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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. THOMAS ANTHONY CASTANEDA, Defendant and Appellant.	B253178 (Los Angeles County Super. Ct. No. VA123130)

APPEAL from a judgment of the Superior Court of Los Angeles County, Robert J. Higa, Judge. Affirmed with directions.

Eric R. Larson, 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, Margaret E. Maxwell and Corey J. Robins, Deputy Attorneys General, for Plaintiff and Respondent.

I. INTRODUCTION

Defendant, Thomas Anthony Castaneda, was jointly tried with a younger cousin and fellow gang member, Matthew David Garcia. The jury convicted defendant of first degree murder. (Pen. Code[1], § 187, subd. (a).) And defendant was convicted of attempted, willful, deliberate and premeditated murder. (§§ 664, subd. (a), 187, subd. (a).) The jury further found criminal street gang and armed principal enhancements were true. (§§ 186.22, subd. (b)(1)(C), 12022.53, subds. (d), (e)(1).) Defendant was sentenced to 50 years to life in state prison. We affirm the judgment. Upon remittitur issuance, the abstract of judgment must be corrected.

II. THE EVIDENCE

A. The Prosecution Case

1. The shooting

On December 17, 2011, around 9 p.m., Sergio Moreno and Carlos Lajovich were standing outside a Bell Gardens party. They were standing next to a driveway where a friend's pickup truck was stopped. Mr. Garcia approached Mr. Moreno and Mr. Lajovich. Mr. Garcia spoke to Mr. Moreno. Mr. Moreno was asked where he was from. Mr. Moreno said he was not from anywhere. Mr. Garcia posed the same question to Mr. Lajovich. Mr. Garcia then opened fire with a handgun. Mr. Moreno heard five or six gunshots. Mr. Garcia shot Mr. Lajovich three times in the torso. Mr. Garcia shot Mr. Moreno once, in the abdomen. Mr. Moreno survived the shooting. Mr. Lajovich did not. There was no evidence either victim was a gang member. Mr. Garcia had just turned 16 at the time of the shooting.

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1 Further statutory references are to the Penal Code unless otherwise noted.

When Mr. Garcia first approached, Mr. Moreno immediately recognized him. Mr. Moreno knew Mr. Garcia from the neighborhood. Prior to trial, Mr. Moreno viewed a photographic lineup and identified Mr. Garcia as the gunman. At trial, Mr. Moreno again identified Mr. Garcia as the person who fired the shots.

Twenty-five-year-old Ernesto Bautista was attending a party at a different house in the same block. He was standing outside when he heard gunshots. He saw someone running toward a white Tahoe that was stopped in the middle of the street. Mr. Bautista briefly looked away. When Mr. Bautista looked back, both the running individual and the Tahoe were gone. Detective Mitchell Carrillo interviewed Mr. Bautista at the scene of the shooting. According to Detective Carrillo, the interview revealed: Mr. Bautista heard a single gunshot followed by about five rapid gunshots; Mr. Bautista saw a male running with a chrome or steel revolver; the gun was in the individual's hand; as the individual neared a Tahoe parked in the street, the driver's door opened; to Mr. Bautista, it appeared as if someone inside the Tahoe had been waiting there for the fleeing individual; the person entered the Tahoe which then fled south. At trial, Mr. Bautista admitted speaking to Detective Carrillo following the shooting. But Mr. Bautista did not remember everything said during the interview. He did remember saying that it appeared the Tahoe had been waiting for the person running.

Twenty-seven-year-old Joselyn Covarrubias was with Mr. Bautista when the gunfire erupted. Ms. Covarrubias testified she also saw a person running towards a Tahoe that was stopped in the middle of the street. Ms. Covarrubias described the Tahoe as "suspicious." She did not see the person enter the Tahoe. However, according to Detective Carrillo, Ms. Covarrubias said: she heard a single gunshot followed by five rapid gunshots; she saw a running individual enter a Tahoe through the driver's door; and the Tahoe had stock rims. Ms. Covarrubias told Detective Karen Shonka: a Tahoe had been parked in the middle of the street; the driver's side door opened as the gunman ran toward it; and the gunman got into the Tahoe.

