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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

THE PEOPLE, Plaintiff and Respondent, v. DANIEL AGUILAR, Defendant and Appellant.	B227935 (Los Angeles County Super. Ct. No. NA073438)

APPEAL from a judgment of the Superior Court of Los Angeles County, David S. Wesley, Judge. Affirmed as Modified.

Lynda A. Romero, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, James William Bilderback II and Thomas C. Hsieh, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted defendant Daniel Aguilar of the first degree murder of Christopher Ash (Pen. Code, § 187, subd. (a)),[1] found true three special circumstances – killing of a witness, lying in wait, and gang killing (§§ 190.2, subds. (a)(10), (a)(15), and (a)(22), respectively) -- and found true a separate gang enhancement (§ 186.22, subd. (b)(1)(C)). The jury also convicted him of custodial possession of a weapon (§ 4502, subd. (a)). The court sentenced him to life without the possibility of parole on the murder conviction, and a consecutive three-year-term on the weapon possession conviction. He appeals from the judgment and we affirm.

BACKGROUND

Murder of Christopher Ash

Defendant, a 204th Street gang member, was convicted as an aider and abettor in the murder of Christopher Ash. Ash was a 204th Street gang member who was killed because fellow gang members believed he was a "snitch" regarding the murder of 14-year-old Cheryl Green, committed by 204th Street member Jonathan Fajardo.[2]

The Green murder occurred on the afternoon of December 15, 2006, when Fajardo fired on a group of African Americans who were gathered in the driveway of a home on South Harvard in Los Angeles. He killed 14-year-old Cheryl Green

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

[2] Defendant was tried with Fajardo, who was charged with the murder of Ash and with the separate murder of Cheryl Green, as well as seven counts of attempted murder. The prosecution sought the death penalty against Fajardo. He was convicted of all charges, and the special circumstances were found true. The record does not reflect his sentence.

and wounded three others. Fajardo later told Los Angeles Police Detectives that he was staying with Ash at Ash's apartment and got the murder weapon there.

Six days after the Green killing, on December 21, 2006, Los Angeles Police officers searched several apartments associated with the 204th Street gang, including the apartment where Ash lived with his mother, Karen Blish, and his sister, Chanel Blish. Defendant, who had been friends with Ash since 1999, stayed at the apartment off and on. Fajardo lived there in the first week of December 2006. The police questioned defendant and Ash at the station about the Green murder, and later released them.

According to Jose Covarrubias,[3] the boyfriend of Ash's sister Chanel and a 204th Street gang member, there were rumors about whether defendant or Ash was snitching about the Green murder, because no one went to jail after the raid on Ash's house. On December 28, 2006, around 8:00 p.m., Covarrubias was with defendant, Fajardo, and other 204th Street gang members Robert Gonzalez, Juan Carlos Pimentel, and Raul Silva in Silva's garage. Silva and Pimentel were "big homies" (higher ups) in the gang.

Pimentel took Covarrubias aside and asked if he thought Ash was snitching. Covarrubias said yes, and that there was talk that Ash was keeping a journal about gang activity. Pimentel said that Ash had to be taken care of and asked if Covarrubias was "down to do it." Covarrubias said he was.

Pimentel then took defendant to the side and spoke to him for a few minutes. The group then gathered and agreed that Ash was a snitch. They decided to bring Ash to Silva's garage and stab him to death. Defendant was part of the

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[3] Covarrubias agreed to testify in exchange for a guilty plea to voluntary manslaughter in Ash's death, an admission of a gang allegation, and a sentence of 22 years in state prison.

conversation, and mentioned that Ash kept a journal. Pimentel asked defendant to pick Ash up and defendant agreed. Gonzalez handed a folding knife to Covarrubias and a homemade shank to Pimentel. Pimentel told Covarrubias to "tear up" Ash's body and to follow Pimentel's lead. Defendant and Gonzalez left to get Ash. Covarrubias, Pimentel, Fajardo, and Silva remained behind.

Ash's mother, Karen Blish, testified that around 10:38 p.m. that night, Ash woke her up (she looked at the clock) and told her that he and defendant were going next door. Karen gave Ash and defendant a hug. Defendant pulled her close and said, "Everything is going to be okay, Mom. It's going to be okay."

