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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

JOHN ABRAHAM BARCO,

Defendant and Appellant.

B230029

(Los Angeles County  
Super. Ct. No. KA069089)

APPEAL from a judgment of the Superior Court of Los Angeles County.  
Robert M. Martinez, Judge. Affirmed.

Conrad Petermann for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Linda C. Johnson and Robert M. Snider, Deputy Attorneys General, for Plaintiff and Respondent.

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John Abraham Barco appeals from the judgment entered upon his convictions by jury of murder (Pen. Code, § 187, subd. (a), count 1),<sup>1</sup> two counts of shooting at an inhabited dwelling (§ 246, counts 2 & 3), conspiracy to commit murder (§ 182, subd. (a)(1), count 5), and willful, deliberate and premeditated attempted murder (§§ 664, 187, subd. (a), count 6).<sup>2</sup> The jury found to be true as to counts 1, 5 and 6 that a principal was armed with a firearm within the meaning of section 12022, subdivision (a)(1). The trial court sentenced appellant to a state prison term of 26 years to life plus a consecutive life sentence with the possibility of parole. Appellant contends that (1) the trial court erred in failing to instruct the jury that the primary witness against him was an accomplice as a matter of law and that his testimony therefore had to be corroborated, and (2) his convictions are unconstitutional as there is insufficient independent evidence to corroborate the testimony of his accomplice.

We affirm.

## **FACTUAL BACKGROUND**

### **The prosecution's evidence**

#### ***The Barco Family***

In 2003, Inisha Barco (Inisha), appellant's daughter, lived in Rialto with her daughter, her sister Vanessa Barco (Vanessa), and Alex Guerrero (Guerrero), the father of Inisha's daughter. In November 2003, Inisha was breaking up with Guerrero and began dating Louis Gutierrez (Gutierrez). At the beginning of 2004, Guerrero

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<sup>1</sup> All further statutory references are to the Penal Code unless otherwise indicated.

<sup>2</sup> This is appellant's second appeal in this matter. In the first appeal, case No. B188810, we reversed count 4 (conspiracy), which was then dismissed on remand. Thereafter, the federal district court granted appellant's petition for writ of habeas corpus on the ground that he received ineffective assistance of counsel. This appeal is from appellant's retrial. In the retrial counts 5 and 6 were renumbered counts 4 and 5, as a result of the prior dismissal of count 4. We continue to refer to the counts by their original designation.

moved to appellant's home. By February, Gutierrez had moved in with Inisha. Inisha and Gutierrez often socialized with her family, with whom Gutierrez had a good relationship. Appellant lived with his wife, Marivel Barco (Marivel), his sons, Johnny Barco (Johnny) and Nathan Barco (Nathan), and Guerrero. After Vanessa broke up with her boyfriend, she too moved into appellant's home.

### ***Assault on Johnny***

On August 29, 2004, Vicky Ware (Vicky) and Rashaun Ware (Rashaun) hosted a party in their backyard. They had three daughters. Johnny and some friends, who were not invited to the party, arrived. When Rashaun asked them to leave, a melee ensued, during which Johnny suffered a fractured pelvis, two fractured vertebrae, swelling of the brain, a bruised liver, a nearly severed thumb and multiple abrasions and had tire marks on his face, suggesting that he had been run over.

### ***Investigation of assault on Johnny***

For a few weeks after the attack, Johnny remained in a coma in intensive care. It was unknown if he would live. The day after Gutierrez learned of the incident, he and Inisha visited Johnny in the hospital. Appellant and other family members were there and were very upset.

Appellant called Detective Dario Aldecoa for updates on the investigation several times a week, sometimes two or three times a day. He was told that the witnesses were inconsistent in their versions of the incident and their descriptions of the perpetrators, or they were otherwise uncooperative. Neither Johnny nor his friends could identify Johnny's assailant from photographs. Appellant told detectives that he had learned that Rashaun was the owner of the house at which Johnny was attacked and that he was frustrated with the police investigation and Johnny's unhelpful friends. Finally, in early November 2004, Detective Aldecoa explained to appellant that the leads were becoming stale, and the investigation was being suspended.