2. The investigation

Detectives circulated a flyer in an attempt to locate the Tahoe. An anonymous phone call led them to a Tahoe parked on a Bell Gardens street. The white Tahoe was parked approximately two blocks from the shooting scene and one block from defendant's residence. The Tahoe belonged to defendant's mother, Clara Vielmas. Ms. Covarrubias identified it as the Tahoe she had seen in the street the night of the shooting. The Tahoe was registered to an address where both defendant and Mr. Garcia lived. The location was "known" as a gang "stronghold." Based on that information, Detective Carrillo prepared a photographic line-up and showed it to the surviving victim, Mr. Moreno. Mr. Moreno identified Mr. Garcia as the person who fired the shots. Mr. Moreno acknowledged knowing Mr. Garcia from the neighborhood.

On January 6, 2012, law enforcement officers executed a search warrant at the home where defendant and Mr. Garcia lived. Defendant and Mr. Garcia were both present at the time. The Tahoe was parked in the backyard, off the driveway. The keys to the Tahoe were in the living room. Mr. Garcia's prints were found on the exterior passenger's side mirror. Defendant's prints were found on the exterior driver's side mirror.

A loaded stainless-steel Smith and Wesson .357 magnum revolver was buried in defendant's backyard. Likewise, the detective found a box of .357 magnum cartridges. The revolver had a six-bullet capacity. Mr. Garcia was a major contributor to deoxyribonucleic acid found on the revolver's body and barrel. Two bullets recovered from Mr. Lajovich's body during an autopsy had been fired from the buried handgun.

Defendant and Mr. Garcia were detained in a police car while the search warrant was executed. Their conversations were recorded. The recording was played for the jury. Detective Wayne Holston had shown Mr. Garcia the flyer depicting the Tahoe. While in the Tahoe with defendant, Mr. Garcia said, "They showed me a picture of your truck." Defendant responded: "What are you talking about, the truck? Why?" Mr. Garcia said he did not know. Defendant lamented the fact that "they" were going to take

him away from his two young daughters. Mr. Garcia said: "Fool. I'm gonna do the most fucking time homie." Defendant answered: "You ain't doing shit. Fucken I didn't touch that shit, just say you sold the fucking thing. Just say it fool. Just say it fool. They're going take me away from my fucken kids fool. I have to be out here for my girls fool. Just say it. Fuck. [¶] . . . [¶] . . . Just say it. You can't let them take me from my girls fool. Don't let them take me from my girls fool. Just say it, please fool. Don't let them take me from my girls fool. Please fool. Don't let them take me from my girls. Please. Come on homie. My kids. Please help me." Mr. Garcia advised defendant: "Don't say shit dog. I'm gonna deny everything fool. They're going give us some time fool. Not just you homie, me too dog. Remember that fucken shit homie. I got life too, dog."

Defendant and Mr. Garcia discussed the gun: "[Defendant]: If they get the prints back on that fucken thing, watch. Did you get to clean it? [¶] [Mr.] Garcia: Huh? [¶] [Defendant]: After I got done touching it last. [¶] [Mr.] Garcia: That was the last time I touched it fool. [¶] [Defendant]: You touched it last? [¶] [Mr.] Garcia: Ah, when at the house, the outside of the bag. Plus there's a box of things in there. A box of [bullets] [¶] [Defendant]: (INAUDIBLE) been there. [¶] [Mr.] Garcia: God, we should have gotten that shit out of here dog. [¶] [Defendant]: I'll say whatever I gotta say, fuck. Whatever dog. [¶] [Mr.] Garcia: Despensa (*sorry/apology*) fool. I love you homie. I didn't mean to get you into this shit dog. [¶] [Defendant]: If you love me homie, you'll say what you gotta say, man. [Mr.] Garcia: What the fuck homie, you gonna let me go down by myself or what, homie?" Mr. Garcia told defendant: "That shit is going to catch us in the red dog. We shouldn't have did that shit dog. Shouldn't have did that shit, homie."

