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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.

KENYON AIKENS et al.,

Defendants and Appellants.

B270559

(Los Angeles County  
Super. Ct. No. BA355108)

APPEALS from judgments of the Superior Court of Los Angeles County. Sam Ohta, Judge. Affirmed as to Defendant and Appellant Aikens; reversed and remanded in part and affirmed in part as to Defendant and Appellant Sconiers.

Joanna McKim, under appointment by the Court of Appeal, for Defendant and Appellant Kenyon Aikens.

Jennifer Peabody, under appointment by the Court of Appeal, for Defendant and Appellant Daryl Sconiers.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Victoria B. Wilson and Chung L. Mar, Deputy Attorneys General, for Plaintiff and Respondent.

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Kenyon Aikens and Daryl Sconiers (collectively, defendants) were convicted by jury of one count of first degree murder (Pen. Code,<sup>1</sup> § 187, subd. (a)), attempted robbery (§§ 211, 664), and first degree burglary (§ 459). The jury found true the special circumstance allegations that defendants committed the murder in the commission or attempted commission of burglary and robbery. (§ 190.2, subd. (a)(17).) The jury also found true the allegation as to both defendants that a principal was armed in the commission of the offenses. (§ 12022, subd. (a)(1).) The trial court sentenced defendants to life without the possibility of parole (LWOP) for the murder, plus one year for the section 12022 allegation, and stayed sentence on the attempted robbery and burglary convictions pursuant to section 654.

Defendants appeal from the judgment of conviction contending the special circumstance allegation must be reversed because there is insufficient evidence they intended to kill or were major participants in the crimes who demonstrated a reckless indifference to human life. We affirm the judgment of conviction against defendant Aikens, whom the 13 evidence establishes was the actual shooter. We reverse the special circumstance finding as to defendant Sconiers and remand the matter for resentencing. We affirm the judgment of conviction against Sconiers in all other respects.

## **BACKGROUND**

In March 2009, Aikens and Sconiers were good friends. They both smoked marijuana, and sometimes obtained it from Marquise “Dub” Edwards. Edwards in turn obtained marijuana from Brian Caulfield.

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

During the week prior to March 26, Aikens's girlfriend Marah Edelen overheard several conversations in which defendants and Edwards discussed "taking someone's weed."<sup>2</sup>

On March 23, Aikens borrowed a car belonging to his roommate, Chris Ulmer. Aikens told Ulmer he intended to use the car to drop Edwards off and then go to the supermarket. When Aikens did not return the car after several hours, Ulmer called him. Aikens told him weapons were being unloaded from the car. Ulmer subsequently went to Aikens's bedroom to get his car keys back. Sconiers was in the room. Ulmer saw a shotgun and a chrome handgun on the bed. Ulmer then went down to the parking garage, where his car was parked in a spare space. Edwards was in the car. Ulmer ended up taking him home.

On March 24, Aikens, Sconiers and Edwards went to Caulfield's apartment in Sherman Oaks. Edwards had previously purchased marijuana from Caulfield at that location. Caulfield's roommate Brian Gonzalez was present, as were several visitors. Gonzalez had never met any of the men before, although he had heard of Edwards.

Sconiers and Edwards went into the back room with Caulfield. According to Gonzalez, Caulfield had a safe in the room where he kept cash, marijuana and a shotgun. At times, Caulfield kept a large quantity of cash or marijuana in the safe. Aikens stayed in the living room. The men's visit lasted less than an hour.

In the morning of March 26, Ulmer heard Aikens tell Sconiers, "You know, it's like I'm the good cop, you're the bad cop. Worse case scenario, I'll

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<sup>2</sup> Edelen was initially uncooperative with police. She did not provide a full account of statements by defendants, including the statement about taking weed. Edelen was given immunity for her trial testimony.

draw first.” Sconiers did not say anything in response. Aikens, Sconiers and Edelen then left the apartment. They took a black messenger bag or satchel with them.

At 5:17 p.m. that same day, surveillance video of the gated entrance to Caulfield’s apartment showed four people outside. One person went in, while three stayed outside. Ken Burns, a resident of the complex, left and three people came in. One appeared to be carrying a messenger bag. Neither the apartment manager, who authenticated the video, nor Burns could tell at trial if defendants were in the group of three men on the video.

