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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

SHMAIL DEON RYALS,

Defendant and Appellant.

B337384

(Los Angeles County
Super. Ct. No. A970093)

APPEAL from an order of the Superior Court of Los Angeles County, Larry Paul Fidler, Judge. Affirmed.

Diane E. Berley, under appointment by the Court of Appeal, for Defendant and Appellant.

Rob Bonta, Attorney General, Charles C. Ragland, Chief Assistant Attorney General, Susan Sullivan Pithey, Assistant Attorney General, David E. Madeo and David A. Voet, Deputy Attorneys General, for Plaintiff and Respondent.

Shmail Deon Ryals challenges the trial court's order denying his petition for resentencing under Penal Code¹ section 1172.6 following an evidentiary hearing held pursuant to section 1172.6, subdivision (d)(3). The court denied Ryals's petition because it found the prosecution proved beyond a reasonable doubt that Ryals could still be found guilty under a felony murder theory as a non-shooter because he intended to kill, and also because he was a major participant in the attempted robbery who acted with reckless indifference to human life.

We conclude that substantial evidence supports the trial court's finding that Ryals could still be found guilty because he was a major participant in the attempted robbery who acted with reckless indifference to human life. We affirm the trial court's order.

FACTS AND PROCEDURAL HISTORY

A. *Evidence Presented at Trial*

At about 11:00 p.m. on June 1, 1988, Beverly Collins saw two Black men sitting in the driver's seat and the front passenger seat of her Chevrolet Caprice. The two men drove away. Collins saw a patrol car coming down the street, so she flagged it down and reported her car stolen.

At around 12:30 a.m., Glenda Harris was with her boyfriend Billie Preston in Preston's front yard.² Preston was

¹ All further statutory references are to the Penal Code.

² Harris testified that Preston was 6 feet 9 inches tall. She did not know how much he weighed, but he was a "big man."

standing on the sidewalk, and Harris was sitting on the front steps of the house. A Chevrolet (Collins's stolen car) rounded the corner. The driver slammed on the brakes and abruptly parked the car in the middle of the street. Ryals and codefendant Melvin Sloan exited the vehicle and approached Preston.³ Sloan declared that they were police, and Ryals confirmed, "Yes, we are the police." Preston began walking with Ryals and Sloan on either side of him. Harris observed that Preston was surrounded and had no way to leave. Preston did not yell or argue with Ryals or Sloan. Ryals and Sloan stepped aside and stood a few feet away from Preston. Although they had moved a few feet away from him, Harris still perceived Preston as surrounded and unable to leave. Tony Richmond, who was holding a gun, got out of the front passenger seat of the car and said, "Put your hands up."⁴ Richmond leaned over the Chevrolet's roof and fired a shot at Preston. Preston stood still, and Richmond fired a second shot at him. Preston fell to the ground. Ryals and Sloan ran back to the car, and Sloan drove the three men away from the murder scene at high speed. Harris went to Preston. She saw two blood stains on his shirt in the area of his stomach. Preston subsequently died from a gunshot wound to the abdomen.

At around 12:30 a.m. or 12:45 a.m., Joseph Abdullah was driving a Mustang. Abdullah's girlfriend Debbie Fox was sitting in the front passenger seat. Abdullah stopped at a four-way stop sign. As he proceeded through the intersection, Abdullah noticed a brown Chevrolet on the cross street quickly approaching him, so he accelerated to clear the intersection. The Chevrolet went

³ Harris identified Sloan at trial.

⁴ Richmond was not tried with Ryals and Sloan.

through the four-way stop without stopping and skidded around the turn to follow Abdullah's Mustang. The Chevrolet had its high beam lights on. Abdullah thought the Chevrolet was a police car, so he pulled over to the side of the road.

The Chevrolet pulled up alongside the Mustang. All four of the Chevrolet's windows were rolled down and there were three men inside. Abdullah later identified Richmond as sitting in the front passenger seat, and Ryals as sitting in the back seat. Ryals said "‘Crips, Crips, we are Crips,’" and flashed gang signs. One of the men in the Chevrolet said, "‘Die white boy.’" Abdullah realized that the Chevrolet was not a police car, and drove away.

Abdullah made a right turn and the Chevrolet followed him. The Chevrolet pursued the Mustang at high speed, turning whenever the Mustang turned. Richmond leaned out the window and fired a shot at the Mustang that pierced the gas tank. Abdullah heard the gunshot and felt it hit the Mustang, so he drove faster. Abdullah made multiple turns, but the Chevrolet continued to pursue the Mustang. Abdullah made a wide turn and the back of the Mustang slid out. The Chevrolet turned with the Mustang and hit the back of it. Abdullah ran two stop lights to escape from the Chevrolet, but the Chevrolet followed the Mustang through the stop lights. At that point, Abdullah was driving at a speed of 100 miles per hour with the Mustang right behind him. The chase continued until Abdullah spotted a police car traveling in the opposite direction. He flashed the Mustang's lights and blew the horn to get the officer's attention.

