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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
THIRD APPELLATE DISTRICT  
(Sacramento)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JESUS CEJA MONTANO,

Defendant and Appellant.

C102118

(Super. Ct. No. 10F03010)

Defendant Jesus Ceja Montano appeals the trial court's denial of his petition for resentencing under Penal Code section 1172.6<sup>1</sup> after the court issued an order to show

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<sup>1</sup> Undesignated statutory references are to the Penal Code.

Effective June 30, 2022, the Legislature renumbered section 1170.95 to section 1172.6. (Stats. 2022, ch. 58, § 10.) There were no substantive changes to the statute. Although defendant filed his original petition under former section 1170.95, we cite to section 1172.6.

cause and held a hearing. Defendant argues the evidence is insufficient to support the court's denial of his petition. We disagree and affirm the order.

## **FACTUAL AND PROCEDURAL BACKGROUND**

### *Trial Testimony*

As did the trial court when reviewing defendant's section 1172.6 petition, we derive our statement of facts from the evidence admitted at trial.

Early in the morning of April 11, 2010, a security guard at an apartment complex noticed defendant getting into a Mustang parked in the complex, with Frank Delamora standing next to the car's trunk. Soon after, the guard saw Delamora yelling at a group of four residents of the complex. As the group ran away, Delamora fired an AK-47 assault rifle at them about 20 to 30 times. Once Delamora stopped shooting, he got into the front passenger side of the Mustang. As defendant drove away, Delamora was leaning out of the passenger side of the car with the rifle in his hands. At least two cars at the complex were damaged by bullet holes.

Soon after the shooting at the apartment complex, California Highway Patrol Sergeant David Costa, who had not yet heard about the shooting, was driving in the area. He had with him a civilian ride-along passenger, Kevin T. Costa saw a Mustang turning at an intersection at "very high speed," so he activated his lights and pursued the car. The Mustang, which was going faster than 80 miles per hour, eventually pulled into a cul-de-sac at a trailer park. Costa entered the cul-de-sac and found the Mustang stopped with the driver's side toward him. Suddenly, the passenger pulled himself partially out of the passenger-side window and, over the car roof, pointed an AK-47 assault rifle at Costa and his passenger. Costa heard two shots, and he immediately retreated by backing out of the cul-de-sac.

The Mustang turned out of the cul-de-sac, and Costa resumed the chase at high speed. The Mustang turned onto a major road, and Kevin saw the passenger sitting partially out of the car, turned toward Costa and Kevin and shooting at them. Costa heard

several shots, and followed the Mustang as it got on the freeway. Kevin T. saw several shots hit the freeway to the side of the patrol car. While on the freeway, the passenger fired over 20 shots at Costa and Kevin. Costa stopped the pursuit after he lost sight of the Mustang, which was traveling at speeds over 100 miles per hour.

Elizabeth W. was driving on the freeway with her three children at the same time as defendant and Delamora. The Mustang passed her with the police following. The passenger, who was holding a gun, hung his head out the window and looked back at the police car. There were “popping sounds” and flashes of light. A bullet went through the front windshield of Elizabeth’s minivan, causing minor injuries to one of Elizabeth’s children.

A responding officer later found the Mustang parked at a local motel. There was an assault rifle with a magazine in the front passenger area. Officers found defendant at the motel, and Kevin identified him as the driver of the Mustang. Although Kevin did not recognize defendant at trial in the courtroom, he confirmed defendant’s identity through a photo exhibit.

Two police detectives later interviewed defendant at the police station. He acknowledged that, the night of the shootings, he and a passenger drove to an apartment complex. After they arrived, the passenger got out, but he stayed in the car. While waiting, defendant heard yelling and gunshots. When the passenger returned, they “got outta there.”

At one point, he noticed a law enforcement vehicle behind them. Defendant turned into a trailer park because, “[w]e weren’t gonna get pulled over.” Defendant realized he had turned into a dead end and needed to turn around. The passenger, who was holding the gun, said “not to get caught.” Defendant “told him to hold on,” and defendant “got outta there.” The passenger again instructed “don’t get pulled over. Don’t get stopped.” Defendant responded, “don’t even worry about it, I got this.” He

was confident they would get away “Cause I was driving.” As they were talking, defendant heard sirens and “likely” heard gunshots.

After exiting the mobile park, defendant saw a law enforcement vehicle behind him and headed to the freeway. As he was driving, the passenger told defendant “don’t get pulled over. Don’t -- don’t stop.” As soon as defendant no longer saw any law enforcement vehicles, he exited the freeway driving about 130 miles an hour. He reasoned he had been “too fast for them” and denied there were any gunshots fired while they were on the freeway.