According to Covarrubias, Pimentel received a phone call saying that Ash, Gonzalez, and defendant were on the way back to Silva's garage. When Ash entered, Fajardo struck him from behind with the butt of a shotgun. Ash stumbled and said, "What the fuck?" The others said, "Fuck the snitch." Ash denied snitching. Pimentel told everyone to calm down, walked Ash toward a Pepsi machine, and stabbed Ash in the neck. Ash fell, and Pimentel stabbed him in the chest. Covarrubias stabbed him in the stomach four or five times, vomited, and dropped the knife. Gonzalez picked up the knife and stabbed Ash. When Ash stopped moving, defendant kicked his legs.

Silva brought a tarp and the group wrapped Ash's body in it and loaded it into a van. Pimentel and Fajardo drove away in the van while the others cleaned Ash's blood in the garage using water and paint thinner and put blood soaked items, including the knives, into a trash can. When Fajardo returned, Covarrubias was crying. Fajardo told him to toughen up.

Around 11:30 p.m. that night, Ash's body was discovered wrapped in a blanket in the street near 20991 Grace Avenue in Carson, about a mile and a half from Silva's home. He had been stabbed and cut more than 70 times, including 11

stab wounds to the neck, four to his back, and 32 to his abdomen. He also had five blunt force injuries to his head.

On January 4, 2007, Los Angeles Police Officers executed a search warrant at the apartment of Adela Rubalcaba, where Pimentel was staying. Fajardo was there and tried to escape by fleeing out the back window, but was apprehended.

In Rubalcaba's Nissan Quest minivan, two blood stains later matched to Ash were discovered, along with two fingerprints later matched to Pimentel. Stains matching Ash's blood were also discovered in Silva's garage.

According to Adela Rubalcaba, on the night of December 27, 2006, Pimentel and Fajardo spent the night at her apartment. She kept the keys to her minivan in the living room. The next morning, she noticed that the minivan was damaged and parked the wrong way.

Melanie Aviles testified that she lent her cell phone to defendant. After 10:00 p.m. on the night of the murder, Aviles' mother, Catalina Alba, called Aviles' phone, and defendant answered (the mother recognized his voice). Cell phone records showed that between 10:21 and 11:00 p.m. on that night, three calls were made from Aviles' phone to a cell phone belonging to Raul Silva that police officers later seized from Silva's bedroom. Between 10:26 and 11:09 that night, 10 calls were made from the phone found in Silva's home to Aviles' phone.

On January 4, 2007, around 11:20 p.m., Los Angeles Police Detectives William Smith and Frank Weber interviewed Fajardo in custody (an audio tape of the interview was played for the jury). Fajardo said that he stayed at Ash's apartment, and that he got the gun he used to kill Cheryl Green from there. When told that Ash had been killed, Fajardo agreed that Ash had probably been killed because he said something.

After the interview, Fajardo was transported to the Carson Sheriff's station. On the way, he told Los Angeles County Sheriff's Detective Angus Ferguson that he did not know why Ash was killed, that he did not kill Ash, and that defendant did not help him kill Ash.

On January 6, 2007, around 1:30 p.m., Detective Ferguson interviewed Fajardo at the Carson Sheriff's Station. Fajardo said that he was staying at the home of Adela Rubalcaba when he heard about a "situation." Fajardo went in Rubalcaba's van to a "place" where Ash and defendant showed up. Fajardo struck Ash in the head with a shotgun and punched him in the face. Two other persons shanked him. Ash claimed that he had not said anything, but no one believed him. Fajardo thought that Ash had snitched on him, and that Ash kept a "big book" on what happened in the neighborhood. Fajardo said that defendant did not help in the attack on Ash or cleaning up afterward. Defendant's role was to get Ash to the murder site. If defendant had refused, something would have happened to him.