At about 12:35 p.m., Santa Monica Police Department Sergeant Barry Barcroft was in his patrol car when he observed a white Mustang and a brown Chevrolet traveling at about 80 miles per hour in the opposite direction. The sergeant made a U-

turn and pursued the two cars. The Mustang went straight through a red light, and the Chevrolet made a right turn. The sergeant pursued the Chevrolet, but lost sight of it for about ten seconds. When Sergeant Barcroft regained sight of the Chevrolet it was traveling at a speed of about 25 to 30 miles per hour. The Chevrolet then accelerated to 80 miles per hour. The sergeant activated his patrol lights and pulled the Chevrolet over. Sloan, who was the driver and the only occupant of the Chevrolet at that point, exited the vehicle. Sergeant Barcroft handcuffed Sloan and walked him over to the Chevrolet. The sergeant observed that the Chevrolet's ignition had been punched out so that the car could be started using a screwdriver.

Sergeant Barcroft contacted Officer Richard Nickel, who was on patrol nearby. Officer Nickel spotted Ryals and Richmond, who matched the descriptions the sergeant had given him, on foot. The officer detained both men and called for backup. Officer Nickel discovered gloves and a screwdriver in Richmond's pocket.

Officers searched the Chevrolet and discovered a live nine-millimeter round on the front seat. Officers also discovered a clip containing live ammunition on the front passenger floorboard. Officers recovered a TEC-9 semi-automatic weapon "similar to an Uzi" with no clip or rounds approximately 50 feet from the spot where Ryals and Richmond were detained. Also recovered at the scene of Preston's murder were two nine-millimeter bullet casings. A firearms identification expert compared the two bullet casings to bullet casings he test-fired from the TEC-9. The expert concluded that the casings found at the murder scene were fired by the TEC-9.

Detective Neal B. May interviewed Richmond after Richmond was arrested. Richmond confessed that he shot Preston and that he discarded the weapon in the bushes later. Richmond told Detective May that he went into Shoreline Crips territory in Venice “to do a jack,” i.e., a robbery. Richmond said he wanted to get “Dayton rims” and money.

B. *Trial, Sentencing, and Direct Appeal*

In 1989, Ryals was prosecuted for first degree murder as a direct aider and abettor to murder who acted with premeditation and deliberation, and under a felony murder theory of liability. The jury found Ryals guilty of one count of first degree murder (§ 187, subd. (a), count 1) and two counts of attempted murder (§§ 187, subd. (a) & 664, counts 2 & 3). The trial court sentenced Ryals to 26 years to life in state prison. On appeal, the court affirmed the judgment.

C. *Resentencing Petition*

In 2019, Ryals filed a petition for vacatur of his murder conviction and resentencing pursuant to former section 1170.95 (now § 1172.6).⁵ The People opposed the petition on the basis that Ryals could not show that he could not be convicted of murder under a still valid theory. Based on the prior appellate opinion, Ryals could still be convicted of first degree murder as a direct aider and abettor who acted with premeditation and deliberation or under a still-valid felony murder theory.

⁵ Ryals did not petition to have his two attempted murder convictions vacated.

In 2022, the prosecution conceded to issuance of an order to show cause to hold an evidentiary hearing pursuant to section 1172.6, subdivision (d)(3).

D. ***Evidentiary Hearing***

The trial court issued the order to show cause and conducted an evidentiary hearing on February 2, and February 9, 2024. Sloan, Richmond, and Ryals each testified.

1. **Testimony**

a. *Sloan*

Sloan testified that, at the time of the murder, he and Richmond were both members of the Avalon gang and had been friends for 16 years. Sloan met Ryals for the first time on the day of the murder.

At around 11:00 p.m. that day, Richmond picked Sloan up in a stolen vehicle. Sloan drove the car and Richmond sat in the passenger seat. Sloan realized that the car was stolen when he began driving it and noticed that there was no ignition. He did not say anything to Richmond about the car being stolen. Sloan and Richmond drove around for several hours. Then Richmond said he wanted to visit an old friend and they went to pick up Ryals.

Sloan was armed with a loaded .44 caliber firearm. He was carrying the gun with the intent to hurt someone, but he did not have anyone in particular in mind. Sloan did not see Ryals with a gun at any point, and he only knew that Richmond had a gun

after Richmond shot Preston. They did not have a plan that day. They were just going to get some alcohol and “mess around.”

