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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE,

Plaintiff and Respondent,

v.

CHARLES HEARD,

Defendant and Appellant.

A130983

**(San Francisco City and County
Super. Ct. No. 210246)**

Defendant Charles Heard (appellant) appeals from his jury convictions of first degree murder (Pen. Code, § 187, subd. (a))¹ (count 1) and attempted second degree robbery (§§ 664, 211) (count 2).² He contends the trial court's instructions on attempted robbery, felony murder, and aiding and abetting were unsupported by substantial evidence; the court erroneously precluded the defense from displaying photos of two

¹ All undesignated section references are to the Penal Code.

² The jury failed to reach a verdict on the count 3 charge of possession of a firearm by a felon (§ 12021, subd. (a)(1)), and a mistrial was declared on that count. The jury also found not true the personal and intentional firearm use allegation attached to counts 1 and 2. (§ 12022.53, subd. (d).) In a bifurcated trial, the jury was unable to reach a verdict on the count 4 charge that appellant participated in a criminal street gang (§ 186.22, subd. (a)) and the gang enhancement allegations attached to counts 1 and 2, and a mistrial was declared on count 4 and the gang enhancement allegations. At sentencing counts 3 and 4 were dismissed; and, on count 1, appellant was sentenced to 25 years to life in state prison with the possibility of parole.

third party suspects; and defense counsel provided ineffective assistance. We reject the contentions and affirm.

BACKGROUND

This case involves the fatal shooting of Richard Barrett on or about November 25, 2008.

Events Prior to Shooting

On July 16, 2008, four months prior to the Barrett shooting, the Federal Bureau of Investigation (FBI), pursuant to an authorized wiretap, recorded a phone call from Gary Owens, Jr., to the phone number of Julius Hughes. The recipient of the call handed the phone to appellant. Owens and appellant talked about strong-arm robberies, narcotics sales, and buying and selling jewelry. Appellant told Owens he had sold a chain, medallion, watch, and ring for “15 racks,” meaning \$15,000. The FBI interpreted appellant’s various statements to Owens to mean that appellant was talking about robbing people of their jewelry and giving advice about robbing someone, and suggesting Owens steal expensive jewelry at a Sacramento “club” owned by a former professional basketball player, where appellant had stolen a black medallion worth \$25,000.

On August 26, 2008, appellant brought a gold cross and chain and a gold pendant and chain to Benjamin Shemano, a jewelry pawnbroker on Mission Street near Fifth Street in San Francisco. Shemano paid appellant \$2,525 for the jewelry.

Eyewitness Duane Reeves

According to Duane Reeves, in the early morning hours of November 25, 2008, he and his friend Barrett conversed on Kearny Street in San Francisco’s North Beach neighborhood. Barrett gave Reeves, who was homeless, some money. They then walked across Kearny Street and parted ways. Barrett walked toward the Fuse Bar (bar) at the corner of Broadway and Kearny. On the outside of his clothing, on a long gold chain, Barrett wore a diamond-encrusted pendant featuring the Flintstones cartoon character “Bamm-Bamm.”

Reeves saw two young Black men wearing hoods approach Barrett; one man asked Barrett for a light, the other asked for a cigarette. When Barrett reached for a

cigarette, the men pushed him up against the wall of the bar and stood in front of him. The men began “reaching toward [Barrett’s] mid area, chest level.” Barrett pushed the men away and ran around the corner with the two men in pursuit. Reeves heard two gunshots and saw the two men run back around the corner and past him. Reeves followed them on Kearny until they jumped into the back seat of a 2004 to 2008 black or dark four-door sedan, which sped off on Montgomery Street. Reeves flagged down a police officer, reported the shooting, and described the getaway car. Subsequently, someone who had apparently been at the bar told Reeves, “Hey, they just shot your buddy and robbed him.”