At about 5:30 p.m. that same day, Aikens, Sconiers and Edwards arrived at Caulfield’s apartment. They placed the black bag on a couch in the living room. Sconiers and Edwards went into the back room with Caulfield.

Aikens stayed in the living room with Gonzalez. Aikens pulled out a gun and what appeared to be a police badge and said he was a police officer. He pointed his gun at Gonzalez and told him to get down on the ground. Gonzalez complied. Aikens put his gun to the back of Gonzalez’s head and handcuffed Gonzalez’s hands behind his back.

Edwards came into the living room and Aikens pointed the gun at him and yelled at him to get down on the floor. Edwards complied. According to Gonzalez, Aikens yelled that he needed more handcuffs and then went down the hallway toward the back bedroom. Defendants later told Edelen that Sconiers got into a struggle with someone in the back room and called for Aikens’s help.

Caulfield’s mother, who was on an open cell phone line with Caulfield, heard someone say, “Don’t resist.” Caulfield replied, “I’m not resisting, man. I’m just laying here. What are the charges?” The other person said, “Possession.” Caulfield screamed, “Mom, Mom, I think I’m being arrested. I

think I'm being arrested, Mom." Caulfield's mother then heard something which sounded like three gunshots from a gun with a silencer. Gonzalez later told police that he heard a gunshot.

Aikens and Sconiers ran out of the back room, and then out of the apartment, yelling, "Grab the bag." Edwards got up off the floor, grabbed the black bag off the couch and fled the apartment as well.

Caulfield stumbled out of the bedroom with a handcuff on one wrist. He yelled, "[T]hey fucking got me. I think I'm done, homey." He then collapsed. Caulfield died from his gunshot wounds. One bullet grazed his chin, then traveled downward into his chest, where it severed major blood vessels. A second bullet entered Caulfield's arm, severed a major blood vessel and continued into his chest.

Defendants returned to Aikens's apartment late in the evening of March 26. Edelen described Aikens as looking "frantic" and Sconiers as looking worried. Aikens quickly packed a bag. While he was packing, Edelen noticed that he had a handgun.

Defendants, Edelen and Aikens's mother left the apartment and drove toward Arizona. During the drive, defendants said the "taking of the weed went wrong." They said that Sconiers struggled with someone and called Aikens for help. When Aikens came into the room, "the guy reached for a gun to shoot at [defendants], and so they had to shoot first." Defendants did not say which of them did the shooting. <sup>3</sup>

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<sup>3</sup> Although Edelen told police about driving to Arizona with defendants after the murder, she did not tell them about defendants' statements concerning events in Caulfield's apartment. Los Angeles Police Department Detective Charles Knolls conducted two substantive interviews of Edelen. According to Detective Knolls, the first time Edelen mentioned any statements by defendants during the drive was when she testified. By then, she had an attorney and immunity.

A police investigation in Caulfield's apartment discovered three .380-caliber bullet casings in his room, all fired from the same semiautomatic weapon. A bullet fragment was found in the carpet in Caulfield's bedroom. A shotgun was also found in the bedroom. A badge was recovered from the living room.

In their defense, the defendants primarily offered evidence which might call into doubt the credibility of some prosecution witnesses and suggest that defendants were not the perpetrators of the attempted robbery and murder.<sup>4</sup>

## DISCUSSION

Both defendants contend there is insufficient evidence to show they were major participants who displayed a reckless indifference to human life and so insufficient evidence to support the special circumstance findings. Aikens additionally contends there is insufficient evidence to show he acted with the intent to kill.

### A. Law

Murder committed while the defendant was engaged in the commission or attempted commission of a burglary or robbery is a special circumstance which permits the punishment of death or LWOP. (§ 190.2, subd. (a)(17)(A).) If the defendant is the actual killer, nothing more is required. (See *People v. Taylor* (2010) 48 Cal.4th 574, 661.) If a defendant is not the actual killer, death or LWOP may be imposed if there is proof that he acted with "reckless indifference to human life and as a major participant" in the commission of a robbery, burglary or certain other enumerated felonies which results in

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<sup>4</sup> Aikens, for example, offered the testimony of Burns, the resident shown in the surveillance video, that he saw three Black males at the complex's gate when he left, and that he also saw three Black males at the gate when he returned about 10 minutes later.

death. (§ 190.2, subds. (d).)<sup>5</sup> The requirement in subdivision (d) arises directly from the United States Supreme Court’s decision in *Tison v. Arizona* (1987) 481 U.S. 137 (*Tison*). (*People v. Estrada* (1995) 11 Cal.4th 568, 575.)