Sloan realized that, because he was driving a stolen car, he had a “golden opportunity” to commit a robbery and not get caught. Sloan did not say anything to Richmond or Ryals about it, though. Sloan saw a “big guy” (Preston) outside a house alone and targeted him as a victim. Sloan stopped the car and yelled “Freeze. Police.” Sloan drew his gun and started walking toward Preston, who was about 20 feet away. Sloan was not paying attention to what Ryals was doing. When Sloan was about 11 feet away from Preston, he realized that Preston “didn’t have anything, that he was under the influence just as much as I was under the influence.” Sloan turned around to leave.

Sloan noticed Ryals at that point. Ryals was standing closer to the Chevrolet than to Preston, and walking back in the direction of the car. Preston was behind Sloan, yelling. Someone said to Sloan, “I need for you to step back.” Sloan turned around and Preston was a little closer to him. Richmond said, “You better freeze.” Sloan heard a gunshot. Sloan did not know that Richmond fired any shots from the car or that Preston had been shot. He was focused on getting into the car and driving away.

Sloan drove past a police car and everyone panicked. Richmond and Ryals got out of the Chevrolet and Sloan kept on driving. The officer pulled Sloan over for drunk driving. While Sloan was detained, the officer received a call regarding a drive-by shooting. The officer put Sloan in the back seat of the squad car. The officer then showed Sloan a gun clip that he found in the Chevrolet and asked where the gun was. Sloan said he had no idea what the officer was talking about. Sloan did not learn

that anyone had been killed until the next day when he was charged with murder.

b. *Richmond*

Richmond testified that he had known Ryals for about two years before the day of the murder. They belonged to different gangs. Richmond and Sloan were both Avalon gang members. Richmond stole the Chevrolet at around 11:00 p.m. or 12:00 a.m. on the night of the murder. He had no plans to do anything other than drive around. Richmond picked up Sloan and let Sloan drive. Richmond directed Sloan to drive to Ryals's house to get Ryals. The three men talked about committing robberies, but they did not have a plan. They were just driving around. At some point, Sloan stopped the car, and Sloan and Ryals got out. Richmond stayed in the car. Richmond was armed with a TEC-9 semi-automatic weapon. Richmond saw Sloan and Ryals approaching a man (Preston) and a woman who were sitting outside. Preston walked toward the street talking loudly. When Preston neared the car, Richmond got out and said, "What's up?" Preston responded, "What's up?" Preston seemed angry. Richmond did not know where Sloan and Ryals were at that point. Richmond fired two shots and hit Preston. Richmond, Sloan, and Ryals got into the car and drove away. Sloan was driving very fast and turning corners. They ended up behind a Mustang, which slowed them down. Richmond shot at the Mustang to get the driver to move out of the way. Ryals told Sloan and Richmond that they had passed a police car. Sloan turned right and Richmond and Ryals jumped out of the car to try to escape. They were caught and arrested.

c. *Ryals*

Ryals testified that he had not met Sloan prior to the day of the murder, though he had known Richmond for four to five years. Ryals did not know if Richmond had ever committed a crime. Ryals and Richmond were both gang members, but they belonged to different gangs.

On the day of the murder Richmond and Sloan approached Ryals in a Chevrolet. Ryals asked them for a ride to his girlfriend's house. Sloan and Richmond were planning to steal cars. Ryals said if they wanted some "Davin rims," they could find some on the block where his girlfriend lived.

Ryals did not know the Chevrolet was stolen until an officer asked what was in Richmond's back pocket and Richmond said he had a screwdriver. Ryals was in the back seat while Sloan was driving, so he did not notice that the Chevrolet's ignition had been punched out. Ryals saw a firearm on Richmond's lap when they stopped at a liquor store on the way to Ryals's girlfriend's house. Ryals described the firearm as an "Uzi-type gun." He did not know what kind it was. They went to Ryals's girlfriend's house, but did not knock on the door because all the lights were off. As they continued down the street, Ryals pointed out three cars that they could steal. They pulled up next to one car and Richmond tried to open the door handle, but the alarm went off, so they drove away.

Sloan turned a corner and stopped the Chevrolet in the middle of the street. Sloan got out of the car without saying anything. Ryals did not know why Sloan got out, but he followed Sloan about a minute later. Ryals did not get out of the car to

help Sloan with a robbery, but if he had known Sloan planned to commit a robbery, he would have helped. Sloan walked to the sidewalk where a man (Preston) was standing, and Ryals followed him. Sloan said “Police,” and Ryals said, “Yeah, police.” Ryals was a little drunk. He did not know what Sloan was doing, he was just following Sloan. Sloan and Ryals surrounded Preston. Preston made a movement and “out of nowhere Tony Richmond shot him.” Richmond shot twice and Preston dropped to the ground. As soon as Preston fell, Ryals ran. Ryals testified that he had not stepped away to give Richmond a clear shot at Preston. Ryals denied knowing that Richmond was the shooter until Ryals ran back to the car and saw Richmond leaning on the window handling the gun. Ryals got into the back seat and Sloan drove them away from the scene. Sloan, Richmond, and Ryals did not talk as they were driving away.