On December 10, 2008, two weeks after the shooting, Reeves was interviewed by San Francisco Police Inspectors Kevin Jones and Robert Lynch and shown two groups of photographs. Out of the second group of six photos, Reeves picked out appellant’s photo as depicting the assailant who asked Barrett for a cigarette. Reeves said appellant’s photo “favored the shorter of the two suspects,” meaning appellant’s photo “resembled” one of the two suspects. Reeves also told Jones when shown that photo, “Kind of maybe like maybe the shorter guy that had the black hood on that was about [5 feet 10 inches,] but I don’t know if that was him or not, but his features kind of, type of guy I saw.” Reeves told Jones he did not see the faces of the two men who assaulted Barrett and did not see a gun. Reeves initialed and dated the back of appellant’s photo.

At trial, Reeves was shown surveillance videos from the crime scene and still photos from the videos. Reeves said the two people who were depicted in the video looked like the two people he saw assaulting Barrett, chased after the assault, and saw getting in the getaway car.³

Eyewitness Francis Smith

At the time of the shooting, Francis Smith, who was visiting San Francisco from Texas, was standing outside the bar smoking with some colleagues. She saw Barrett being wrestled from behind by two men who were “clawing” and “pulling” at his upper

³ On cross-examination, Reeves said he was not able to identify either of Barrett’s assailants.

chest, around his shoulders, “neck area,” and shirt, almost ripping Barrett’s shirt off. The men shoved Barrett into the wall but he eventually was able to pull away from them. One of the assailants, who had a gun, ran after Barrett, toward the corner where Smith was standing. The assailant with the gun was a little taller than Barrett, about 5 feet 10 or 11 inches tall, and had gold crowns in his mouth. Smith did not get a good look at the other assailant. Smith ducked to get out of the way, heard shots fired, and saw the flash from the gun. The shooter was standing next to her and she had a clear look at his face. The shooter then turned and ran down Kearny Street. Immediately following the shooting, the police interviewed Smith. She was shown three suspects but was unable to identify any of them.

On January 8, 2009, a police officer showed Smith two photo lineups at her Texas home. Smith did not identify anyone in the first group of photos; she immediately identified appellant in the second group of photos. At that time, she was 95 percent sure or “pretty sure” he was the shooter. She said she would have been 100 percent sure if appellant’s mouth had been open in the photo and she could see gold crowns on his teeth.

The preliminary hearing took place on October 6 and 7, 2009. On October 7, Smith identified appellant as the shooter. When appellant opened his mouth revealing gold crowns, Smith said she was 100 percent sure he was the shooter. At trial in May 2010, Smith again identified appellant as Barrett’s shooter. When she viewed a surveillance video of persons walking on Montgomery Street, Smith recognized appellant by his clothing and identified him as the shooter. She also viewed a surveillance video of Broadway and Kearny Streets and identified appellant as the shooter running away. Smith was also shown still photos from the surveillance videos and said they depicted the two people who attacked Barrett.

Karl Rodriguez

Karl Rodriguez was inside the bar’s restroom when he “thought [he] heard firecrackers.” Fifteen or 20 seconds later, he saw Barrett, whom he had known previously, laying on the bar floor about 10 feet from the front door. Rodriguez approached Barrett, who was having trouble breathing, and held his hand to comfort him.

At that time, Barrett was holding the Bamm-Bamm pendant and chain in his hand. When the police arrived, Rodriguez decided to leave and take the pendant, telling Barrett he would make sure Barrett or Barrett's family got it. Rodriguez left the scene with the pendant, not realizing he did not have the chain. Two weeks later, Rodriguez gave the pendant to another person to give to Barrett's daughter. Police obtained the pendant from Barrett's mother.

Crime Scene Investigation

The police investigation showed that no property was taken from Barrett's person during the incident; he was still in possession of his money, Rolex watch, diamond ring, and cocaine. Barrett had been shot twice in the back. Two nine-millimeter bullets were recovered from Barrett's body and two expended nine-millimeter shell casings were found on the sidewalk outside the bar's entrance. Ballistics testing was inconclusive as to whether one gun had fired both bullets; however, it was determined that one gun ejected both casings.