“The standard of review for a sufficiency of the evidence claim as to a special circumstance is whether, when evidence that is reasonable, credible, and of solid value is viewed ‘in the light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the allegation beyond a reasonable doubt.’ [Citations.] The standard is the same under the state and federal due process clauses. [Citation.] We presume, in support of the judgment, the existence of every fact the trier of fact could reasonably deduce from the evidence, whether direct or circumstantial. [Citation.]” (*People v. Clark* (2016) 63 Cal.4th 522, 610 (*Clark*).

#### 1. *Major participant*

The California Supreme Court has set forth several factors which are relevant in determining if a defendant is a “major participant” within the meaning of *Tison*. Those factors are: “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 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

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<sup>5</sup> LWOP or the death penalty may also be imposed on an accomplice who, “with the intent to kill, aids, abets, counsels, commands, induces, solicits, requests, or assists any actor in the commission of murder in the first degree.” (§ 190.2, subd. (c).) The prosecution did not contend that either defendant had the intent to kill and there is no evidence to support a finding of such an intent.

defendant do after lethal force was used?” (*People v. Banks* (2015) 61 Cal.4th 788, 803, fn. omitted (*Banks*).)

As the Court explained: “No one of these considerations is necessary, nor is any one of them necessarily sufficient. All may be weighed in determining the ultimate question, whether the defendant’s participation ‘in criminal activities known to carry a grave risk of death’ (*Tison v. Arizona*, *supra*, 481 U.S. at p. 157) was sufficiently significant to be considered ‘major’ (*id.* at p. 152; see *Kennedy v. Louisiana* [2008] 554 U.S. [407,] 421.)” (*Banks*, *supra*, 61 Cal.4th at p. 803.)

## 2. *Reckless indifference*

Generally, recklessness “encompasses both subjective and objective elements. The subjective element is the defendant’s conscious disregard of risks known to him or her. But recklessness is not determined merely by reference to a defendant’s subjective feeling that he or she is engaging in risky activities. Rather, recklessness is also determined by an objective standard, namely what ‘a law-abiding person would observe in the actor’s situation.’ (Model Pen. Code, § 2.02, subd. (2)(c).)” (*Clark*, *supra*, 63 Cal.4th at p. 617.)

The California Supreme Court has set forth several factors which are relevant in determining if a defendant acted “with reckless indifference to human life” within the meaning of *Tison*. Those factors are: (1) knowledge of weapons, and use and number of weapons; (2) physical presence at the crime and opportunities to restrain the crime and/or aid the victim; (3) duration of the felony; (4) defendant's knowledge of cohort's likelihood of killing; (5) defendant’s efforts to minimize the risks of the violence during the felony. (*Clark*, *supra*, 63 Cal.4th at pp. 618–622.) As was the case with “the factors concerning major participant status in *Banks*, [n]o one of these



considerations is necessary, nor is any one of them necessarily sufficient.’ [Citation.]” (*Id.* at p. 618.)

### B. Aikens

There is substantial evidence that Aikens was the actual killer. The evidence shows that Aikens brought a gun to the robbery and pointed it at Gonzalez’s head during the robbery. Edelen’s testimony shows that Aikens went to the back room in response to a call for help from Sconiers. There is no indication that he put his gun away before he went to the room. Very soon after Aikens entered the back room, Caulfield was shot. Forensics showed that only one gun was fired in the back room.<sup>6</sup> Edelen saw Aikens with a gun after the killing. In contrast, there is no evidence that Sconiers brought a gun to the robbery, and Sconiers was not seen with a gun after the killing. The most reasonable inference from the evidence is that Aikens was the shooter.

Aikens argues that the fact that he “had a gun did not mean Sconiers was unarmed and not the shooter.” This is literally true, but meaningless. Aikens’s possession of a gun would not preclude Sconiers from having a gun as well. But that misses the point: There is no evidence showing that Sconiers was armed. To the extent defendant relies on Edelen’s testimony that defendants said “they” were forced to shoot first to argue that Sconiers also had a gun, this is a colloquial use of “he.” Only one gun was used, so clearly only one person fired a gun.