Custodial Possession of a Weapon

On November 11, 2009, defendant was housed alone in cell number 12 of a module in Los Angeles County Jail. An inmate trustee with the last name of Barragan ran up to Deputy Sheriff Fernando Luviano, who was supervising the trustee in that module. Breathing heavily, the trustee yelled, "Deputy, Deputy, the chubby guy in number 12 shanked me." Deputy Luviano had the trustee remove his shirt and saw a minor puncture wound on the trustee's chest. After taking the trustee to the clinic, Deputy Luviano removed defendant from his cell and searched it. In a small slit in the corner of defendant's mattress, he found a two-inch piece of wood with a piece of metal sharpened to a point attached to it.

Defense

Dr. James Shaw, a professor of psychology with a PhD. in education, had studied Hispanic gangs, including the 204th Street gang. Such gangs discipline snitches by killing them, and use a female or friend to lure the snitch.

DISCUSSION

I. *Sufficiency of the Evidence to Prove Aiding and Abetting*

Defendant contends that the evidence is insufficient to prove that he aided and abetted the murder of Christopher Ash. He argues that the testimony of Covarrubias and the out-of-court statements by Fajardo, both of whom were accomplices, were not sufficiently corroborated, and that, as an additional ground, the evidence was insufficient to show that defendant acted with the specific intent to aid Ash's killers. We disagree on both counts.

Defendant's liability for Ash's murder was as an aider and abettor. The elements of aiding and abetting are: (1) knowledge of the unlawful purpose of the perpetrator; (2) the intent or purpose of committing, facilitating or encouraging commission of the crime; and (3) commission of an act, or the giving of advice, that aids, promotes, encourages, or instigates the commission of the crime. (*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.)

The requisite corroboration of an accomplice's testimony "'may be circumstantial or slight and entitled to little consideration when standing alone, and it must tend to implicate the defendant by relating to an act that is an element of the crime. The corroborating evidence need not by itself establish every element of the crime, but it must, without aid from the accomplice's testimony, tend to connect the defendant with the crime. [Citation.] The trier of fact's determination

on the issue of corroboration is binding on the reviewing court unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime.' [Citations.]" (*People v. Abilez* (2007) 41 Cal.4th 472, 505.)

Here, Covarrubias' testimony and Fajardo's statements, if adequately corroborated, were sufficient to prove defendant's guilt as an aider and abettor. Covarrubias testified that defendant was among those 204th Street gang members who gathered at Raul Silva's garage before the killing, agreed that Ash was a snitch, and decided to bring him there and stab him to death. Pimentel asked defendant to pick Ash up and defendant agreed. According to Covarrubias, defendant specifically agreed that Ash was going to die and that he intended to use a ruse of asking Ash to accompany him to party and smoke methamphetamine. Fajardo's out-of-court statements similarly described defendant as having transported Ash to the killing site.

This evidence was amply corroborated. The scene of Ash's murder was Raul Silva's garage -- stains matching Ash's blood were discovered there. Independent evidence reasonably suggested that defendant transported Ash there. Ash's mother, Karen Blish, testified that around 10:38 p.m. on the night of the murder, Ash woke her up and told her that he and defendant were going next door. Karen gave Ash and defendant a hug. Defendant pulled her close and said, "Everything is going to be okay, Mom. It's going to be okay." Other evidence showed that on the night of the murder, defendant possessed a cell phone that belonged to Melanie Aviles – Aviles had lent defendant the phone; on the night of the murder, around 10:00 p.m., Aviles' mother, Catalina Alba, called the phone and defendant answered. Cell phone records for that phone showed that that between 10:21 and 11:00 p.m. that night, around the time, according to Karen

Blish, that defendant left with Ash, three calls were made from the Aviles' cell phone (possessed by defendant) to a cell phone belonging to Raul Silva that police later seized from Silva's bedroom. Additional records showed that between 10:26 and 11:09 that night, 10 calls were made from Silva's phone to Avila's phone. Ash's body was discovered around 11:30 p.m. that night, wrapped in a blanket in the street near 20991 Grace Avenue in Carson, about a mile and a half from Silva's house.