At the next intersection, Sloan sideswiped a Mustang. Richmond said to the driver either “‘Die white boy[,]’” or “‘You’re a dead white boy.’” Richmond fired the Uzi at the Mustang. Ryals said “‘Crip’” right after Richmond fired the shot. Ryals did not know that Richmond was going to fire the gun before it happened. Ryals did not know why he said “‘Crip.’” He was drunk and it was a stupid thing to do. They followed the Mustang. They passed a police car going in the opposite direction. The officer made a U-turn and pursued them. Sloan made several turns to lose the police car. Ryals and Richmond jumped out of the car in an attempt to escape. They hid, but officers found and arrested them.

Ryals never saw Sloan with a gun.

2. Arguments

Defense counsel argued that if the trial court found Ryals credible, the court must grant the petition for resentencing. If the court did not find, beyond a reasonable doubt, that Ryals either aided and abetted with intent to kill or that he was a major participant who acted with reckless indifference to human life, then Ryals must be re-sentenced.

The People argued that Ryals's testimony was not credible. It defied common sense that Ryals, Sloan, and Richmond were planning to commit a robbery but did not communicate about what they were doing when they targeted Preston. It was also unreasonable to conclude that Ryals and Sloan approached a man of Preston's size not knowing that they had Richmond, who was in the car ready to shoot, as back-up. Ryals and Sloan's act of stepping back to allow Richmond a clear shot at Preston demonstrated that Ryals acted with premeditation and deliberation to aid and abet a murder. Even if the fact finder was generous, the facts showed that Ryals aided and abetted an attempted robbery as a major participant who acted with reckless indifference to human life. He was at the scene in a position to intervene, but instead stepped back to give Richmond a clear shot.

E. *Trial Court's Written Ruling*

In a minute order dated March 15, 2024, the trial court denied Ryals's petition. The court found not credible the evidentiary hearing testimony of Ryals, Sloan, and Richmond. In

particular, the court did not believe that Ryals was “just there, not involved in what was happening.” Ryals told Preston that he and Sloan were police, and both Ryals and Sloan stepped back to give Richmond a clear shot at Preston. The trial court found not credible Ryals’s testimony that he did not know anybody was armed until after he saw Richmond with a gun. The TEC-9 is a large “Uzi-like weapon” that is not easily concealed. Sloan testified that he was armed with a gun and intended to “hurt somebody.” Sloan’s testimony that he was unaware of what Ryals was doing when they stepped back from Preston in unison was not believable. Their actions of posing as police officers and then stepping back to give Richmond a clear shot at Preston evidenced planning. The court found beyond a reasonable doubt that Ryals planned to commit a robbery with Sloan and Richmond, and that Ryals aided and abetted the others with the intent to kill.

The court further found that Ryals was a major participant who acted with reckless indifference to human life, and that he could still be convicted as a non-shooter participant in the robbery under the current law. The court found that Ryals was involved in the planning of the attempted robbery and would have been aware of the TEC-9 and Sloan’s firearm before the shooting, even if Ryals did not supply a weapon. Ryals had to be aware of the dangers of using a firearm. Although there was no evidence that Ryals was aware that Richmond had a violent past, Ryals was present and facilitated by giving Richmond a clear line of sight to shoot Preston. Ryals could have prevented the murder, but did not. At the scene of the second shooting Ryals threw gang signs while someone in the car yelled, “‘Die white boy.’”

DISCUSSION

A. *Legal Principles*

Section 1172.6, subdivision (a) permits a defendant convicted of murder to file a petition in the sentencing court to seek vacatur of their conviction if the conviction rests on “the natural and probable consequences doctrine or other theory under which malice is imputed to a person based solely on that person’s participation in a crime.”

Upon receipt of a facially sufficient petition, the trial court will appoint counsel, if requested. (*People v. Lewis* (2021) 11 Cal.5th 952, 967; § 1172.6, subd. (b)(3).) “If the petitioner makes a prima facie showing that the petitioner is entitled to relief, the court shall issue an order to show cause,” and set the matter for a hearing (§ 1172.6, subds. (c) and (d)(1) & (3).)