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<sup>6</sup> Although a shotgun was found in the back room, it was not the weapon which was used to kill Caulfield. Gonzalez testified that Caulfield kept a gun in the back room, and the most reasonable inference is that the shotgun belonged to Caulfield. There is no evidence to indicate that Sconiers brought the shotgun to the apartment.

As Aikens acknowledges, there is no need to prove that the actual killer had an intent to kill at the time of the underlying crime. (§ 190.2, subd. (b).) (See *People v. Taylor, supra*, 48 Cal.4th at p. 661.)

### C. Sconiers

Since Sconiers was not the actual shooter, the special circumstance finding can only be upheld if he was a major participant who acted with reckless indifference to human life.

#### 1. *Major participant*

As set forth in section A above, several factors are relevant to a determination of whether a defendant is a major participant in the crimes.

##### a. Planning role

While there is no evidence that Sconiers was the mastermind of the criminal enterprise, the evidence shows he was involved in planning it. He went with Aikens and Edwards to the target apartment two days before the robbery and went into the back room where the drugs and money were kept. It is reasonable to infer that the three men were assessing the apartment in preparation for the robbery and that Sconiers in particular was assessing the back room. This is a particularly strong inference given that during the actual robbery, Sconiers's role was to go into the back room. In addition, Aikens outlined the "good-cop/bad-cap" plan to Sconiers before the robbery, although there is no evidence that Sconiers provided any feedback on the plan.

##### b. Weapons

The weapons factor considers what role, if any, the defendant had in supplying or using lethal weapons. (*Banks, supra*, 61 Cal.4th at p. 803.) There is no evidence Sconiers was involved in obtaining the firearms seen in Aikens's bedroom before the robbery, although he was certainly aware that

Aikens had obtained the weapons. There is also no evidence he used a firearm during the robbery.

c. Awareness of danger

The awareness factor considers whether the defendant was aware of particular dangers posed by the nature of the crime, weapons used, or experience or past conduct of the other participants. (*Banks, supra*, 61 Cal.4th at p. 803.)

There is no evidence of past criminality, violent conduct or gun use by Sconiers or Aikens. There is nothing to show Sconiers was aware of any criminality or violent conduct of Edwards. There is evidence that Sconiers was aware Aikens intended to bring a firearm to the robbery, and that Aikens planned to draw the weapon if there were difficulties.

d. Presence and actions

This factor asks not only if the defendant was present at the scene of the killing, but also if he was in a position to facilitate or prevent the actual murder, and if his own actions or inaction played a particular role in the death. (*Banks, supra*, 61 Cal.4th at p. 803.) Sconiers was present at the scene of the killing, and was in close proximity to the victim. Thus, he was in a position to prevent the actual murder. To a degree, he did the opposite: he contributed to the murder by calling for help from Aikens. There is no evidence, however, that Sconiers was aware that Aikens would arrive with his gun already drawn. There is also no evidence of Sconiers's actions or inaction once Aikens was in the room.

e. Activity after the killing

Sconiers fled immediately after the shooting. There is no evidence he sought help for the victim.

f. Analysis

Considered together, these factors support the conclusion that Sconiers was a major participant in the criminal activities at Caulfield's apartment. He was present at every step of the crimes, from the planning stages of the robbery through the escape to Arizona after the shooting. Most significantly, Sconiers was present inside the apartment at all relevant times. He was the primary actor in the attempted robbery, accompanying the victim into the back room where the marijuana and cash were stored. Sconiers contributed indirectly to the murder by calling for help, and doing so with the knowledge that Aikens was armed and willing to draw his handgun. There is no evidence he attempted to prevent Aikens's use of the gun or to help the victim after the shooting. (See *Banks, supra*, 61 Cal.4th at p. 803, fn. 5 [noting *Tison's* emphasis on defendants' "physical presence and active involvement in every step"]; *In re Loza* (2017) 10 Cal.App.5th 38, 50 [finding "particularly significant in determining petitioner's status as a major participant his physical presence at the scene, involvement in the actual robbery, and inaction either in attempting to prevent the shootings or in assisting the victims"].)

Sconiers contends he was a minor participant in the robbery, and compares himself to the defendant in *Enmund v. Florida* (1982) 458 U.S. 782 (*Enmund*). *Enmund*, although the "mastermind" of the robbery, acted merely as the getaway driver for the robbery. He was parked on the road 200 yards away from the victims' house during the robbery (*id.* at pp. 784, 788) and so was not in a position to facilitate or prevent the actual murder or play any role in the death. Sconiers was far more than a mere getaway driver.