This evidence is more than adequate to connect defendant to Ash's murder in such a way as to reasonably suggest that Covarrubias' testimony and Fajardo's out-of-court statements tending to prove defendant's guilt as an aider an abettor were truthful. (See *People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1178.) That being so, Covarrubias' testimony and Fajardo's statements proving that defendant agreed to transport Ash to Raul Silva's garage where he would be killed was sufficient to prove that defendant acted with knowledge of the intent of the actual perpetrators, and with the intent or purpose of facilitating Ash's murder.

II. *Aiding and Abetting Instruction*

The trial court instructed the jury in the language of CALJIC No. 3.00, which states in relevant part that "[e]ach principal [referring to the actual perpetrator and the aider and abettor], regardless of the extent or manner of participation is *equally guilty*." (Italics added.) Defendant contends that the trial court erred in so instructing.

We conclude, first, that defendant forfeited the contention. "Generally, a person who is found to have aided another person to commit a crime *is* 'equally guilty' of that crime. [Citation.] [¶] However, in certain cases, an aider may be found guilty of a greater or lesser crime than the perpetrator. (*People v. McCoy*

(2001) 25 Cal.4th 1111, 1114-1122 [an aider might be found guilty of first degree murder, even if shooter is found guilty of manslaughter on unreasonable self-defense theory]; *People v. Woods* (1992) 8 Cal.App.4th 1570, 1577-1578 [aider might be guilty of lesser crime than perpetrator, where ultimate crime was not reasonably foreseeable consequence of act aided, but a lesser crime committed by perpetrator during the ultimate crime was a reasonably foreseeable consequence of the act aided].)" (*People v. Lopez* (2011) 198 Cal.App.4th 1106, 1118.)

Because the instruction at issue was generally correct, we agree with prior decisions which have held that a defendant's failure to object and request a modification forfeits the issue. (*Lopez, supra,* and cases therein cited; but see *People v. Nero* (2010) 181 Cal.App.4th 504, 517-518.) In any event, defendant suffered no prejudice. The applicable test is that of *Chapman v. California* (1967) 386 U.S. 18, 24. (*People v. Samaniego, supra,* 172 Cal.App.4th at p. 1164.) In finding true the special circumstances of witness killing, lying in wait, and gang murder, the jury necessarily found that defendant aided the actual killers with the intent to kill. Given these findings, any error in instructing in the "equally guilty" language was harmless beyond a reasonable doubt, because the jury would necessarily have convicted defendant of first degree murder even without the asserted error in the instruction. "It would be virtually impossible for a person to know of another's intent to murder and decide to aid in accomplishing the crime without at least a brief period of deliberation and premeditation, which is all that is required" to prove first degree murder. (*Samaniego, supra,* 172 Cal.App.4th at p. 1166; see also *People v. Gonzales* (2011) 51 Cal.4th 894, 941, fn. 28.)

III. *Out-of-Court Statement*

Over defendant's hearsay objection, the trial court permitted Deputy Sheriff Fernando Luviano to testify that while he was supervising inmate trustees in a module at Los Angeles County jail, a trustee with the last name of Barragan ran up to him, breathing heavily, and yelled, "Deputy, Deputy, the chubby guy in number 12 shanked me." Cell number 12 was defendant's cell. The trial court instructed the jury: "I'm going to allow this in . . . not for the truth of the matter asserted, meaning whatever he said I'm not allowing it in for the truth. I'm allowing it in to explain the conduct that this deputy did after hearing it. . . . So I'm limiting it to that – for that purpose, so it is not offered for the truth of the mater asserted."

Deputy Luviano later testified that he had the trustee remove his shirt and saw a minor puncture wound on the trustee's chest. After taking the trustee to the clinic, Deputy Luviano removed defendant from his cell and searched it. In a small slit in the corner of defendant's mattress, he found a two-inch piece of wood with a piece of metal sharpened to a point attached to it.

On appeal, defendant contends that the trial court erred in admitting the out-of-court statement of the trustee. The heading of his argument states that the evidence "was irrelevant, constituted hearsay and violated appellant's confrontation rights." He does not expand on the hearsay or the violation-of-confrontation-right's argument, and therefore the arguments are forfeited.[4]

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[4] In any event, the arguments are meritless. The trial court admitted the statement for the nonhearsay purpose of proving the Deputy's state of mind so as to explain why defendant's cell was searched. Even if the statement were introduced for a hearsay purpose, the statement qualified under the hearsay exception for an excited utterance under Evidence Code section 1240. Moreover, because it was made under circumstances objectively indicating that the primary purpose was to assist in an ongoing emergency (i.e., the stabbing of the trustee), it was nontestimonial and did not violate defendant's right of confrontation. (*Davis v. Washington* (2006) 547 U.S. 813, 819.)

