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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

In re MARVIN S., a Person Coming Under  
the Juvenile Court Law.

B241281  
(Los Angeles County  
Super. Ct. No. FJ49756)

THE PEOPLE,

Plaintiff and Respondent,

v.

MARVIN S.,

Defendant and Appellant.

APPEAL from an order of the Superior Court of Los Angeles County. Robert J. Totten, Juvenile Court Referee. Reversed.

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Tanya Dellaca, 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 Analee J. Brodie, Deputy Attorneys General, for Plaintiff and Respondent.

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Minor Marvin S. appeals from the order declaring him a ward of the court and placing him home on probation based on a true finding that he aided and abetted the crime of misdemeanor vandalism. Because substantial evidence does not support aiding and abetting liability, we reverse.

### **FACTUAL AND PROCEDURAL BACKGROUND**

On February 10, 2012, the People filed a Welfare and Institutions Code section 602 petition alleging that Marvin had vandalized public property, the wall of a United States Post Office, in violation of Penal Code section 594, subdivision (a). The petition further alleged that Marvin had committed the crime for the benefit of a criminal street gang within the meaning of Penal Code section 186.22, subdivision (b)(1)(A).

A contested adjudication hearing produced the following evidence: On the morning of Tuesday, November 22, 2011, Jose Aguilar, while driving in his neighborhood, observed two boys, whom he identified as Marvin and Milton P., in an alley and then outside a United States Post Office one block away. A third boy was with them, but Aguilar could not identify him. Aguilar believed that Marvin and Milton knew he often had called the police to report acts of graffiti in the neighborhood, so he changed cars to follow them from the alley to the post office. Aguilar called the police. He reported that “they were painting letters with spray,” both in the alley and at the post office. Aguilar in his testimony, however, made clear that “the boy with the glasses,” Milton, was the only boy painting at both locations. Aguilar saw Marvin “standing there close by.” Aguilar did not see Marvin’s face while Milton was painting because Marvin “had his back” turned and was “just looking at [Milton].”

Los Angeles Police Department (LAPD) Officer Susan Garcia responded to Aguilar’s report of spray paint vandalism. She investigated the graffiti in both locations when the paint was still wet. She recognized the graffiti as that of the Drifters gang and also saw lines crossing out another gang’s graffiti. Officer Garcia found a can of silver spray paint, matching the color of the wet graffiti, in the gutter by the post office.

LAPD Officer Ramon Gullien looked for the suspects. He immediately saw Milton, wearing glasses and carrying a backpack. When he made contact with Milton, he

noticed Marvin peeking from behind a nearby wall and detained both minors. The officer found a pink spray paint tip in Milton's jacket and school notebooks in Milton's backpack covered with Drifters writing.

LAPD Officer Kenny Talbert testified as a gang expert that the Drifters gang members create fear and intimidation in the community by committing vandalism. He explained that sometimes one gang member will spray paint while another acts as a lookout "because they don't want to get caught." Based on field identification reports and his knowledge of the community, he testified that both Milton and Marvin were self-admitted members of the Drifters gang. The officer acknowledged that he had never seen Marvin engaged in criminal activity. He also knew that Marvin and Milton went to school together in the neighborhood.

The People argued that Marvin had aided and abetted Milton's vandalism by standing with Milton and had furthered the crime as a lookout by "watching out for any potential threats." The juvenile court found that Marvin was acting in concert with Milton because they traveled together from the alley to the post office and were detained near each other. Although acknowledging that Marvin did not actually spray paint either in the alley or at the post office, the court found aiding and abetting liability because "he is just there. He is there participating in the crime." The court agreed with the People that Marvin could have been a lookout, although he was "less effective" by looking at Milton spray painting rather than at the street. The court suggested that Marvin was not vigilant as a lookout because the boys were "confident that Drifters control this particular area, [so] they don't feel there is a risk from anyone." The court declared Marvin a ward of the court as described by Welfare and Institutions Code section 602 and placed him home on probation. It also found the Penal Code section 186.22, subdivision (b)(1)(A), gang enhancement true and raised the charge to a felony, setting the maximum term of confinement at four years.

## DISCUSSION

Marvin contends the evidence is not sufficient to establish that he aided and abetted the vandalism because his “role was limited to standing by and observing his companion [Milton] as [Milton] painted the wall.” We agree.

The court reviewing a claim of insufficient evidence must determine if the “record contains any substantial evidence tending to support the finding of the trier of fact . . . .” (*In re Roderick P.* (1972) 7 Cal.3d 801, 808.) Although evidence must be viewed in the light most favorable to the trier of fact’s finding, suspicion alone “is not a sufficient basis for an inference of fact.” (*Id.* at p. 809.)

