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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT ANTHONY GARCIA,

Defendant and Appellant.

B288849

(Los Angeles County  
Super. Ct. No. VA136393)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed and remanded with directions.

John A. Colucci, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr., Supervising Deputy Attorney General and David A. Wildman, Deputy Attorney General for Plaintiff and Respondent.

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## INTRODUCTION

A jury convicted Robert Anthony Garcia of first degree murder and unlawful driving or taking a vehicle. Garcia argues substantial evidence did not support the jury's conviction for first degree murder; he does not challenge his conviction for unlawful driving or taking a vehicle. Garcia also contends the trial court erred by imposing certain fines and fees without considering his ability to pay. Because substantial evidence supported the conviction for first degree murder, we affirm the convictions. We remand, however, for a hearing on Garcia's ability to pay the assessments and restitution fines the trial court imposed.

## FACTUAL AND PROCEDURAL HISTORY

### A. *Jose Salgado Is Killed*

At 2:00 a.m. on February 26, 2014 Garcia and another male confronted Jose Salgado near a gas station in Whittier. Garcia or his companion fired a gun once or twice; a single shot struck Salgado in the back of the head and killed him. A driver passing by called 911 after seeing Salgado slumped over in the street.

The cashier at the gas station witnessed the incident. He did not see the gun fire, but he heard a gunshot, looked to the street, saw Salgado fall to the ground, and watched two male assailants run away. The cashier told the police the shooter was "approximately five-six, 120 to 140 pounds," wore "a dark long-sleeved top like a sweater [or] hoodie maybe" or "a black hat," and wore brown shorts.

In the immediate vicinity police found fresh graffiti for the Canta Ranas (Singing Frogs) criminal street gang on buildings and cars. Canta Ranas has been in Santa Fe Springs since the

1950's and at the time of Salgado's murder, the gang was expanding into Whittier. Garcia was a member of Canta Ranas.<sup>1</sup>

B. *Detectives Identify Garcia from Surveillance Video*

Whittier Police obtained surveillance video from three establishments near the shooting, including footage from the afternoon of February 25, 2014. One recording from that afternoon showed two men walking down the sidewalk. Whittier Police detectives who worked in gang investigation units identified the men as Garcia and another known member of Canta Ranas. In another recording a man identified as Garcia was wearing a plaid shirt, dark shorts, and a black baseball hat with a white logo. Surveillance video from the time and location of the murder captured only grainy images of the feet of a person presumed to be Salgado and his assailants.

Based on the surveillance videos the police obtained warrants to search the homes Garcia shared with his mother and his father. There the police found frog figurines, a particle board with the gang moniker "Crook" painted on it, a black hat with the initials "CR," and a black San Francisco 49ers hat with a white "SF" logo on it. A forensic specialist tested the two hats for gunshot residue and dabbed them for DNA samples. Both hats contained particles consistent with gunshot residue. The "SF" hat contained the DNA of four individuals, including Garcia.

Police also found Garcia's cell phone at his mother's house. The phone contained pictures of Garcia flashing Canta Ranas gang signs and holding a .38-caliber Smith & Wesson safety hammerless handgun. The gun used to shoot Salgado was never recovered, but a ballistics expert determined the bullet was fired

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<sup>1</sup> At the time of the trial Garcia had a new tattoo above his right eyebrow that read "Canta Ranas."

by one of four guns: a .38 special, a .38 long Colt, a .38 Smith & Wesson, or a .357 Magnum. A firearms expert testified that a Smith & Wesson hammerless handgun with a safety on the back of the hand grip would shoot only a single bullet. To shoot a second bullet, the shooter had to release the trigger, depress the safety again, and then pull the trigger.

Police took Garcia into custody and charged him with vandalism. At the time police did not believe they had sufficient evidence to charge Garcia with murder. Garcia pleaded no contest to vandalism and was released.

C. *Police Arrest Garcia for Unlawful Driving or Taking a Vehicle, and Garcia Confesses He Was at the Shooting*

On August 10, 2014 a woman reported her car stolen. The next day, officers spotted it. After a brief chase, officers apprehended and arrested Garcia, who was driving the car. His passenger was a known member of Santa Ranas.