## 2. *Reckless indifference*

As the California Supreme Court explained in *Clark*, there is an interrelationship between being a major participant and having reckless indifference to human life. The Court noted that “*Tison* stated: ‘These requirements significantly overlap both in this case and in general, for the greater the defendant’s participation in the felony murder, the more likely that he acted with reckless indifference to human life.’ (*Tison, supra*, 481 U.S. at p. 153.) The high court also stated: ‘Although we state these two requirements separately, they often overlap. For example, we do not doubt that there are some felonies as to which one could properly conclude that any major participant necessarily exhibits reckless indifference to the value of human life. Moreover, even in cases where the fact that the defendant was a major participant in a felony did not suffice to establish reckless indifference, that fact would still often provide significant support for such a finding.’ (*Id.* at p. 158, fn. 12.)” (*Clark, supra*, 63 Cal.4th at p. 615.)

The most significant factor showing that Sconiers was a major participant is also a factor which is considered in determining if he acted with reckless indifference to human life. This factor is slightly restated in *Clark* as the defendant’s physical presence at the crime scene and opportunities to restrain the crime and/or aid the victim. (*Clark, supra*, 63 Cal.4th at pp. 619-620.) Other relevant related factors are the defendant’s knowledge of the presence of weapons, their number and their use. (*Id.* at pp. 618-619.)

Sconiers was present at the scene, knew Aikens was bringing a firearm and that Aikens was willing to draw the firearm if difficulties arose. Sconiers increased the likelihood of a shooting by calling for help from his armed companion. There is no evidence Sconiers attempted to help the

victim. These two factors support a conclusion that Sconiers acted with reckless indifference to human life.

Two other factors listed in *Clark* do not weigh in favor of reckless indifference. Those factors are: (1) the duration of the felony and (2) defendant's knowledge of his cohort's likelihood of killing. (*Clark, supra*, 63 Cal.4th at pp. 620-621.) The crimes happened very rapidly, which is insufficient to support a conclusion that Sconiers acted with reckless indifference. (*Ibid.* [lengthy duration of interaction between defendants and victims supports finding of reckless indifference].) There is nothing to show that Sconiers had any reason to believe that Aikens was likely to kill anyone. Aikens had no criminal history; he had never been arrested prior to this case. There is no evidence that Aikens had a history of violent acts or was prone to violence. Aikens did indicate that he might "draw" his gun, but that statement was made in reference to his posing as a police officer and, as such, shows a plan to intimidate, not to shoot. This factor also does not support a conclusion that Sconiers acted with reckless indifference.

The fifth factor listed in *Clark* is mixed. This factor considers a defendant's efforts to minimize the risks of the violence during the felony. (*Clark, supra*, 63 Cal.4th at pp. 621-622.) Defendants as a whole did make efforts to minimize the risks of violence during the robbery by impersonating police officers. Sconiers, however, increased the risk of violence to Caulfield when he called for help from Aikens.

The fact that Sconiers was a major participant in the crimes who was present every step of the way does weigh in favor of a finding of reckless indifference. The circumstances of the shooting itself, however, weigh against such a finding. There is no evidence that Sconiers had any reason to believe Aikens would shoot Caulfield. Aikens threatened only to draw the

gun, and to do that as part of the police officer impersonation. The actual shooting occurred almost spontaneously, when the victim, who had access to a gun, resisted the robbery. This makes the crimes very similar to the “garden-variety armed robbery” in *Enmund* and *Banks*, in which a potentially armed victim was spontaneously shot when he resisted. (See *Banks, supra*, 61 Cal.4th at pp. 802, 807; see also *Clark, supra*, 63 Cal.4th at pp. 617-618 & fn. 74.) Apart from Sconiers’s call for help, there is nothing in the shooting in this case to distinguish it from the crimes in *Enmund* and *Banks*. Participation in such a crime does not show reckless indifference to human life.

### **DISPOSITION**

The judgment of conviction is affirmed as to defendant Aikens. The true finding on the special circumstance as to defendant Sconiers is reversed, and the matter is remanded for resentencing. The judgment against Sconiers is affirmed in all other respects.

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GOODMAN, J.\*

We concur:

ASHMANN-GERST, Acting P.J.

CHAVEZ, J.

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\* Retired judge of the Los Angeles Superior Court assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.