3. The gang evidence

Detective Carrillo testified defendant and Mr. Garcia were members of a Bell Gardens gang. Both lived in the area claimed by the gang. Defendant had gang tattoos

on his neck. The gang's primary activities included petty theft, vandalism, assaults, shootings and robbery. Two weeks prior to the shooting, Detective Carrillo had seen defendant driving the Tahoe in the area. The city block where the shooting occurred was claimed by a rival gang. With respect to gang culture, Detective Carrillo explained that younger gang members prove themselves by "putting in work" for the gang. Shooting up rival gang territory would qualify as putting in work. In the usual case, an older or trusted gang member would accompany the younger member. This is done in order to verify the younger member's criminal conduct. In response to a hypothetical question tracking the facts of this case, Detective Carrillo testified the shooting was committed for the gang's benefit. Both the gunman's and the driver's reputations would be enhanced by the crime. And the driver, a trusted gang member, would verify what the gunman had done.

B. Mr. Garcia's Defense Case

As noted above, defendant and Mr. Garcia were jointly tried. Defendant did not present any evidence in his defense. However, Mr. Garcia presented evidence as follows. Herman Basulto was in the area to pick up a friend. Mr. Basulto heard gunshots. Mr. Basulto saw a male running down the street. The individual was holding his jacket over his head with one hand. His other hand was hidden. Mr. Basulto made eye contact with the running male. Mr. Basulto gave a description of the man. Mr. Basulto also identified an individual in a photographic lineup as "kind of" matching the running male. But the individual whose photograph was in the line-up was *not* the person Mr. Basulto had seen that night. Mr. Basulto did not select defendant's or Mr. Garcia's photograph. Officer Brett Benson interviewed the surviving victim, Mr. Moreno, in the immediate aftermath of the shooting. Mr. Moreno described the gunman. Mr. Moreno did not tell Officer Benson he recognized the shooter. Dr. Mitchell Eisen testified concerning eyewitness identification. Dr. Eisen described factors influencing and detracting from eyewitness identifications and witnesses' memories.

III. DISCUSSION

A. Sufficiency of the Evidence

1. Standard of review

Defendant challenges the sufficiency of the evidence in two respects. The standard of review is as follows: "'[W]e review the whole record to determine whether any rational trier of fact could have found the essential elements of the crime . . . beyond a reasonable doubt. [Citation.] The record must disclose substantial evidence to support the verdict—i.e., evidence that is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] In applying this test, we review the evidence in the light most favorable to the prosecution and presume in support of the judgment the existence of every fact the jury could reasonably have deduced from the evidence. [Citation.] "Conflicts and even testimony [that] is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. [Citation.] We resolve neither credibility issues nor evidentiary conflicts; we look for substantial evidence. [Citation.]" [Citation.] A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict. [Citation.]' (*People v. Zamudio* (2008) 43 Cal.4th 327, 357, 75 Cal.Rptr.3d 289, 181 P.3d 105 (*Zamudio*), italics omitted.)" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87; accord, *People v. Banks* (2014) 59 Cal.4th 1113, 1156.)

2. Counts 1 and 2

Defendant challenges the sufficiency of the evidence he directly aided and abetted in the shootings. Defendant asserts merely driving Mr. Garcia to and from the shooting scene is legally insufficient. Our Supreme Court has held in the instructional context when defining aider and abettor liability, "[A]n appropriate instruction should inform the jury that a person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561, accord, *People v. Biane* (2013) 58 Cal.4th 381, 385.) Defendant argues there was no substantial evidence a driver had waited in the Tahoe and he was the person behind the wheel. We conclude substantial evidence supports the verdicts.

The surviving victim, Mr. Moreno, identified defendant's cousin and fellow gang member, Mr. Garcia, as the gunman. Mr. Moreno knew Mr. Garcia from the neighborhood. The gun used in the shooting was buried in *defendant's* backyard. Mr. Garcia also lived at that address. And the residence was a known gang hangout. Mr. Garcia's deoxyribonucleic acid was on the gun. In conversation with each other, defendant and Mr. Garcia discussed the gun and its disposition. Both had handled the weapon. At the time of the shooting, the Tahoe was not parked at the curb. It was suspiciously stopped in the middle of the street. The Tahoe did not move from the area when the gunfire erupted. When the shooting stopped, Mr. Garcia ran back toward the Tahoe. As Mr. Garcia did so, someone inside the Tahoe opened the driver's door. Ms. Covarrubias identified the Tahoe she saw near the scene of the shooting. That Tahoe belonged to defendant's mother. And defendant had been seen driving the Tahoe two weeks earlier. Law enforcement officers found the Tahoe parked in defendant's backyard, off the driveway. Further, both Mr. Garcia's and defendant's prints were found on the Tahoe. Moreover, defendant's prints were on the driver's side exterior

