one whom the police suspect'"]; *People v. Stansbury*, *supra*, 9 Cal.4th at p. 834 [questioning after entering a room in the jail section of a police station which required passage through locked doors was not custodial].) A coercive environment is insufficient by itself to create a duty to give the required advisements. (*Oregon v. Mathiason* (1977) 429 U.S.

492, 495; *Green v. Superior Court*, *supra*, 40 Cal.3d at p. 135.) Nor is the two-hour duration of the questioning in an interview room dispositive. (*Green v. Superior Court*, *supra*, 40 Cal.3d at pp. 131-135; see *People v. Spears*, *supra*, 228 Cal.App.3d at p. 27.) And Mr. Alfaro offered no testimony as to whether he believed he was free to leave. (*Green v. Superior Court*, *supra*, 40 Cal.3d at p. 135.) Taken collectively and viewed objectively, a 17-year-old would not have felt restrained to the degree associated with a formal arrest. (See *Yarborough v. Alvarado* (2004) 541 U.S. 652, 663-666; *People v. Moore, supra,* 51 Cal.4th at p. 402.)

D. Sufficiency of the Evidence Mr. Prado Committed the Assault with the Intent to Benefit the Gang

Mr. Prado asserts the evidence failed to establish he committed the assault with the intent to benefit the gang. We find there was substantial evidence to that effect. Our Supreme Court has set forth the applicable standard of review. "Substantial evidence is evidence that is '"reasonable in nature, credible, and of solid value."' (*People v. Johnson* (1980) 26 Cal.3d 557, 576.) 'In reviewing the sufficiency of the evidence, we must determine "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."' (*People v. Davis* (1995) 10 Cal.4th 463, 509.) We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.) 'The focus of the substantial evidence test is on the *whole* record of evidence presented to the trier of fact, rather than on "'isolated bits of evidence."' [Citation.]' (*People v. Cuevas* (1995) 12 Cal.4th 252, 261.)" (*People v. Medina, supra,* 46 Cal.4th at p. 919; accord, *In re V.V.* (2011) 51 Cal.4th 1020, 1026.)

There was substantial evidence the crime was committed to benefit the gang. Mr. Prado was associated with, if not a member of, the gang. Mr. Prado's friend, Mr. Delgado, was an admitted associate or member of the gang as well. Detective

Freeman testified, based on hypothetical facts tracking those of this case, that Mr. LeBlanc's murder benefited the gang. Detective Freeman explained: "When an individual disrespects members of a neighborhood, they're going to be dealt with. And this is . . . [the gang] responding and their associates responding that this is what will happen if you disrespect us in our neighborhood . . . ." This was substantial evidence supporting the gang enhancement. (See *People v. Livingston* (2012) 53 Cal.4th 1145, 1170-1172; *People v. Albillar* (2010) 51 Cal.4th 47, 59-62.)

E. Cumulative Error

Defendants contend they are entitled to reversal because of cumulative error. Apart from the degree of the murder committed, we find no prejudicial legal error. Therefore, we reject defendants' argument the cumulative effect of all the errors requires reversal other than in connection with the instructional error. (*People v. Jones* (2013) 57 Cal.4th 899, 981; *People v. Edwards* (2013) 57 Cal.4th 658, 746.)

IV. DISPOSTION

Defendants' first degree murder convictions are reversed. Upon remittitur issuance, the prosecution may proceed to retry the degree of murder. If no retrial occurs or no first degree murder verdict is returned as to a particular defendant, he is to be sentenced for second degree murder. The judgments are affirmed in all other respects.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

KRIEGLER, J.