### ***Gutierrez's description of a murder plot***

According to Gutierrez, who provided the only direct evidence of a murder conspiracy, beginning a few days after the assault on Johnny, appellant began to blame

Rashaun. Appellant learned from one of Johnny's friends, who was at the party, that Rashaun punched Johnny, knocking him out. Then everyone jumped on Johnny, threw him into the street and ran him over. Appellant was angry and often said he wanted to retaliate.

After Johnny was released from the hospital and moved home, appellant continued talking in front of his family about retaliating. By October or November 2004, he asked Guerrero and Gutierrez to shoot Rashaun. On one occasion, Gutierrez walked into the garage when appellant was talking to Guerrero about killing Rashaun. Appellant said that Guerrero should drive by the Wares' residence, shoot, drive by again, and shoot a second time. The first shooting would wake the Wares so that they would be standing and an easier target for the second shooting. Appellant offered Guerrero and Gutierrez a few thousand dollars and Guerrero free rent to do the shooting. Appellant asked Gutierrez a few other times to shoot at the house. Gutierrez never agreed to do so, nor did he refuse, as he was intimidated by appellant.

Gutierrez witnessed approximately five conversations between appellant and Guerrero about the shooting. Gutierrez would just walk in and listen. Appellant wanted the shooting to occur around Christmas so that it would be more devastating for Rashaun's family. Appellant wanted to use two shooters and be present in a car as a lookout. He threatened to kill Gutierrez if Gutierrez said anything about the plot.

On one occasion, appellant drew a map or diagram of Rashaun's house and block, mentioned the street, and explained his plan in front of the whole family. Guerrero and Gutierrez were seated next to him. Gutierrez only pretended to pay attention. Appellant explained what he wanted Guerrero and Gutierrez to do, where appellant was going to be, and that he was going to phone them.

A few months before the shooting, appellant asked Gutierrez, Guerrero and appellant's family to obtain guns. Because Gutierrez knew that the gun was to be used

to retaliate for Johnny's beating, he did not look for one.<sup>3</sup> However, he had previously told one of Inisha's neighbors, Ray, a San Bernardino Verdugos Street gang member, of the assault on Johnny. Ray told Inisha and Gutierrez that he could get an AK-47 gun for them. Inisha reported the offer to appellant, who told her to purchase the gun. She agreed to do so. A few days later, Inisha purchased the gun for \$300 or \$400. Inisha, Ray, a friend of Ray's and Gutierrez were present during the transaction.

Inisha and Gutierrez brought the loaded rifle in a case to appellant's house, as he had requested. Gutierrez carried it. Most of the family was there at the time. Gutierrez gave appellant the weapon in the garage, with Nathan present. Appellant asked Gutierrez to demonstrate how to load and unload the gun, which Gutierrez did. Appellant asked Gutierrez to leave the gun. Before the shooting, Gutierrez brought the gun back to Inisha's apartment at appellant's request. A few weeks after the shooting, it was returned to appellant.

### *The Ware shootings*

On December 21, 2004, the Wares were at home. Shortly before 10:00 p.m., they heard glass breaking at the front of the house. Vicky saw what turned out to be a tire iron come through the dining room window. Four to seven gunshots followed.

Rashaun hurried to their five-year-old daughter Larissa's room where a window had been broken and there were bullet holes in the wall. Larissa had been shot in the chest. Vicky called 911, screaming, "My baby's dead," and ran outside.<sup>4</sup>

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<sup>3</sup> Gutierrez told Juan Avalos (Avalos), his best friend, that appellant wanted him to buy a gun to retaliate against Johnny's attackers. Gutierrez seemed scared and nervous and told Avalos he was not going to participate. Gutierrez said he was afraid of appellant, that appellant was crazy and that appellant would be responsible if anything happened to Gutierrez. He made similar statements to Veronica Preciado (Preciado), his former girlfriend, with whom he continued a relationship while he was with Inisha, and Gutierrez's mother. After the murder, he told Preciado he feared what appellant might do to him.

<sup>4</sup> Larissa later died at the hospital during surgery of her gunshot wound.

Vicky then noticed an older, white two-door car slowly approaching her house. Guerrero, the driver, was alone. He had circled the block, came close to the Ware house and stopped. Guerrero pointed a gun out the window and shot three to seven shots at Vicky, missing her as she dropped to the ground. When the shooting stopped, Inisha ran back inside.