Defendant acknowledged the AK-47 used during the shootings was his. He “allow[ed]” the passenger to use his gun because “I was the driver. When you run passenger, you’re the trigger man. Simple as that.”

#### *Procedural History*

In January 2014, defendant and Delamora were charged with nine counts of attempted murder, each as to a different civilian (§§ 187, subd. (a), 664; counts one-four, eight-eleven); attempted murder of Sergeant Costa (§ 187, subd. (a), 664; count five); attempted murder of Kevin (§ 187, subd. (a), 664; count seven); assault on a peace officer with a semiautomatic firearm (§ 245, subd. (d)(2); count six); and two counts of discharge of a firearm at an occupied motor vehicle (§ 246; counts twelve and thirteen). Firearm and gang enhancements were also alleged. (§ 186.22, subd. (b)(1), 12022, subd. (a)(2), 12022.53.)

During trial, the jury was instructed that to prove attempted murder the People must prove defendant “took at least one direct but ineffective step toward killing another person,” and “intended to kill that person.” (CALCRIM No. 600.) The jury was also instructed as to counts five through twelve on the natural and probable consequences theory of liability. (CALCRIM No. 417.) The prosecutor argued in closing that defendant could be liable for all counts as an aider and abettor and for counts five through twelve as a co-conspirator.

In February 2014, the jury found defendant guilty of counts one through seven, twelve, and thirteen. The jury also found true the firearm and gang enhancements. In March 2014, the trial court sentenced defendant to prison for an aggregate term of 94 years plus 37 years to life.

On appeal, this court struck the gang and gang-related firearm enhancements under sections 186.22, subdivision (b) and 12022.53, subdivision (e)(1) and remanded the matter for resentencing. (*People v. Delamora* (May 25, 2016, C076142) [nonpub. opn.].) In September 2016, the trial court resentenced defendant to prison for an aggregate term of 35 years plus seven years to life. (*People v. Montano* (May 10, 2022, C094078) [nonpub. opn.].)

*Petition for Resentencing*

In February 2019, defendant filed a petition for recall and resentencing. (*People v. Montano, supra*, C094078.) In August 2020, the trial court denied defendant's petition at the prima facia stage. (*Ibid.*)

In May 2022, this court reversed the trial court's order as to counts five and seven (the attempted killings of Sergeant Costa and Kevin) and remanded the matter for the court to issue an order to show cause and hold a hearing to determine whether defendant was entitled to relief. (*People v. Montano, supra*, C094078.) On remand, the court issued an order to show cause and ordered briefing.

The prosecution filed a brief stating they intended to rely on the trial record; the clerk's and reporter's transcripts were filed with the brief.<sup>2</sup> The prosecution argued defendant could still be found guilty of the attempted killings of Sergeant Costa and Kevin because defendant was a "direct perpetrator and aider and abettor of attempted

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<sup>2</sup> In their respondent's brief, the People request we take judicial notice of the record from defendant's trial. We decline to do so because the record on appeal includes the materials provided to the trial court.

murder.” Defendant supplied the gun and drove the car during the pursuit at “extreme speed” in a reckless manner.

The parties stipulated to vacating the evidentiary hearing and submitted the matter on their briefs.

In September 2024, the trial court issued a written decision denying defendant’s section 1172.6 petition. The court found defendant was a direct aider and abettor in the crimes. First, the evidence showed defendant knew that Delamora intended to kill Sergeant Costa and Kevin. While in the cul-de-sac, defendant would have “clearly been able to see Delamora” position himself in the car’s passenger window while holding defendant’s assault rifle. He also would have heard the shots fired at Costa and Kevin in the cul-de-sac and on the freeway.

Second, the evidence established defendant intended to aid (and in fact aided) Delamora in attempting to murder Costa and Kevin. In allowing Delamora to continue using his assault rifle, defendant “demonstrated his intent to assist Delamora in attempting to murder” Costa and Kevin. Defendant continued driving and never asked Delamora to stop shooting. As defendant explained, “ ‘I was the driver. When you run passenger, you’re the trigger man. Simple as that.’ ”

Third, the evidence showed defendant intended to kill Costa and Kevin because he chose to continue driving the car during the pursuit, “thereby allowing Delamora to continue to try and kill” Costa and Kevin with defendant’s AK-47.

Defendant timely appealed.

## **DISCUSSION**

Defendant contends the trial court erred in denying his section 1172.6 petition. He argues there was no evidence that he acted with the intent to kill Costa or Kevin. Instead, he argues, at trial the prosecution argued defendant was “guilty of the attempted murders of [Costa and Kevin] based solely on the natural and probable consequences doctrine.” We are not persuaded.