mirror. Mr. Garcia's prints were on the passenger side's exterior mirror. Mr. Garcia and defendant were inside the gang hangout when law enforcement officers executed the search warrant. Defendant and Mr. Garcia discussed the crime while detained in a police van. Mr. Garcia described the Tahoe as defendant's truck: "They showed me a picture of *your* truck." (Italics added.) This revelation caused defendant to begin lamenting his fate. In that recorded conversation, defendant did not deny his involvement in the shootings. Defendant did not protest when Mr. Garcia, referring to the gun and the bullets, said, "[*W*]*e* should have gotten that shit out of here dog." (Italics added.) Defendant did not object when Mr. Garcia said, "*We* shouldn't have did that shit dog." (Italics added.) Defendant and Mr. Garcia both assumed they would be incarcerated. Defendant asked Mr. Garcia to accept responsibility for the shootings. This was so defendant's young children would not grow up without a father. Mr. Garcia repeatedly advised defendant not to tell the authorities anything. Defendant and Mr. Garcia were cousins and fellow gang members. Further, Mr. Garcia was younger than defendant. And it was common for a younger gang member to put in work for the gang with an older, trusted gang member present to confirm the criminal conduct. This was sufficient evidence for a reasonable jury to conclude: defendant knew Mr. Garcia intended to shoot and kill a rival gang member or members; defendant intended to facilitate that crime; and defendant drove Mr. Garcia to and from the shooting scene.

3. Count 2

Assuming he was the driver, defendant challenges the sufficiency of the evidence as to the attempted murder of Mr. Moreno on an additional ground. Defendant argues he was tried as a direct aider and abettor and not on a natural and probable consequences theory. Further, the prosecutor argued in part that Mr. Lajovich was the intended victim, and Mr. Moreno was in the "kill zone." Defendant reasons he could not be guilty of the attempted murder because he was not present at the shooting scene. Under these

circumstances, defendant could not have known Mr. Moreno was standing in the kill zone. We conclude the jury properly could reach a guilty verdict on count 2.

Attempted murder has two elements—a specific intent to kill, and a direct but ineffectual act toward accomplishing the intended killing. (*People v. Perez* (2010) 50 Cal.4th 222, 229-230; *People v. Stone* (2009) 46 Cal.4th 131, 136.) A "kill zone" theory relates to the intent to kill element of attempted murder. (*People v. Stone, supra,* 46 Cal.4th at pp. 136-137; *People v. Bland* (2002) 28 Cal.4th 313, 329-331.) When an accused uses lethal force designed to kill everyone in an area around the targeted victim, this can create what the law characterizes as a kill zone. (*People v. Perez, supra,* 50 Cal.4th at p. 232; *People v. Bland, supra,* 28 Cal.4th at pp. 329-330; see CALJIC No. 8.66.1.) In these circumstances, the assailant may be found to have had the concurrent intent to kill the nontargeted victims. (*People v. Stone, supra,* 46 Cal.4th at p. 137; *People v. Bland, supra,* 28 Cal.4th at pp. 329-331.) As our Supreme Court has explained, "'[T]he fact the person desires to kill a particular target does not preclude finding that the person also, concurrently, intended to kill others within what [has been] termed the "kill zone."' ([*People v.*] *Bland, supra,* 28 Cal.4th at p. 329.)" (*People v. Stone, supra,* 46 Cal.4th at p. 137.) It is for the jury to determine whether a perpetrator actually intended to kill the victim, either as a primary target or within a kill zone. (*People v. Stone, supra,* 46 Cal.4th at pp. 137-138; see *People v. Perez, supra,* 50 Cal.4th at p. 232.) Here, the jury was so instructed. And the prosecutor argued Mr. Garcia had an intent to kill Mr. Moreno either as a primary target or as someone within the kill zone. Defendant's liability, on the other hand, was premised on knowledge of Mr. Garcia's purpose, intent to aid and encourage the offense and conduct consistent with that mental state. (*People v. Biane, supra,* 58 Cal.4th at p. 385; *People v. Beeman, supra,* 35 Cal.3d at p. 561.)