“At the hearing . . . the burden of proof shall be on the prosecution to prove, beyond a reasonable doubt, that the petitioner is guilty of murder . . . under California law as amended by the changes to [s]ection 188 or 189 made effective January 1, 2019. . . . The prosecutor and the petitioner may also offer new or additional evidence to meet their respective burdens. . . . If the prosecution fails to sustain its burden of proof, the prior conviction, and any allegations and enhancements attached to the conviction, shall be vacated and the petitioner shall be resentenced on the remaining charges.” (§ 1172.6, subd. (d)(3).)

Under section 189 as amended on January 1, 2019, “A participant in the perpetration or attempted perpetration of a

felony listed in subdivision (a) [(including robbery)] in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of [s]ection 190.2.” (§ 189, subd. (e).)

The trial court acts as the finder of fact when determining whether the prosecution has met its burden beyond a reasonable doubt. (*People v. Clements* (2022) 75 Cal.App.5th 276, 296–297; see *People v. Gentile* (2020) 10 Cal.5th 830, 855 [former “section 1170.95 requires the superior court to determine on an individualized basis, after considering any new or additional evidence offered by the parties, whether the defendant is entitled to relief”], superseded by statute on another ground as stated in *People v. Birdsall* (2022) 77 Cal.App.5th 859, 868.)

“Where the trial court’s decision on review is predominantly a question of fact, the appellate court reviews the record for substantial evidence. ([*People v. Sifuentes* (2022) 83 Cal.App.5th 217,] 233, citing *People v. Perez* (2018) 4 Cal.5th 1055, 1066.)” (*People v. Underwood* (2024) 99 Cal.App.5th 303, 314.) “In reviewing the trial court’s findings for substantial evidence, we apply well-settled principles. ‘We “‘examine 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 that would support a rational trier of fact in finding [the necessary

fact] beyond a reasonable doubt.’” [Citation.] Our job on review is different from the trial judge’s job in deciding the petition. While the trial judge must review all the relevant evidence, evaluate and resolve contradictions, and make determinations as to credibility, all under the reasonable doubt standard, our job is to determine whether there is any substantial evidence, contradicted or uncontradicted, to support a rational fact finder’s findings beyond a reasonable doubt.’ [Citations.]” (*People v. Oliver* (2023) 90 Cal.App.5th 466, 480.)

B. *Analysis*

The trial court ruled that Ryals could still be found guilty under a felony murder theory as a non-shooter participant in the robbery on two bases: (1) he acted with intent to kill (§ 189, subd. (e)(2)); and (2) he was a major participant who acted with reckless indifference to human life (§ 189, subd. (e)(3)).⁶ Ryals contests both findings. We conclude that substantial evidence supports the trial court’s ruling that Ryals was guilty of felony murder as a major participant in the attempted robbery who acted with reckless indifference to human life pursuant to section 189, subdivision (e)(3). (See *People v. Underwood, supra*, 99 Cal.App.5th at p. 314 [trial court’s factual findings supporting

⁶ The People’s assertion that the trial court denied Ryals’s petition because it found that Ryals directly aided and abetted Preston’s murder misreads the trial court’s ruling. The trial court stated, “The prosecution has proved beyond a reasonable doubt that Ryals, Sloan and Richmond were three gang members who planned to commit a robbery and that Ryals aided and abetted the others with the specific intent to kill.”

felony murder conviction under section 1172.6, subd. (d)(3) are reviewed for substantial evidence].)

- 1. Substantial Evidence Supports the Trial Court's Finding that Ryals Participated in an Attempted Robbery in Which Preston was Murdered**

Ryals contends that he cannot be convicted of felony murder under the current law because there was no underlying crime in this case. As the trial court instructed the jury, the underlying crime in this case was attempted robbery. “Robbery is defined as ‘the felonious taking of personal property in the possession of another, from his person or immediate presence, and against his will, accomplished by means of force or fear.’ (§ 211.) An attempted robbery consists of two elements: (1) the specific intent to rob; and (2) a direct, unequivocal, but ineffectual, overt act towards the commission of the intended robbery. (*People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.)” (*People v. Burgess* (2023) 88 Cal.App.5th 592, 603–604.) There was substantial evidence that Ryals intended to rob Preston, and that Ryals committed overt acts toward commission of that intended robbery.

The evidence showed that Ryals intended to commit robbery. Ryals, Sloan, and Richmond admitted that they intended to commit robbery, and Ryals admitted that he discussed robbery with the other two men: At trial, evidence was presented that after his arrest Richmond told an officer he was in the area to commit robbery and that he wanted to steal Davin rims or money. At the evidentiary hearing, Ryals testified that he directed Sloan to drive to an area where he knew they could

find Davin rims and then pointed out three cars that they could steal. They tried the door of one car, but were deterred when the car's alarm went off. Sloan testified at the evidentiary hearing that he intended to rob Preston specifically. Although Sloan stated that he did not communicate to Ryals and Richmond his plan to rob Preston, the trial court did not credit this testimony. The court could reasonably infer that, given the group's ongoing conversations, canvassing, and thwarted attempt at robbery, Ryals did, in fact, share his plan to rob Preston with Ryals and Richmond and, knowing Sloan's plan, Ryals and Richmond intended to aid and abet Sloan in the attempted robbery.