### ***Guerrero's arrest***

Guerrero sped away. Ten minutes later, Deputy Sheriff Henri Floris stopped him. Guerrero was in a car belonging to Inisha. When the deputy searched Guerrero, he uncovered a cell phone and three shards of what appeared to be vehicle glass from Guerrero's front pocket and a plastic bag containing six unexpended bullets from his rear pocket. When asked about the bullets, Guerrero said that he had a gun in the car. He was arrested. Inside the car, Deputy Floris observed a small black revolver, a single unfired bullet on the driver's seat, among other items.

### ***Investigation of the Ware shooting***

Police investigators found four bullets inside the Ware's house, three being recovered. Six expended casings were retrieved on the street. Forensics established that all of the bullets, including a bullet removed from Larissa, were fired from Guerrero's gun.

Records from Verizon Wireless reflected that on December 21, 2004, at 9:09 p.m., near the time of the shooting, a call was made from a land line telephone at the Barco residence to Guerrero's cell phone. The call lasted 24 seconds, but there was no evidence that the call was answered.

At approximately 5:00 a.m., the morning after the shooting, the police went to Inisha's apartment and reported that Guerrero had been involved in a murder and arrested. Gutierrez said he knew Guerrero and was shocked that he committed such a crime. Gutierrez lied and said that he knew nothing about the shooting, that the Barco family knew nothing about the shooting and that they would have nothing to do with guns. He said that no one at the Barco house ever spoke of revenge. Gutierrez feared that if he told the truth, appellant would learn that he had provided information.

In subsequent visits to appellant's house, Gutierrez heard appellant say he was upset that Guerrero had been arrested, but believed he was apprehended because he did not listen to appellant's instructions. Appellant also said that he was glad Larissa was killed so Rashaun would feel the same pain appellant had experienced.

On January 6, 2005, detectives interviewed appellant. He said that Guerrero had been living in his house. He showed no emotion until the end of the interview, when he said he could not believe a murderer was living in his house. His eyes became watery. Later, in front of family members, appellant told Gutierrez that he fooled the detective by crying about the little girl's death.

On March 3, 2005, a search warrant was executed at appellant's home. A loaded .25-caliber semiautomatic pistol was recovered from a nightstand in appellant's bedroom, and a nine-millimeter handgun was found in Johnny's bedroom. A newspaper article entitled "Witness Sought In Man Beating" was recovered from the master bedroom closet floor. Handwritten on the article were the words, "Save. Little John."

#### ***Gutierrez's breakup with Inisha***

Gutierrez continued living with Inisha until February 2005, when they had an acrimonious breakup. He did not want to be in the Barco family circle because appellant threatened to kill him if he said anything. Gutierrez moved into his mother's house. When he returned to Inisha's apartment to pick up some of the items he had left there, the police were there. Inisha accused him of breaking into her apartment the previous day. He said he did not do so; he had used a key to retrieve some of his things. The accusations almost caused Gutierrez's arrest, but Inisha declined to press charges. Gutierrez left without further incident, claiming at trial that he did not yell to Inisha that he would go to the police and falsely implicate appellant, as she claimed.

#### ***Gutierrez talks to police***

Later that day or the next, Gutierrez telephoned Detective Aldecoa, stating that he had information regarding the Ware murder. Detective Aldecoa went to Gutierrez's mother's house and interviewed Gutierrez for more than an hour. Gutierrez told him

that he was present when the Barco family planned the murder. He reported that appellant tried to solicit his and Guerrero's help in carrying out a drive-by shooting at the Wares' house and had prepared a map or diagram of the house and street. Gutierrez explained how Inisha came to purchase the gun, how he gave it to appellant knowing what it was for, and how appellant had him demonstrate loading and unloading it.

Gutierrez said that he did not want to discuss the plot with police in front of Inisha because he was afraid of appellant. In light of the breakup with Inisha, he believed appellant and his companions would come after him and probably kill him because of what he knew. No promises were made by the district attorney for Gutierrez's statements, though he was subsequently granted immunity from prosecution.