While in custody for stealing the car, officers investigating Salgado's murder transferred Garcia to the Whittier jail so they could question him and conduct an undercover operation in a holding cell. Detective Chad Hoeppner removed Garcia from the holding cell and questioned him outside the cell, but close enough so the informant inside the cell could hear the conversation. Detective Hoeppner showed Garcia a surveillance tape from the afternoon before the shooting, and Garcia identified himself as one of the people in the recording. Detective Hoeppner also showed Garcia pictures of items recovered from Garcia's house, including the black hat with the white "SF" logo. Detective Hoeppner asked Garcia, "Remember the[ ] photos of you wearing that hat during the daytime? The same hat you were wearing that night?" Garcia responded, "Yup." Detective Hoeppner told

Garcia the hat tested positive for gunshot residue and falsely told Garcia an eyewitness identified Garcia from a six-pack photographic lineup, but Garcia did not acknowledge any involvement in the shooting.

Detective Hoeppner returned Garcia to the holding cell, where an undercover informant engaged Garcia in a somewhat disjointed conversation as the informant attempted to steer the discussion to certain aspects of the crime. With respect to the encounter with Salgado, Garcia told the informant he “ran up to” Salgado, who “looked like he was trying to get out of the area quick.” Garcia said “the homie,” presumably Garcia’s companion, “was like hey foo, just get the fuck outta here dog,” which Garcia characterized as “[t]rying to give [Salgado] a pass.” The informant asked Garcia, “Was [Salgado] trying like [to] get in your face?” Garcia responded, “(unintelligible) went boom pop. One shot.” Garcia said he was just “[t]rying to scare” Salgado with what may have been a warning shot, but “the next one, (unintelligible) dropped.” The informant asked, “In the head? Good ass aim or something. What the fuck, you been practicing, you been playing fucking call of duty and shit?” Garcia said only, “Some bull shit, fool.”

The informant asked what Salgado “g[o]t popped with,” and Garcia responded, “A 38, no hammer.” Garcia said, “There’s a safety in the back, you got to squeeze it.” Earlier in the conversation the informant had asked Garcia if the “burner” was gone, and Garcia said it was. Garcia said the police had “[j]ust the hat,” but “[t]hat’s all they need.” The informant asked Garcia if he saw “any people in the streets when it happened.” Garcia said, “Nobody,” but the police told him they had a witness from “the [convenience store] across the street.” The informant asked how far away Garcia was from the convenience store, and Garcia said, “Like, across the street, but you have to have some good ass

eyes. . . . But it was, like, at the time, fool, you know?” The informant asked Garcia if his “crime partner” was also in custody, and Garcia responded, “Nah, he’s not. . . . He’s out there.”

D. *The Jury Convicts Garcia, and the Trial Court Sentences Him*

The People charged Garcia with one count of unlawful driving or taking a vehicle (Veh. Code, § 10851, subd. (a)) and one count of murder (Pen. Code, § 187, subd. (a)).<sup>2</sup> In connection with the murder count, the People alleged a principal personally used and intentionally discharged a firearm causing great bodily injury or death within the meaning of section 12022.53, subdivisions (b) through (e)(1). The People alleged Garcia committed both crimes for the benefit of, at the direction of, or in association with a criminal street gang, with the specific intent to promote, further, or assist in criminal conduct by gang members, within the meaning of section 186.22, subdivision (b)(1).

The jury convicted Garcia on both counts and found true the firearm and gang allegations. The court sentenced Garcia on his murder conviction to a term of 50 years to life, consisting of 25 years to life for first degree murder plus 25 years for the firearm enhancement. The court also sentenced Garcia on his conviction for unlawful driving or taking a vehicle to a concurrent term of two years. The court struck the gang enhancements for sentencing. The court ordered Garcia to pay a \$40 court operations assessment for each conviction, a \$30 court facilities fee for each conviction, and a \$300 restitution fine. The court imposed and stayed a \$300 parole revocation fine. Garcia timely appealed.

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<sup>2</sup> Undesignated statutory references are to the Penal Code.

## DISCUSSION

### A. *Substantial Evidence Supported Garcia’s Conviction for First Degree Murder*

#### 1. *Standard of Review*

““When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.” [Citation.] We 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.” [Citation.] In so doing, a reviewing court “presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.”” (*People v. Dalton* (2019) 7 Cal.5th 166, 243-244.)

““Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]” [Citation.] A reversal for insufficient evidence “is unwarranted unless it appears ‘that upon no hypothesis whatever is there sufficient substantial evidence to support’ the jury’s verdict.” (*People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

The standard of review is the same where, as here, the People rely mainly on circumstantial evidence. (*People v. Ghobrial* (2018) 5 Cal.5th 250, 277-278; *People v. Jones* (2018) 26 Cal.App.5th 420, 442.) Although the jury must acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court, that must be convinced the defendant is guilty beyond a reasonable doubt. (*Ghobrial*, at p. 278; *Jones*, at p. 442.) If the circumstances reasonably justify the trier of fact's findings, the reviewing court must affirm even if it believes the circumstances might also warrant reversal. (*Ghobrial*, at p. 278; *Jones*, at p. 442.) "When 'there are two possible grounds for the jury's verdict, one unreasonable and the other reasonable, we will assume, absent a contrary indication in the record, that the jury based its verdict on the reasonable ground.'" (*Ghobrial*, at p. 278.)

2. *There Was Substantial Evidence Garcia Either Shot Salgado or Aided and Abetted His Murder*

Garcia argues that, while the evidence was sufficient to show he was present at the crime scene, it was not sufficient to prove he was the shooter or aided and abetted the murder. The People need not prove Garcia was the shooter so long as there was substantial evidence he worked with an accomplice to murder Salgado according to a predetermined plan. (See *People v. Gomez* (2018) 6 Cal.5th 243, 279 (*Gomez*); *People v. Johnson* (2019) 32 Cal.App.5th 26, 58 (*Johnson*).) "To prove that a defendant is an accomplice the prosecution must show that the defendant acted 'with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense.' [Citation.] 'The aider and abettor doctrine merely makes aiders



and abettors liable for their accomplices' actions as well as their own. It obviates the necessity to decide who was the aider and abettor and who the direct perpetrator or to what extent each played which role.” (*Gomez*, at p. 279; see *People v. McCoy* (2001) 25 Cal.4th 1111, 1120.) Thus, the jury need not have unanimously agreed whether Garcia personally shot Salgado or merely aided or abetted the murder. (*Gomez*, at p. 279; see *People v. Smith* (2014) 60 Cal.4th 603, 618 [“the jury need not decide unanimously whether defendant was guilty as the aider and abettor or as the direct perpetrator”].)

Garcia’s confession coupled with the circumstantial evidence sufficiently established Garcia either shot Salgado or aided and abetted his murder. (See *People v. Maury* (2003) 30 Cal.4th 342 [combination of evidence proving the defendant was in the area where the victim was found and the defendant’s statements, which included details only the killer would have known, was sufficient to sustain a murder conviction].) Garcia’s statements to the jailhouse informant showed he was present at the crime scene, included details only someone present at the crime would know (e.g., the type of gun used, the number of shots that struck the victim, and the location of the gunshot wound), and described his involvement in the crime to include, at a minimum, that he “ran up to” Salgado to cause a confrontation. (*Johnson, supra*, 32 Cal.App.5th at p. 60 [circumstantial evidence of participation by an accomplice includes “presence at the scene of the crime, companionship, and conduct before and after the offense”].) In addition to identifying the type of gun used in the crime, Garcia described how to use the gun, and officers found a picture of Garcia holding the same type of gun on his cell phone.

Garcia’s statements during the undercover operation confirmed that Garcia was present at Salgado’s shooting. For example, Garcia said the police had “[j]ust the hat,” referring to

the black hat with the white “SF” logo, but “[t]hat’s all they need.” At the time, police had informed Garcia that they found the hat in his house and that it tested positive for gunshot residue. (See *People v. Mohamed* (2011) 201 Cal.App.4th 515, 521-522 [evidence that the defendant was wearing the same clothing as the robber was substantial evidence of identity].) Other circumstantial evidence included the surveillance tapes showing Garcia in the same area as the shooting earlier in the day and Garcia’s conviction for tagging property in the area also on the same day.