Getaway Car

Around 1:00 a.m., following the shooting, San Francisco Police Officers Craig Leung and his partner pursued, at high speeds along city streets, a car matching the description of the getaway car. They eventually lost it when it drove onto the freeway. The vehicle was described as a dark gray American car with possible front end damage.

On November 29, 2008, four days after Barrett's murder, a gray Nissan Maxima with front end damage, registered to Hughes and purchased by him on September 16, was towed from 25th Street. On November 18, 2009, Leung viewed the Maxima and identified it as the car he pursued following the shooting.

At trial, Reeves was shown a photo of the Maxima and said it resembled the getaway car. San Francisco Police Officer Sean Griffin testified that the Maxima was in appellant's possession when Griffin detained him on November 19, 2008, six days before Barrett's murder.

Subsequent Robbery of Thomas

Reginald Thomas testified that, at approximately 2:00 a.m. on a weekend in December 2008, he was leaving a club at the corner of Van Ness and Pacific Avenues. On the outside of his clothing, he was wearing a white gold chain and attached pendant in the shape of the State of California valued at \$22,000. He was also wearing a wristwatch valued at \$15,000. After noting that his car was blocked by a limousine belonging to San Francisco 49ers tight end Vernon Davis, whom Thomas had earlier seen inside the club, Thomas turned to go back inside the club. Three assailants dressed in black hoodies approached him. One of the assailants, identified by Thomas at trial as appellant, pointed a gun at Thomas and said, "Come up off the jewelry and the money." Thomas gave appellant his pendant and chain, watch, cell phone, and about \$400 in cash. When one of Thomas's friends saw what was happening and yelled Thomas's name, the three assailants fled. Thomas did not report the incident to police because he feared for his life.

On December 18, 2008, appellant was arrested by San Francisco Police Sergeant Reese Burrows. In the four years Burrows had known appellant, Burrows had never known him to be gainfully employed. At the time of the arrest, appellant was wearing jeans with horseshoes stitched on the back pockets. A surveillance video from the night of Barrett's murder showed a man at the scene wearing that type of jeans. Burrows seized a cell phone from appellant. Appellant had previously provided the telephone number for the seized cell phone to law enforcement and family services, and voicemail messages had been left for him at that number. The seized phone's subscriber was appellant's girlfriend, Sade Barrow, who had the same San Francisco address that appellant had listed on pawnshop tickets. Burrows searched the seized phone and found photos on it of Thomas's stolen chain and pendant. Burrows also seized from appellant keys to a Toyota Highlander rental car. A search of the rental car turned up Thomas's stolen chain and pendant.

On December 19, 2008, Burrows showed Thomas a photo lineup; Thomas identified appellant as the person who had robbed him of his chain, watch, cell phone, and money. Thomas said appellant had used a "simulated gun."

On cross-examination, Burrows said Thomas told him the robbery took place at approximately 2:00 a.m. on December 15, 2008. Subsequently, when recalled by the defense, Burrows said Thomas told him he was at the club on the late night of Sunday, December 14, and early morning of Monday, December 15. In rebuttal, Assistant District Attorney Heather Trevisan, testified that on February 11, 2009, Thomas told her he had gone to the club on Saturday night, December 13, 2008, and was robbed early Sunday morning, December 14.

Cell Phone Records

An examination of the records for the cell phone seized from appellant revealed the phone was in the vicinity of the Barrett murder near the time it was committed. Records for the cell phone also established that the phone made and received calls at 4:58 and 4:59 p.m. on November 25, 2008, in the cell phone tower coverage area that included Shemano's pawnshop; Shemano testified appellant visited at 5:06 p.m. on that date. On December 8, the date that Shemano testified appellant sold him jewelry, appellant's cell phone made four calls through the same cell phone tower.