### **The defense's evidence**

#### ***Appellant's good character***

Appellant was a teacher in West Covina, ran an after-school program and taught in student's homes. Appellant called several friends, relatives and colleagues as witnesses, who testified to his good, honest and nonviolent character.

#### ***Barco family relationships***

The Barco family members were very close. After Johnny was attacked, Vanessa moved back to appellant's house because she no longer felt comfortable living at Inisha's apartment. Guerrero, who lived at appellant's house, had a good relationship with appellant, who treated him like a son. Nathan regarded Guerrero as a brother.

#### ***Appellant did not want to retaliate***

Appellant testified on his own behalf that neither he nor anyone in his home ever experienced frustration or anger toward anyone in connection with Johnny's



beating, nor did they ever discuss shooting or planning retaliation.<sup>5</sup> When Johnny's friend said that they would get the perpetrators, appellant told them not to talk that way. According to Nathan, Gutierrez told appellant, "I could take care of this," and appellant told him not to do so.

Appellant testified that he was frustrated with the lack of an arrest.<sup>6</sup> He made frequent calls to the police, but did not know who was responsible for attacking Johnny.<sup>7</sup> After Johnny returned home, appellant continued contacting the police.

Appellant denied having a conversation in the garage with Gutierrez about retaliating or planning a drive-by shooting at the Ware's house. Appellant did not own a gun and never discussed with Gutierrez obtaining one. The only gun in the house was when Gutierrez, an avid gun owner, brought one, and appellant became angry at him for doing so. Appellant acknowledged writing down the address and directions to the Wares' house, but claimed he did so in order to retrieve Johnny's car.

***Gutierrez's alleged involvement in conspiracy***

Gutierrez began living with Inisha in 2003 or 2004. He became close with her family and had a good, or at least cordial, relationship with appellant, who never threatened or bullied him. Gutierrez did not appear to be intimidated by appellant. After the attack on Johnny, Gutierrez told Gabriel that Johnny was like a brother to him and that he and his cousins would retaliate.

Regarding the purchase of the AK-47, Inisha testified that Gutierrez told her that he wanted \$300 to buy an AK-47. She called Gutierrez "stupid" and refused to

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<sup>5</sup> Johnny's friend told Marivel that Johnny's injuries were sustained at the Wares' house. When Johnny was in the hospital, neither Inisha, Vanessa, Nathan nor Vanessa's boyfriend, Michael Gabriel (Gabriel), who had lived with Vanessa at Inisha's for a short time and went to the hospital several times, ever heard appellant or anyone talk about retaliating.

<sup>6</sup> Vanessa testified that absence of an arrest did not frustrate appellant.

<sup>7</sup> Appellant told the detective that Rashaun was responsible.

give him the money. He nonetheless obtained the money from his cousin and bought the gun. Inisha denied being present when Gutierrez purchased the AK-47 and testified that she first knew that Gutierrez had purchased the gun when he carried it into appellant's house. But she told Detective Aldecoa that she was present when the gun was bought and that she did not know it was taken to appellant's house.

In November 2004, Gutierrez brought the loaded gun to appellant's living room. He had never before brought a gun to appellant's house. Appellant became angry that Gutierrez did so and told him to take it out. Appellant said he brought the gun "for the Black guys," and appellant said there would be no retaliation. Gutierrez asked appellant to keep a small loaded handgun for him, which after first refusing, appellant agreed to do. Appellant denied directing Gutierrez to buy the gun and that Gutierrez showed him how to load and unload it.

On the night of the shooting, everyone in the Barco family, as well as Guerrero and Gutierrez, was at the family home. Appellant went to bed between 9:00 or 10:00 p.m., after Gutierrez and Inisha had gone home. He thought Guerrero was asleep. He denied telephoning Guerrero on December 21, 2004, near the time of the shooting. When the police came to his house to advise him of the shooting and Guerrero's arrest, appellant believed Guerrero was still asleep at home.

Guerrero used Inisha's car, which had been parked in appellant's driveway, to commit the drive-by shooting. Appellant denied telling Johnny or Gutierrez that Guerrero should have gotten on the freeway after the shooting, as appellant had told him to, and he would not have been caught. No one in the Barco family ever said that they were glad the little girl was shot so that Rashaun could feel the same pain they had experienced. To the contrary, appellant claimed that he and his wife were upset and sad about the murder.