(*People v. Barnett* (1998) 17 Cal.4th 1044, 1107, fn. 37 [failure to present argument or analysis forfeits contention].)

Rather, defendant argues that the statement constituted irrelevant and inadmissible "other crimes" evidence under Evidence Code section 1101. Because this objection was not made below, it, too, is forfeited. (*People v. Lewis* (2008) 43 Cal.4th 415, 503.) In any event, although the trial court did not so rule, we note that the statement was admissible to prove that defendant possessed the weapon found in the mattress in the cell he occupied.

Finally, even assuming that the statement was wrongly admitted (a conclusion we do not reach), defendant argues *not* that the error was prejudicial to the conviction for possession of a sharp instrument, but rather that it was prejudicial to the conviction for the Ash murder, because the evidence of his guilt of that crime "was sketchy" and the statement portrayed him as being "just as violent as Covarrubias." However, the evidence of defendant's involvement in Ash's murder was hardly "sketchy." Covarrubias' detailed testimony describing the killing and defendant's role was amply corroborated, as were Fajardo's statements to law enforcement connecting defendant to the crime. Under any standard, the introduction of the trustee's statement, if error, was harmless. (*Chapman v. California, supra*, 386 U.S. at pp. 23-24; *People v. Watson* (1956) 46 Cal.2d 818, 836.)

IV. *Witness Killing Special Circumstance*

"[T]he elements of the witness-murder special circumstance are: '"(1) a victim who has witnessed a crime prior to, and separate from, the killing; (2) the killing was intentional; and (3) the purpose of the killing was to prevent the victim from testifying about the crime he or she had witnessed." [Citation.]' [Citation.]

The murder victim need not have been an eyewitness to the crime for the special circumstance to apply, so long as the defendant believed he was exposed to criminal prosecution and intentionally killed the victim to prevent him or her from testifying in an anticipated criminal proceeding." (*People v. Clark* (2011) 52 Cal.4th 856, 952.)

Defendant contends that the evidence was insufficient to prove the witness killing special circumstance, because it failed to show that Ash was killed to prevent him from testifying about the Green murder. We disagree. The evidence showed that defendant and the actual perpetrators believed that Ash had snitched to the police about the Green murder and that he kept a book or record of activities of the 204th Street gang. From this evidence, the jury could reasonably infer that defendant and the others believed that Ash would likely be a witness in a criminal proceeding and that they intentionally killed him, at least in part, to prevent him from testifying about the Green murder. (See *People v. San Nicolas* (2004) 34 Cal.4th 614, 656 ["A defendant also may be motivated by multiple purposes in killing the victim; the witness-killing special circumstance applies even when only one of those motives was to prevent the witness's testimony"].)

V. *Abstract of Judgment*

On the conviction for custodial possession of a weapon, the trial court imposed a $30 court security assessment (§ 1465.8 subd. (a)(1)) and a $30 court building assessment (Gov. Code, § 70373). The court did not impose those assessments on the murder conviction. Respondent correctly contends that such assessments must be imposed on every conviction a defendant suffers. (See *People v. Lopez* (2010) 188 Cal.App.4th 474, 480.) Therefore the abstract of judgment must be amended to add those assessments to the murder count. (See

People v. Dotson (1997) 16 Cal.4th 547, 554, fn. 6 [unauthorized sentence may be corrected at any time].)

DISPOSITION

The judgment is modified to reflect a $30 court security assessment (§ 1465.8 subd. (a)(1)) and a $30 court building assessment (Gov. Code, § 70373) on count 9 (defendant's murder conviction). In all other respects the judgment is affirmed.

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WILLHITE, J.

We concur:

EPSTEIN, P. J.

SUZUKAWA, J.