There was ample evidence from which a fact finder could conclude that Ryals took direct, unequivocal steps toward robbing Preston. Ryals exited the car with Sloan, who approached Preston with his firearm drawn. As the trial court found, Ryals's testimony that he never saw Sloan with a gun is not believable in light of the fact that the gun was drawn and the two men were only feet away from each other. Sloan announced to Preston that they were the police, and Ryals helped to ensure Preston's compliance by confirming to Preston that he and Sloan were, in fact, police officers. Ryals then assisted Sloan in shepherding Preston closer to the Chevrolet, where Richmond was armed and waiting, by walking closely next to Preston on Preston's other side. When, for whatever reason, Ryals and Sloan decided to abandon the attempt, the trial court could reasonably infer that the decision was communicated between all three men, as according to Harris's testimony, their movements appeared coordinated. Richmond yelled for Preston to "freeze" in the parlance of police, continuing the ruse that the three men were law enforcement officers, and Ryals and Sloan stepped away from

Preston in unison leaving Richmond with a clean line of sight, which he immediately used to shoot and kill Preston.

The foregoing facts are substantial evidence that Ryals intended to commit a robbery and facilitated the attempted robbery with his own overt acts.⁷

2. Substantial Evidence Supports the Finding that Ryals Was a Major Participant in the Attempted Robbery

In determining whether the defendant was a major participant in the underlying felony, “the ultimate question [is] whether the defendant’s participation ‘in criminal activities known to carry a grave risk of death’ [citation] was sufficiently significant to be considered ‘major.’ [Citations.]” (*People v. Banks* (2015) 61 Cal.4th 788, 803 (*Banks*).) To do so, we consider multiple factors (which we refer to as the *Banks* factors), including: “What role did the defendant have in planning the criminal enterprise that led to one or more deaths? What role did the defendant have in supplying or using lethal weapons? What

⁷ Ryals argues that the court erred by ignoring the “undisputed evidence” that Ryals consumed a 40-ounce Old English 800 shortly before the shooting, and thus could not have formed the intent to kill. It is unclear whether Ryals also contends such evidence prevented him from forming an intent to commit a robbery. Regardless, the evidence to which Ryals refers is his own testimony at the evidentiary hearing. The trial court did not credit Ryals’s testimony, and we do not re-weigh the credibility of witnesses on appeal. (See *People v. Oliver, supra*, 90 Cal.App.5th at p. 480 [trial court evaluates credibility, appellate court reviews for substantial evidence].)

awareness did the defendant have of particular dangers posed by the nature of the crime, weapons used, or past experience or conduct of the other participants? Was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death? What did the defendant do after lethal force was used?” (*Ibid.*, fn. omitted.) “No one of these considerations is necessary, nor is any one of them necessarily sufficient.” (*Ibid.*)

With respect to the first *Banks* factor—Ryals’s role in planning the offenses—there is no evidence that Ryals spearheaded the plan to rob Preston. However, Ryals, Sloan, and Richmond were all in the stolen Chevrolet together and had been discussing robbery. It is reasonable to infer that they conferred about how to handle robbing a lone victim before they encountered Preston. Their actions confirm such an inference. They executed the attempted robbery and the shooting in a highly coordinated manner that suggested all three men were involved in the planning. Ryals accompanied Sloan when he initiated contact with Preston. Together with the Sloan, Ryals told Preston they were police, perpetuating the falsehood that they were officers in order to lead Preston closer to the Chevrolet with minimal resistance. Ryals moved in a deliberate fashion, flanking Preston on one side while Sloan hemmed Preston in on the other side. Ryals then stepped back from Preston simultaneously with Sloan. Watching their movements, Harris found their timing significant and sinister. It is highly improbable that it was a coincidence that Richmond shot and killed Preston immediately after Ryals and Sloan stepped away

from him in unison. Ryals's role in the attempted robbery was significant and weighs against him.

As to the second *Banks* factor, there was no evidence that Ryals provided Sloan and Richmond with firearms, but the evidence demonstrates that he knew both men were armed and what type of weapon each was carrying. At the evidentiary hearing Ryals testified that he saw a gun that looked like an Uzi in Richmond's lap when they stopped at a liquor store before they committed the attempted robbery. Although Ryals said he never saw Sloan with a gun, the trial court found him not credible. Sloan testified that he approached Preston while holding his .44 caliber firearm, and that he drew the gun just after identifying himself and Ryals to Preston as the police. It is implausible that Ryals, who was mere feet away and confirmed they were police right after Sloan drew his gun, was unaware that Sloan was armed with a firearm. This factor also weighs against Ryals.