In February 2005, Gutierrez and Inisha broke up. Gutierrez moved from the apartment. Appellant was happy about the breakup and changed the locks to the apartment. The next day, Inisha and Nathan discovered that the apartment had been broken into and ransacked. Inisha called the police. Before they arrived, Gutierrez

begged her not to press charges. Then he yelled, “I am going to lie about your dad and say that he had a part of the shooting.” Inisha refused to press charges, saying that all she wanted was her stuff back, which Gutierrez never returned despite promising to do so. Around this time, Gutierrez’s car was vandalized when parked in front of appellant’s house. When he saw Inisha walk to the house he threatened to kill her. Inisha was too afraid to press charges.

On March 3, 2005, appellant was arrested. Police recovered a .25-caliber handgun from his nightstand while executing a warrant.

## **DISCUSSION**

### **I. Instruction on accomplice as a matter of law**

#### ***A. Background***

The trial court instructed the jury in accordance with CALCRIM Nos. 300 and 301 that the testimony of a single witness can prove any fact, except for the testimony of Gutierrez, if the jury found him to be an accomplice.<sup>8</sup> The jury was further instructed in accordance with CALCRIM No. 334 that it had to first decide whether Gutierrez was an accomplice before evaluating his testimony. If it determined that he was an accomplice, then it could not convict appellant of any crime based on Gutierrez statements alone. Corroborating evidence tending to connect appellant to the commission of the crime was required, although such evidence could be slight.<sup>9</sup>

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<sup>8</sup> Combined CALCRIM Nos. 300 and 301, as given, state: “Neither side is required to call all witnesses who may have information about the case or to produce all physical evidence that might be relevant. [¶] Except for the testimony of Louis Gutierrez, which requires supporting evidence if you find him to be an accomplice, the testimony of only one witness can prove any fact. Before you conclude that the testimony of one witness proves a fact, you should carefully review all the evidence.”

<sup>9</sup> CALCRIM No. 334, as given, provides: “Before you may consider the statement or testimony of Louis Gutierrez as evidence against the defendant, you must decide whether Louis Gutierrez was an accomplice to those crimes. A person is an accomplice if he or she is subject to prosecution for the identical crime charged against the defendant. Someone is subject to prosecution if he or she personally committed the crime or if: [¶] 1. He or she knew of the criminal purpose of the person who

At the close of the evidence, defense counsel requested that the trial court instruct the jury on accomplices as a matter of law in accordance with CALCRIM NO. 335.<sup>10</sup> The trial court declined to so instruct the jury, stating: “The accomplice

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committed the crime; AND [¶] 2. He or she intended to, and did in fact, aid, facilitate, promote, encourage, or instigate the commission of the crime or participate in a criminal conspiracy to commit the crime. [¶] The burden is on the defendant to prove that it is more likely than not that Louis Gutierrez was an accomplice. [¶] An accomplice does not need to be present when the crime is committed. On the other hand, a person is not an accomplice just because he or she is present at the scene of a crime, even if he or she knows that a crime will be committed or is being committed and does nothing to stop it. [¶] A person who lacks criminal intent but who pretends to join in a crime only to detect or prosecute those who commit that crime is not an accomplice. [¶] A person may be an accomplice even if he or she is not actually prosecuted for the crime. [¶] If you decide that Louis Gutierrez was not an accomplice, then supporting evidence is not required and you should evaluate his or her statement or testimony as you would that of any other witness. [¶] If you decide that Louis Gutierrez was an accomplice, then you may not convict the defendant of any crime based on his or her statement or testimony alone. You may use the statement or testimony of an accomplice to convict the defendant only if: [¶] 1. The accomplice’s statement or testimony is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice’s statement or testimony; AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crimes. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crimes, and it does not need to support every fact mentioned by the accomplice in the statement or about which the accomplice testified. On the other hand, it is not enough if the supporting evidence merely shows that a crime was committed or the circumstances of its commission. The supporting evidence must tend to connect the defendant to the commission of the crime. [¶] The evidence needed to support the statement or testimony of one accomplice cannot be provided by the statement or testimony of another accomplice. [¶] Any statement or testimony of an accomplice that tends to incriminate the defendant should be viewed with caution. You may not, however, arbitrarily disregard it. You should give that statement or testimony the weight you think it deserves after examining it with care and caution and in the light of all the other evidence.”