Effective January 1, 2019, Senate Bill No. 1437 (2017-2018 Reg. Sess.) (Senate Bill No. 1437) amended sections 188 and 189 to “eliminate[] natural and probable consequences liability for murder as it applies to aiding and abetting[] and limit[] the scope of the felony-murder rule.” (*People v. Lewis* (2021) 11 Cal.5th 952, 957.) The bill also added section 1172.6 to enable defendants who could no longer be convicted of murder under the amended laws to petition for retroactive relief. (*Lewis*, at p. 959.) Senate Bill No. 775 (2021-2022 Reg. Sess.) (Senate Bill No. 775) subsequently expanded relief to those convicted of attempted murder under the natural and probable consequences doctrine. (§ 1172.6, subd. (a)(1); *People v. Delgadillo* (2022) 14 Cal.5th 216, 223, fn. 3.) Where, like here, there is a prima facie showing that the petitioner is entitled to relief and the trial court issues an order to show cause, the prosecution bears the burden of proving, beyond a reasonable doubt, that the petitioner remains guilty of attempted murder under California law as amended by Senate Bill Nos. 1437 and 775. (§ 1172.6, subd. (d)(3).) The parties may offer evidence from a prior trial, or new or additional evidence at the hearing. (*Ibid.*)

We review the denial of a section 1172.6 petition following an evidentiary hearing for substantial evidence. (*People v. Guiffreda* (2023) 87 Cal.App.5th 112, 125.) 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 defendant guilty] beyond a reasonable doubt.’ ” (*People v. San Nicolas* (2004) 34 Cal.4th 614, 657-658.) “We do not reweigh the evidence or revisit credibility issues, but rather presume in support of the judgment the existence of every fact that could reasonably be deduced from the evidence.” (*People v. Pham* (2009) 180 Cal.App.4th 919, 924-925.)

“To prove the crime of attempted murder, the prosecution must establish ‘the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ ” (*People v. Canizales* (2019) 7 Cal.5th 591, 602.)

“[T]o be guilty of attempted murder as [a direct] aider and abettor, a person must give aid or encouragement with knowledge of the direct perpetrator’s intent to kill and with the purpose of facilitating the direct perpetrator’s accomplishment of the intended killing -- which means that the person guilty of attempted murder as an aider and abettor must intend to kill.” (*People v. Lee* (2003) 31 Cal.4th 613, 624.) Direct aiding and abetting attempted murder remains a valid theory after Senate Bill No. 1437. (*People v. Coley* (2022) 77 Cal.App.5th 539, 548.)

To determine whether a defendant is guilty of attempted murder as a direct aider and abettor, a court may consider factors such as the defendant’s “ ‘presence at the scene of the crime, companionship [with the direct perpetrator], and conduct before and after the offense.’ ” (*People v. Nguyen* (2015) 61 Cal.4th 1015, 1054.) When determining the state of mind of the aider and abettor, the “existence of the requisite knowledge may be established by circumstantial evidence.” (*People v. White* (2014) 230 Cal.App.4th 305, 319.)

Here, substantial evidence supports the trial court’s finding beyond a reasonable doubt that defendant had the requisite intent to kill Sergeant Costa and Kevin and is therefore still guilty of attempted murder under current law.<sup>3</sup>

As we have detailed above, defendant admitted to being at a shooting with Delamora at an apartment complex before the encounter with Costa. Multiple cars were hit with gunfire. Defendant drove the duo from that scene and was determined they were *not* “gonna get pulled over.” He drove accordingly, speeding throughout the pursuit, with a brief stop for his passenger to open fire on a marked police car (containing a civilian passenger) with defendant’s own assault rifle. The evidence showed the gun was pointed

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<sup>3</sup> What the prosecutor may have argued at defendant’s jury trial is irrelevant to our analysis of whether the trial court’s findings as to defendant’s guilt are supported by substantial evidence.

directly at the police car and its occupants. Once Delamora started shooting out of the window, defendant, who acknowledged Delamora was his “trigger man,” continued in his role as “driver,” enabling Delamora to keep shooting toward Costa and Kevin.

Defendant continued to enable Delamora to shoot at his two targets, , hitting the freeway divider next to the car multiple times as well as firing a bullet through the windshield of another car, as Delamora fired over 20 shots at Costa and Kevin on the freeway.

Although reasonable minds could differ as to defendant’s actual intent, substantial evidence supports the trial court’s determination beyond a reasonable doubt that defendant shared Delamora’s intent to kill the occupants of the police car, Costa and Kevin, by repeatedly firing at them with an assault rifle during a high-speed chase conducted by defendant.

## **DISPOSITION**

The trial court’s order denying defendant’s section 1172.6 petition for resentencing is affirmed.

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/s/  
Duarte, J.

We concur:

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/s/  
Earl, P. J.

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/s/  
Mauro, J.