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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

SELVIN SALAZAR,

Defendant and Appellant.

B234313

(Los Angeles County
Super. Ct. No. Y077285)

APPEAL from a judgment of the Superior Court of Los Angeles County,
Eric C. Taylor, Judge. Affirmed.

Linn Davis, 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, Steven D. Matthews and
Herbert S. Tetef, Deputy Attorneys General, for Plaintiff and Respondent.

Selvin Salazar appeals the judgment entered following his conviction by jury of assault with a firearm and assault by means of force likely to produce great bodily injury. (Pen. Code, §§ 245, subds. (a)(2), (a)(1).)¹ The jury found both offenses had been committed for the benefit of a criminal street gang within the meaning of section 186.22, subdivision (b)(1).

Salazar contends the conviction of assault by means of force likely to produce great bodily injury must be set aside because it is a lesser offense necessarily included within assault with a firearm. We reject this contention and affirm the judgment.

FACTS AND PROCEDURAL BACKGROUND

On January 29, 2010, at approximately 10:00 p.m., Salazar, his brother Kevin Diaz, Joseph Luna, Hector Aguilar and other gang members were drinking in front of their apartment building on Osage Avenue in Lennox, California. When Raul Hermosillo and his girlfriend walked past the apartment building to go to the market, Luna made threatening statements and the other gang members practically surrounded Hermosillo and his girlfriend. Hermosillo previously had been a member of Salazar's gang. However, after Hermosillo was arrested in 2008, he was labeled a snitch and gang members with whom he previously had associated harassed him, beat him and on two occasions, stabbed him. Hermosillo grabbed his girlfriend and told the gang members, "I'm going to the store, stop fucking with me."

On their return from the market, Hermosillo saw Aguilar in front of the apartment building. Because Aguilar had never previously harassed Hermosillo, Hermosillo continued walking. However, Salazar, Diaz, and Luna emerged from behind a stairway and approached him. Luna struck Hermosillo in the back of the head. Salazar also swung at Hermosillo. Hermosillo fell to the ground in the middle of the street. While he was on the ground, Luna and Salazar punched and kicked him. Diaz called Hermosillo a bitch, lifted his shirt and displayed a pistol. Hermosillo testified Diaz was going to aim the gun at him but a truck drove between them, almost striking Diaz, and Diaz fired the

¹ Subsequent unspecified statutory references are to the Penal Code.

pistol at the truck. After Diaz fired the shot, Salazar, Diaz, and Luna ran to the rear of the apartment building.

Salazar and Diaz were charged with attempted murder of the driver of the truck in count 1 (§§ 664, 187, subd. (a)), shooting at an occupied motor vehicle in count 2 (§ 246), assault with a firearm on Hermosillo in count 3, and assault by means of force likely to produce great bodily injury on Hermosillo in count 4.

The prosecutor argued count 4 was based on Hermosillo's testimony that Salazar and Luna punched and kicked him while he was on the ground. Count 3, assault with a firearm, was based on Hermosillo's testimony that, while he was being beaten, Diaz approached and directly committed assault with a firearm, aided and abetted by Salazar. The prosecutor noted Salazar was responsible for Diaz's offense as an aider and abettor if Salazar knew Diaz's unlawful intent and promoted, encouraged or instigated the commission of the crime. The prosecutor argued the participants knew there was going to be an assault when Hermosillo returned from the market. Noting numerous gang members were involved in the attack, the prosecutor asserted: "So, in a sense, they all aid and abet each other."

The jury acquitted Salazar and Diaz of attempted murder and shooting at an occupied motor vehicle but convicted them of assault with a firearm on Hermosillo in count 3, and assault by means of force likely to produce great bodily injury on Hermosillo in count 4.

The trial court sentenced Salazar to 14 years in prison on count 3, consisting of the upper term of four years for assault with a firearm, plus a consecutive term of 10 years for the gang enhancement. Pursuant to section 654, the trial court stayed a concurrent term on count 4.

DISCUSSION

Salazar contends the conviction in count 4 must be set aside because it is based on the same conduct underlying count 3. He relies on the rule that prohibits simultaneous convictions for both a greater offense and a lesser offense necessarily included within it based on the same conduct. (*People v. Milward* (2011) 52 Cal.4th 580, 589.) He claims

the only conduct relied upon by the prosecutor to establish both offenses was Salazar's participation in the beating of Hermosillo, during the course of which Diaz produced a firearm. Salazar concludes that because both convictions were based on the same conduct, the conviction of the lesser offense, assault by means of force likely to produce great bodily injury, must be reversed.

The question whether a violation of section 245, subdivision (a)(1) is necessarily included within a violation of section 245, subdivision (a)(2) has not been resolved by our high court. In *People v. Milward*, *supra*, 52 Cal.4th at p. 586, the defendant asserted the lesser offense necessarily was included within the greater but *Milward* did not reach the issue because it concluded a violation of section 245, subdivision (a)(1) is a necessarily included within the crime of aggravated assault by a life prisoner in violation of section 4500.

However, even assuming for the sake of discussion that a violation of section 245, subdivision (a)(1) is included within a violation of section 245, subdivision (a)(2) when both offenses are committed by a single perpetrator, that rule would not apply here. Salazar's liability for assault by means of force likely to produce great bodily injury on Hermosillo was based on his personal conduct. His liability for the assault with a firearm was based on Diaz's conduct, for which Salazar vicariously was liable as an aider and abettor. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118 [aider and abettor liability is vicarious in that the aider and abettor is liable for another's actions as well as his own]; *People v. Prettyman* (1996) 14 Cal.4th 248, 259 [aider and abettor "shares the guilt of the actual perpetrator"]; § 31.)

Salazar claims the fact the trial court stayed the term imposed on count 4 supports his argument. However, "section 654 concerns only multiple punishment, not multiple convictions." (*People v. Correa* (2012) 54 Cal.4th 331, 336.) Thus, the stay of the punishment in count 4 has no bearing on the propriety of multiple convictions.

In sum, Salazar properly was convicted of assault with a firearm based on Diaz's conduct, which Salazar aided and abetted, and assault by means of force likely to produce great bodily injury based on his own conduct.

DISPOSITION

The judgment is affirmed.

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KLEIN, P. J.

We concur:

KITCHING, J.

ALDRICH, J.