<sup>10</sup> CALCRIM No. 335 provides in pertinent part: “If the crime[s] of <insert charged crime[s]> (was/were) committed, then <insert name[s] of witness[es]> (was/were) [an] accomplice[s] to (that/those) crime[s]. [¶] You may not convict the defendant of <insert crime[s]> based on the (statement/ [or] testimony) of an

status of Mr. Gutierrez is a material issue of fact that the jury is going to have to assess. Granted, there are inconsistencies, but part of his explanation is that he did not intend to participate at any acts that were perceived to be participations where actions that resulted from fear or duress, and the jury will have to address that. And I have included instructions on accomplices.”

In closing argument, the prosecutor argued that Gutierrez was not an accomplice. She argued that there was no evidence that Gutierrez intended to, and did, aid, facilitate, promote, encourage, or instigate the commission of the crime or participate in a criminal conspiracy. Even if he bought the AK-47, it was not used in the conspiracy. Defense counsel argued that by Gutierrez’s own statement that he brought the AK-47 into appellant’s home, he was an accomplice.

### ***B. Contention***

Appellant contends that the trial court erred in instructing the jury that it was to determine whether Gutierrez was an accomplice, rather than instructing that he was an accomplice as a matter of law. He argues that Gutierrez by his “own account, . . . agreed to get some guns to do the shooting. He, by his actions, implicitly communicated that he would participate in the shooting.” The contention is without merit.

### ***C. Who is an accomplice***

An accomplice’s testimony is viewed with caution and suspicion because it comes from a tainted source and might have been given in the hope or expectation of

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accomplice alone. You may use the (statement/ [or] testimony) of an accomplice to convict the defendant only if: [¶] 1. The accomplice’s (statement/ [or] testimony) is supported by other evidence that you believe; [¶] 2. That supporting evidence is independent of the accomplice’s (statement/ [or] testimony); AND [¶] 3. That supporting evidence tends to connect the defendant to the commission of the crime[s]. [¶] Supporting evidence, however, may be slight. It does not need to be enough, by itself, to prove that the defendant is guilty of the charged crime, and it does not need to support every fact (mentioned by the accomplice in the statement/ [or] about which the witness testified).”

leniency. (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1023.) “A person arrested in incriminating circumstances has a strong incentive to shift blame or downplay his own role in comparison with that of others, in hopes of receiving a shorter sentence and leniency in exchange for cooperation.” (*Williamson v. United States* (1994) 512 U.S. 594, 607–608, (conc. opn. of Ginsburg, J.)) Consequently, a conviction cannot stand on the uncorroborated testimony of an accomplice. (*People v. Verlinde* (2002) 100 Cal.App.4th 1146, 1157; § 1111 [“A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense”].)

An accomplice is one who is liable to prosecution for the identical offense charged against the defendant. (*People v. Boyer* (2006) 38 Cal.4th 412, 467.) “In order to be chargeable with the identical offense, the witness must be considered a principal under section 31.” (*People v. Fauber* (1992) 2 Cal.4th 792, 833 (*Fauber*); *People v. Lewis* (2001) 26 Cal.4th 334, 368–369.) Section 31 provides that “[a]ll persons concerned in the commission of a crime . . . whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission . . . are principals in any crime so committed.” A person aids and abets in the commission of a crime if he or she “act[s] 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.” (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Coconspirators are treated as accomplices for the purpose of meeting the requirement that an accomplice’s testimony must be corroborated. (*People v. Garcia* (2000) 84 Cal.App.4th 316, 326.)

Whether a person is an accomplice is a question of fact for the jury, unless there is no dispute as to the facts or the inferences to be drawn from them. (*People v. Avila* (2006) 38 Cal.4th 491, 565.) If that issue is based on disputed facts, the jury must decide it. (See *Fauber, supra*, 2 Cal.4th at p. 834.)