Regarding the third *Banks* factor, there was no evidence presented that Ryals was aware that either Sloan or Richmond had a violent history, but the evidence indicates that he knew Richmond would shoot Preston. Undoubtedly, Ryals understood that being shot would pose serious danger to Preston's life.

As to the fourth *Banks* factor—was the defendant present at the scene of the killing, in a position to facilitate or prevent the actual murder, and did his or her own actions or inaction play a particular role in the death?—the answer is a resounding “yes.” Ryals was helping Sloan to limit Preston's ability to escape, both by pretending to be law enforcement and by standing right next to Preston with Ryals on Preston's other side. Ryals did not have to step away from Preston to give Richmond a clear line of sight,

but he did. He made no effort to prevent the shooting, but instead his conduct facilitated it.

Regarding the fifth *Banks* factor—Ryals’s actions after the force was used—Ryals knew that Preston had been shot, but he did nothing to assist him. Ryals fled the scene in the stolen Chevrolet with Sloan and Richmond, and only minutes later, participated in the attack on Abdullah.

Substantial evidence supports the trial court’s finding that Ryals was a major participant in the attempted robbery.

3. Substantial Evidence Supports the Finding that Ryals Acted with Reckless Indifference to Human Life

“Reckless indifference to human life has a subjective and an objective element. [Citation.] As to the subjective element, ‘[t]he defendant must be aware of and willingly involved in the violent manner in which the particular offense is committed,’ and he or she must consciously disregard ‘the significant risk of death his or her actions create.’ [Citations.] As to the objective element, ‘ “[t]he risk [of death] must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him [or her], its disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor’s situation.” ’ [Citations.] ‘Awareness of no more than the foreseeable risk of death inherent in any [violent felony] is insufficient’ to establish reckless indifference to human life; ‘only knowingly creating a “grave risk of death” ’ satisfies the statutory requirement.” (*In re Scoggins* (2020) 9 Cal.5th 667, 677

(*Scoggins*.) To determine whether defendant had the requisite mental state, “[w]e analyze the totality of the circumstances” in a manner that largely overlaps with our major participant discussion. (*Id.* at pp. 676–677.) As our Supreme Court has explained, “[a]lthough we state these two requirements separately, they often overlap,’ ” “for the greater the defendant’s participation in the felony murder, the more likely that he [or she] acted with reckless indifference to human life.’ ” (*People v. Clark* (2016) 63 Cal.4th 522, 615 (*Clark*)).

“In *Clark, supra*, 63 Cal.4th at pages 618 through 622, the California Supreme Court established a five-factor test for whether a defendant acted with reckless indifference to human life. . . . [N]o one factor is necessary, nor is any necessarily sufficient. The first factor is the defendant’s knowledge of weapons and use and number of weapons. (*Id.* at p. 618.) ‘The mere fact of a defendant’s awareness that a gun will be used in the felony is not sufficient to establish reckless indifference to human life.’ (*Ibid.*) However, it may be ‘significant’ if a defendant personally uses a weapon during the crime. (*Ibid.*) The second factor is whether the defendant was physically present at the crime scene and whether he or she had opportunities to limit the crime or aid the victim(s). (*Id.* at p. 619.) A defendant’s presence may be particularly significant where ‘the murder is a culmination or a foreseeable result of several intermediate steps, or where the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force.’ (*Ibid.*) The third factor is the duration of the felony; crimes of longer duration present greater risk of violence and therefore evince more reckless indifference. (*Id.* at p. 620.) ‘Where a victim is held at gunpoint,

kidnapped, or otherwise restrained in the presence of perpetrators for prolonged periods, “there is a greater window of opportunity for violence” [citation], possibly culminating in murder.’ (*Ibid.*) The fourth factor is the defendant’s knowledge of his or her coparticipants’ likelihood of killing. (*Id.* at p. 621.) A defendant who knows a coparticipant previously has used lethal force is more culpable than one unaware of a coparticipant’s propensity for violence. (*Ibid.*) The fifth factor is whether the defendant made any efforts to minimize the risk of violence. (*Ibid.*) Such efforts may include planning the crime to occur at a time or location where bystanders are unlikely to be present, or using unloaded or minimally loaded firearms. (See *id.* at pp. 621–622.)” (*People v. Henley* (2022) 85 Cal.App.5th 1003, 1015–1016.)

We have already found that Ryals was a major participant in the attempted robbery. This alone is a factor that weighs heavily against him. (*Clark, supra*, 63 Cal.4th at p. 615 [“‘the greater the defendant’s participation in the felony murder, the more likely that he acted with reckless indifference to human life’ ”].)