On the evidence before it, the jury could reasonably find as follows. Defendant and Mr. Garcia armed themselves with a loaded weapon. Mr. Garcia was defendant's younger cousin and fellow gang member. Defendant drove Mr. Garcia to a gang stronghold in rival gang territory where two parties were taking place. This ensured many potential victims would be present. The jury could reasonably infer defendant and

Mr. Garcia were aware there were large numbers of people congregated in the area. The plan was that Mr. Garcia would shoot one or more rival gang members to put in work for the gang. Further, consistent with gang culture, defendant served both as Mr. Garcia's transportation to and from the scene, and as a witness to the shootings. Defendant waited in the Tahoe while Mr. Garcia approached Mr. Lajovich and Mr. Moreno. The two victims were standing near a driveway next to a pickup truck. Mr. Garcia fired his weapon six times, emptying it. He fired in the direction of the two victims who were standing in close proximity to each other. Mr. Garcia struck Mr. Lajovich three times and Mr. Moreno once. The jury reasonably could find that by emptying the weapon in a space confined by the presence of the truck, Mr. Garcia intended to kill Mr. Lajovich and concurrently intended to murder anyone in the kill zone. The nature and scope of the attack supported a reasonable conclusion Mr. Garcia intended to kill a rival gang member and concurrently anyone within the zone of danger. (See *People v. Stone, supra,* 46 Cal.4th at pp. 136-138; *People v. Bland, supra*, 28 Cal.4th at pp. 329-331.) The jury could also reasonably conclude defendant shared Mr. Garcia's intent to kill a rival gang member and anyone in the kill zone. Defendant was properly convicted of the attempted murder of Mr. Moreno.

C. Failure To Instruct With CALJIC No. 8.31

Defendant contends his murder conviction should be reversed because the trial court prejudicially erred in failing to sua sponte instruct on implied malice second degree murder. Defendant reasons: "[T]he prosecution's evidence established only that [defendant] drove codefendant Garcia so that Garcia could commit a shooting in rival gang territory. This constituted strong evidence of implied malice, i.e., a conscious disregard for life, but it did not by any means establish that [defendant] specifically intended for anyone to be killed." Any error was harmless under any standard because the jury found defendant guilty of willful, deliberate and premeditated murder. (*People v. Coddington* (2000) 23 Cal.4th 529, 593-594, disapproved on other points in *People v.*

Knoller (2007) 41 Cal.4th 139, 155-156, and *Price v. Superior Court* (2001) 25 Cal.4th 1046, 1069, fn. 13; *People v. Jackson* (1989) 49 Cal.3d 1170, 1199.)

D. The Abstract of Judgment

We asked the parties to brief the question whether the abstract of judgment must be amended to reflect: the sentence on count 2; the $60 court facilities assessment; and the $80 court operations assessment. (Gov. Code § 70373, subd. (a)(1); § 1465.8, subd. (a)(1).) We will direct the superior court clerk upon remittitur issuance to amend the abstract of judgment to so reflect. (*People v. Jones* (2012) 54 Cal.4th 1, 89; *People v. Mitchell* (2001) 26 Cal.4th 181, 185.)

IV. DISPOSITION

The judgment is affirmed. Upon remittitur issuance, the superior court clerk is to prepare an amended abstract of judgment reflecting: the count 2 sentence; the $60 court facilities assessment (Gov. Code, § 70373, subd. (a)(1)); and the $80 court operations assessment (Pen. Code, § 1465.8, subd. (a)(1)). Thereafter a copy of the corrected abstract of judgment is to be delivered to the Department of Corrections and Rehabilitation.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

TURNER, P.J.

We concur:

MOSK, J.

KRIEGLER, J.