***D. Gutierrez was not an accomplice as a matter of law***

To be an accomplice as a matter of law as an aider and abettor, there must be no dispute whether the person acted with knowledge of the criminal purpose, and with the intent or purpose, of committing, encouraging or facilitating commission of the offense. (*People v. Beeman, supra*, 35 Cal.3d at p. 560.) While appellant focuses on Gutierrez's testimony suggesting that he was an accomplice, he ignores other testimony, including Gutierrez's contradictory testimony, suggesting that he was not an accomplice. We must focus on this latter testimony.

Gutierrez's testimony was riddled with inconsistency. He testified that on the morning after the Ware shooting, he told police that he and the Barco family knew nothing about it. Months later, and only after ensconced in an acrimonious break-up with Inisha, and, according to her, after he threatened to lie and implicate appellant in the murder, did Gutierrez report appellant's involvement. While he admitted to police that he purchased an AK-47 for appellant, he also testified that Inisha, not he, purchased that weapon for \$300 or \$400. The AK-47 was taken back to Gutierrez's and Inisha's residence before the shooting, kept there until afterwards and was not used in the shooting.

Other evidence similarly demonstrates that there existed a question of fact as to whether Gutierrez was an accomplice. Gutierrez testified that appellant asked him to shoot at the Wares' house, and though he did not refuse to do so because he was intimidated by appellant, he never agreed to do so. According to Gutierrez, appellant offered him a few thousand dollars to participate in the shooting. The record fails to indicate that Gutierrez ever received any money from appellant for participating, giving rise to an inference that Gutierrez did not agree to participate. While Gutierrez testified that, at appellant's request, he brought the AK-47 to appellant's house and demonstrated how to load and unload it, which appellant argues establishes Gutierrez to be an accomplice as matter of law, appellant denied that this occurred raising a factual issue on this point.

On the occasion when appellant discussed his plan for retaliation and drew a map or diagram of Rashaun's house and block, mentioning the street, Gutierrez was seated next to appellant and testified that he only pretended to pay attention. Merely because Gutierrez was present when appellant was planning the murder, his knowledge of those plans was insufficient to make him an accomplice to the conspiracy and murder. (*People v. Luna* (1956) 140 Cal.App.2d 662, 664 [mere presence at the scene of the crime and failure to take steps to prevent it do not establish one as an aider and abettor].) Gutierrez told his best friend, Juan Avalos (Avalos), that appellant wanted him to buy a gun to retaliate against Johnny's attackers. Gutierrez seemed scared and nervous, and told Avalos he was not going to participate. He also told Preciado before the shootings that appellant wanted him to do something Gutierrez did not want to do. Gutierrez said he was afraid of appellant, that appellant was crazy and that appellant would be responsible if anything happened to Gutierrez.

In short, Gutierrez's inconsistent testimony and other evidence gave rise to two diametrically opposed inferences. One would make him an accomplice, while the other would not. Under these disputed facts, it was for the jury to determine Gutierrez's credibility and which was the truthful version. Credibility and factual determinations are within the exclusive province of the trier of fact. (*People v. Lee* (2011) 51 Cal.4th 620, 632.) Hence, the trial court correctly refused to make that determination and refused to instruct the jury that Gutierrez was an accomplice as a matter of law.

Relying upon language in *People v. Beeman* that an aider and abettor must act "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" (*People v. Beeman, supra*, 35 Cal.3d at p. 560, second italics added), appellant argues that there is no dispute that Gutierrez was an accomplice. The evidence is undisputed that he acted with knowledge of the criminal purpose of the perpetrator, as he admitted being present during the planning. "A *required* second element for an aider and abettor is itself phrased in the disjunctive; he is one who acts



‘with an intent *or* purpose either of committing, or of encouraging or facilitating commission of, the offense.’” Appellant asserts that while Gutierrez’s intent may be in dispute, “his *purpose* was clearly not,” as he admitted purchasing an AK-47, the only purpose of which was to facilitate the shooting. Consequently, both requirements to be an aider and abettor, (1) knowledge and (2) intent or purpose, were undisputed.

This argument fails for several reasons. First, the Supreme Court in *People v. Beeman* did not intimate that it intended the words “intent” and “purpose” to constitute separate and distinct requirements. Rather, those terms appear to have been used simply as alternative ways of describing a single requirement: that an aider and abettor must harbor a mental state aimed at achieving the charged offense.