With respect to the first factor—knowledge of weapons—there is no evidence that Ryals himself was armed or that he procured the firearms used in the attempted robbery and murder. However, as we have discussed, substantial evidence supports that Ryals was aware that both Sloan and Richmond were armed. Ryals’s actions evince that Ryals knew the TEC-9 was loaded, and that, at the very least, Ryals knew Richmond intended to shoot Preston when Ryals and Sloan backed away. When considered in the context of the wide spectrum of knowledge and involvement with deadly weapons, Ryals’s actions place him

closer to the defendant who supplies the weapons, loads them, or wields them himself than to the defendant who has no knowledge of the weapons involved. There is strong circumstantial evidence that Ryals knew Richmond would shoot Preston, and that Ryals facilitated that shooting by helping to surround Preston, lure him toward Richmond on false pretenses, and then move away from Preston to give Richmond a clear shot.

Regarding the second factor, Ryals was present on the scene. Our Supreme Court has counseled that “ ‘[p]roximity to the murder and the events leading up to it may be particularly significant where . . . the participant who personally commits the murder exhibits behavior tending to suggest a willingness to use lethal force. In such cases, “the defendant’s presence allows him to observe his cohorts so that it is fair to conclude that he shared in his actions and mental state. . . . [Moreover,] the defendant’s presence gives him an opportunity to act as a restraining influence on murderous cohorts. If the defendant fails to act as a restraining influence, then the defendant is arguably more at fault for the resulting murders.”’ (*Clark, supra*, 63 Cal.4th at p. 619.)” (*Scoggins, supra*, 9 Cal.5th at p. 678.) The circumstantial evidence supports the trial court’s finding that Ryals knew Richmond was not only willing to use lethal force, but that Richmond would, in fact, shoot Preston. Ryals played a critical role in facilitating the shooting. Further, as detailed below in connection with the fifth factor, Ryals’s presence was significant in light of his “fail[ure] to act as a restraining influence,” from which it is “fair to conclude that he shared in [Richmond’s] actions and mental state.” (*Clark, supra*, at p. 619.) This factor weighs heavily against him.

The third factor is absent in this case. The attempted robbery was not prolonged.

With respect to the fourth factor, subsequent to *Banks* and *Clark*, our Supreme Court has expressed the question as “What was the defendant’s knowledge of his or her confederate’s propensity for violence or likelihood of using lethal force?” (*Scoggins, supra*, 9 Cal.5th at p. 677.) “Defendant’s knowledge of such factors may be evident before the felony or may occur during the felony.” (*Clark, supra*, 63 Cal.4th at p. 621.) As we have discussed, Ryals’s actions during the attempted robbery demonstrate that, at a minimum, he knew Richmond would shoot Preston.

As to the fifth factor, Ryals made no attempt to minimize the violence, but instead facilitated it. This factor also weighs heavily against him.

Analyzing the totality of the circumstances, we conclude that Ryals acted with reckless indifference to human life in the attempted robbery. (*Scoggins, supra*, 9 Cal.5th at p. 677.) “The Supreme Court . . . made clear felony murderers . . . who simply had awareness their confederates were armed and armed robberies carried a risk of death, lack the requisite reckless indifference to human life.’ [Citation.]” (*Clark, supra*, 63 Cal.4th at pp. 617–618.) The high court has elaborated that “[a] robbery in which the only factor supporting reckless indifference to human life is the fact of the use of a gun is what we meant by ‘a garden-variety armed robbery’ in *Banks, supra*, 61 Cal.4th at page 802.” (*Clark, supra*, 63 Cal.4th at p. 617, fn. 74.) The Court has not otherwise set a standard for a garden-variety armed robbery. (*Ibid.*) Ryals did not simply have knowledge that Richmond planned to use a gun and that use of a gun in any

armed robbery presents certain dangers to human life. He knew that Richmond would shoot Preston when he and Sloan stepped aside. Even if Ryals did not think Richmond would murder Preston, he understood the increased risk the robbery posed to Preston's life, but he nonetheless played a vital role in the crime. Ryals's actions were "a gross deviation from the standard of conduct that a law-abiding person" and enforce our conclusion that he acted with reckless indifference to human life. (*Scoggins, supra*, 9 Cal.5th at p. 677.)

Substantial evidence supports the trial court's findings that Ryals was a major participant who acted with reckless indifference to human life in the attempted robbery. As such, he could still be found guilty of felony murder under sections 188 and 189 as amended on January 1, 2019.

DISPOSITION

The trial court's order is affirmed.
NOT TO BE PUBLISHED.

MOOR, J.
WE CONCUR:

HOFFSTADT, P. J.

KIM (D.), J.