Any “persons concerned in the commission of a crime” may be charged as principals in the crime. (Pen. Code, § 31.) Aiding and abetting requires both “knowledge of the unlawful purpose of the perpetrator” and the “intent or purpose of committing, facilitating or encouraging commission of the crime . . . .” (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164.) Further, the aider and abettor must commit an act that “in fact assists the achievement of the crime.” (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.)

Even if the defendant has knowledge of the perpetrator’s intent, “[m]ere presence at the scene of a crime . . . does not amount to aiding and abetting.” (*People v. Allen* (1985) 165 Cal.App.3d 616, 625.) Although an unexplained presence at the scene of a crime may suggest complicity, other facts and circumstances must support that the defendant intentionally aided and abetted the perpetrator’s acts. (*People v. Wilson* (1928) 93 Cal.App. 632, 636-637.) For example, an inference of aiding and abetting may be appropriate for “one who is present for the purpose of diverting suspicion, or to serve as a lookout . . . .” (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743-744.) Inferences based on factors such as “presence at the scene of the crime, companionship, and conduct before and after the offense” may be reasonable if they support that the accused in fact “aided the perpetrator by acts or encouraged him by words or gestures.” (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409, 411.) Without sufficient evidence of an encouraging act, however, “[m]embership in a gang cannot

serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting [under California law].” (*Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342, overruled on other grounds in *Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242, 1248.)

In this case, the juvenile court based its inference of aiding and abetting liability on Marvin’s presence during the crime and Milton’s detention by the police. Based on the evidence, the court could reasonably infer that Marvin had knowledge of the perpetrator’s criminal intent because he followed Milton to the post office after Milton had painted the wall in the alley. This act alone, however, is not substantial evidence of the second two elements of aiding and abetting liability—intent to aid and abet and conduct that in fact supports the act—and no other evidence supports those two elements.

Although Marvin’s presence during the crime may raise suspicion of his involvement, suspicion without behavior or words encouraging the act cannot establish that Marvin intended to aid and abet the vandalism. No evidence exists of any such behavior or words encouraging the act. The record is clear that Marvin did not paint either wall. He merely looked at the wall while Milton spray painted in the alley. He accompanied Milton to the post office, where again he watched Milton spray paint. Although conduct after the crime can support an inference of consciousness of guilt (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1095 [fleeing with perpetrator supported inference of shared criminal intent]), Marvin did not flee. Rather, the police found him behind a wall watching Milton’s detention. That evidence does not show a criminal intent. And neither Marvin’s companionship with Milton that morning, nor his membership in the same gang, can alone support an inference that Marvin intended his presence to assist the crime. (*Mitchell v. Prunty, supra*, 107 F.3d at p. 1342.)

The evidence is not only devoid of any behavior or words to suggest that Marvin intended to encourage Milton’s act, but also cannot support an inference that his conduct or his presence in fact facilitated the vandalism. According to the evidence, Marvin faced the walls while Milton spray painted at both locations. This evidence demonstrates that Marvin did not act as a lookout but simply watched his friend. Although the juvenile

court proposed that the boys could have thought their gang was so well known in the area that they did not need to be vigilant, this inference supports only the conclusion that Marvin did *not* act as a lookout. If Milton did not need a lookout, Marvin's passivity still would not constitute conduct aiding the crime. In addition, if Milton did not fear the community, he would not have needed Marvin to aid and abet the crime by adding fear and intimidation. This case is not like *In re Juan G.* (2003) 112 Cal.App.4th 1, 5, in which the minor's presence while his companion demanded money at knifepoint added to the victim's fear and intimidation, supporting and benefiting the perpetrator, and thus was sufficient evidence of aiding and abetting liability. Even resolving all factual inferences in favor of the court's finding, no evidence establishes that Marvin's mere presence at the post office helped enable the crime by adding to the community's intimidation. On the contrary, one witness was not too afraid to follow the boys and report the vandalism to the police. The witness actually saw three boys, indicating that any fear he had was no more increased by Marvin's presence.

Because the evidence is not sufficient to support the intent and conduct elements of aiding and abetting liability, the petition alleging that Marvin committed misdemeanor vandalism was improperly sustained.<sup>1</sup>

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<sup>1</sup> Marvin also contends the juvenile court erred by imposing a criminal street gang enhancement under Penal Code section 186.22, subdivision (b)(1)(A), and using the finding that the crime benefited a criminal street gang to treat the offense of misdemeanor vandalism as a felony. He also requests that the maximum period of confinement be stricken. Because we reverse the adjudication order on the ground that no substantial evidence supports the vandalism finding, we need not reach those issues.

**DISPOSITION**

The order is reversed.

NOT TO BE PUBLISHED.

ROTHSCHILD, J.

We concur:

MALLANO, P. J.

CHANEY, J.