Second, Gutierrez’s statement that he purchased an AK-47 was contradicted by his statement that he did not. To the extent that appellant contends that the “purpose” element is undisputed because Gutierrez purchased an AK-47, he is therefore wrong.

Third, appellant’s efforts to distinguish between “intent” and “purpose” parses that language too finely. Webster’s Third New International Dictionary (2002) page 1176 defines “intent” as “the design or *purpose* to commit any wrongful . . . act.” (*Italics added.*) In *Cel-Tech Communications, Inc. v. Los Angeles Cellular Telephone Co.* (1999) 20 Cal.4th 163, 173, footnote 5, in discussing the meaning of the word “purpose” in the Business and Professions Code section 17043, the Supreme Court stated that “[t]he Model Penal Code itself resolves the ambiguity by defining “intentionally” or “with intent” as meaning ‘purposely.’” Thus, intent and purpose can be used as synonyms.

## **II. Sufficiency of corroborating evidence**

### ***A. Contention***

Premised upon his conclusion that Gutierrez was an accomplice, appellant contends that there is insufficient corroborative evidence to support appellant’s conviction. We disagree. We conclude that whether Gutierrez was an accomplice as a matter of law, and the jury should have been so instructed, or, if the jury found him to

be an accomplice on conflicting evidence, there was sufficient evidence to corroborate his testimony and support the jury's guilty verdicts.

***B. Standard of review***

In reviewing a jury verdict to determine whether there is sufficient corroborating evidence to support the testimony of an accomplice as to the defendant's guilt, "the opinion of the reviewing court that those circumstances might also be reconciled with the innocence of appellant will not warrant interference with the determination of the jury. [Citations.] The nature and character of the corroborative evidence required by Penal Code, sections 1108 and 1111, have been stated in numerous recent decisions. If corroborating evidence creates more than a suspicion of guilt, it is sufficient even though it 'be slight and, when standing by itself, entitled to but little consideration.' Corroborating evidence need not establish the precise facts testified to by the witness whose testimony it supports." (*People v. Malone* (1947) 82 Cal.App.2d 54, 60–61.) "The corroborating evidence may be circumstantial or slight and entitled to little consideration when standing alone, so long as it tends to implicate the defendant by relating to an act that is an element of the crime. [Citations.] The independent evidence need not corroborate the accomplice as to every fact on which the accomplice testifies [citation] and need not establish every element of the charged offense [citation]. The corroborating evidence is sufficient if, without aid from accomplice testimony, it ""tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth."" [Citations.]" (*People v. Vu, supra*, 143 Cal.App.4th at p. 1022.)

***C. Adequate corroborating evidence***

Even if Gutierrez was an accomplice as a matter of law and the jury should have been so instructed, or the jury determined from conflicting evidence that he was an accomplice, his testimony was sufficiently corroborated to support the verdicts. The evidence, although slight, was sufficient to establish a connection between appellant and the charged offenses so as to corroborate Gutierrez's testimony. Appellant had a strong motive to shoot at the Wares, as his son had been brutally

beaten at their residence. Appellant was understandably consumed by his son's fight for life, speaking daily with the investigating detective, sometimes several times a day, over a period of two months, to determine whether the guilty party had been apprehended. Appellant was frustrated when told that the investigation was being suspended for lack of an identification witness. As a reminder, he kept a newspaper article on his son's assault in a closet in his master bedroom.

Also, Gutierrez testified that appellant planned to call the shooters near the time of the shooting. Within a matter of minutes before the shooting, a telephone call was made from appellant's home phone to the cellular phone carried by Guerrero when arrested. There was no evidence that anyone besides appellant contacted Guerrero.

Finally, appellant admitted writing down the address and directions to the Ware residence, corroborating Gutierrez's testimony that such information and a drawing or diagram of the Wares' residence with the street name and related information on it was prepared by appellant. While appellant claimed that he was simply writing the location because they had to recover Johnny's car there, the jury could reasonably infer that he was mapping out a plan for retaliation. It was for the jury to draw the inference it felt appropriate.

### **DISPOSITION**

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

\_\_\_\_\_, J.  
ASHMANN-GERST

We concur:

\_\_\_\_\_, Acting P. J.  
DOI TODD

\_\_\_\_\_, J.  
CHAVEZ