The evidence of Garcia’s gang affiliation reinforced that the shooting was “the object of a joint criminal effort perpetrated by two men working in concert.” (*Gomez, supra*, 6 Cal.5th 243 at p. 280; see *People v. Arauz* (2012) 210 Cal.App.4th 1394, 1403 [“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.”].) The evidence showed Garcia had strong ties to the Canta Ranas criminal street gang. Garcia pleaded guilty to painting Canta Ranas graffiti near the crime scene, police found Canta Ranas paraphernalia and clothing in Garcia’s room, and Garcia was arrested for driving or taking of a vehicle in the presence of a known Canta Ranas gang member. At trial, Garcia appeared with a new “Canta Ranas” tattoo above his right eyebrow. And the murder occurred in rival gang territory into which Canta Ranas was seeking to expand. Substantial evidence supported Garcia’s conviction for first degree murder.

B. *Remand Is Necessary To Give Garcia the Opportunity To Request a Hearing On His Ability To Pay Fines, Fees, and Assessments*

In *People v. Dueñas* (2019) 30 Cal.App.5th 1157 (*Dueñas*) this court held a trial court cannot impose a court operations assessment under section 1465.8 or a court facilities assessment under Government Code section 70373 without first determining the defendant's ability to pay. (*Dueñas*, at pp. 1168, 1172.) Garcia argues *Dueñas* requires reversal of the \$80 in court operation assessments and the \$60 in court facilities assessments imposed by the trial court and requests that we stay execution of the \$300 restitution fine imposed under section 1202.4. The People argue that Garcia forfeited this argument by failing to raise it in the trial court and that the record does not establish Garcia is unable to pay the assessments and fines.

Garcia did not forfeit the argument. As we explained in *People v. Castellano* (2019) 33 Cal.App.5th 485 (*Castellano*), at the time the trial court sentenced Garcia, "*Dueñas* had not yet been decided; and no California court prior to *Dueñas* had held it was unconstitutional to impose fines, fees or assessments without a determination of the defendant's ability to pay. Moreover, none of the statutes authorizing the imposition of the fines, fees or assessments at issue authorized the court's consideration of a defendant's ability to pay. Indeed . . . in the case of the restitution fine, . . . section 1202.4, subdivision (c), expressly precluded consideration of the defendant's inability to pay. When, as here, the defendant's challenge on direct appeal is based on a newly announced constitutional principle that could not reasonably have been anticipated at the time of trial, reviewing courts have declined to find forfeiture." (*Castellano*, at p. 489; see *People v. Santos* (2019) 38 Cal.App.5th 923, 931; *People v. Jones* (2019) 36 Cal.App.5th 1028, 1032; see generally

*People v. Brooks* (2017) 3 Cal.5th 1, 92 [“[r]eviewing courts have traditionally excused parties for failing to raise an issue at trial where an objection would have been futile or wholly unsupported by substantive law then in existence”].)

Nor does *Dueñas* require the defendant to demonstrate adverse consequences from imposition of the fines, fees, and assessments. “[A] defendant must in the first instance contest in the trial court his or her ability to pay the fines, fees and assessments to be imposed and at a hearing present evidence of his or her inability to pay the amounts contemplated by the trial court. In doing so, the defendant need not present evidence of potential adverse consequences beyond the fee or assessment itself, as the imposition of a fine on a defendant unable to pay it is sufficient detriment to trigger due process protections.” (*Castellano, supra*, 33 Cal.App.5th at p. 490; see *Dueñas, supra*, 30 Cal.App.5th at pp. 1168-1169.) Thus, on remand Garcia does not need to present evidence of potential adverse consequences beyond the amount of the assessments or fines, and the trial court should consider all relevant factors in determining Garcia’s ability to pay, including any wages Garcia may earn during his incarceration. (See *Castellano*, at p. 490.)

## DISPOSITION

The convictions are affirmed. The matter is remanded with directions to give Garcia the opportunity to request a hearing on his ability to pay the assessments and fines imposed by the trial court. If Garcia demonstrates he does not have the ability to pay, the trial court must strike the court facilities and court operations assessments and stay the execution of the restitution fines. If Garcia fails to demonstrate his inability to pay, the court

may enforce the assessments and fines the court previously imposed.

SEGAL, J.

We concur:

ZELON, Acting P. J.

STONE, J.\*

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\* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.