Records for appellant's seized cell phone also showed calls made at approximately 2:00 a.m. on Sunday, December 14, 2008, in the vicinity of and around the time of the Thomas robbery. The parties stipulated that between 12:13 a.m. and 9:27 a.m. on Monday, December 15, the cell phone's calls triggered cell phone towers only in the East Bay.

Gang Evidence

The prosecution's criminal street gang expert, San Francisco Police Sergeant David Do, testified appellant frequently associated with Hughes and other members of the Central Divisadero Players (CDP), an African-American gang in San Francisco's Western Addition. Do described CDP's primary activities as narcotics sales, robbery, murder, and illegal possession of firearms. Do stated appellant engaged in gang-related crimes or activities between 2003 and 2008 and is an active participant in CDP. Do opined the Barrett murder was committed for the benefit of CDP.

The Defense

Mike Rodrigues testified he, Smith, and David Stribble were outside the bar in the early morning hours of November 25, 2008, when Rodrigues heard scuffling. One man held a gun against Barrett's chest and then raised the gun in the air. After seeing the gun, Rodrigues ran back to the bar; Smith remained. When police showed Rodrigues a photo lineup that included appellant's photo, Rodrigues did not identify anyone.

Stribble testified he, Rodrigues, and Smith were outside the bar when he saw two men push Barrett up against the building; the men were pushing and grabbing Barrett. It did not appear to Stribble that Barrett was trying to protect any property; it seemed like Barrett was trying to get away. When Barrett got away, one of the assailants chased him around the corner holding a gun in the air. Barrett ran into the bar. Stribble said appellant was not the person who chased Barrett. When Stribble saw the gun, he turned and ran. He turned around after hearing the gunfire, saw Smith huddled on the sidewalk, and went to grab her. He then saw the shooter turn around, grin at him and Smith, and flee down Kearny Street. Stribble said the shooter was "absolutely not" appellant. However, he did not see the shooter fire the gun. About five minutes later, a black SUV full of men pulled up and asked what had happened. When Stribble responded that someone had been shot, one SUV passenger, who looked a lot like appellant, grinned; the SUV then drove off. Subsequently, when police showed Stribble a photo lineup including appellant's photo, Stribble did not identify appellant; instead, he identified another man as the person he had seen in the SUV.

Psychologist Geoffrey Loftus, an expert on human perception and memory testified regarding the possible suggestiveness and unreliability of eyewitness testimony. Dr. Benham Bavarian, a consultant in biometrics identification and an expert in measurement of facial features, concluded that significant differences existed between measurements taken from photos of appellant's face and measurements taken from images of the person in the surveillance videos near the murder scene.

Rebuttal

Dr. Richard Vorder Bruegge, a photographic technologist for the FBI and an expert in forensic video and imaging analysis, opined that Dr. Bavarian's methodology and conclusions were unreliable.

DISCUSSION

I. *The Instructions on Attempted Robbery and Felony Murder Were Supported by Substantial Evidence*

Appellant contends the trial court erred in instructing the jury on attempted robbery and felony murder in the commission of attempted robbery because there was insufficient evidence establishing that appellant and the other assailant attempted to rob Barrett before he was fatally shot. Appellant also contends the court erred in instructing the jury on aiding and abetting and felony murder as a nonkilling accomplice because there was insufficient evidence that he was a "non-shooter" aider and abettor of the Barrett shooting. Appellant argues the instructional errors require reversal of his attempted robbery and murder convictions.

"Even absent a request, the trial court must instruct on the general principles of law applicable to the case. [Citation.] The general principles of law governing a case are those that are commonly connected with the facts adduced at trial and that are necessary for the jury's understanding of the case. [Citation.] The trial court must give instructions on every theory of the case supported by substantial evidence, including defenses that are not inconsistent with the defendant's theory of the case. [Citation.] Evidence is 'substantial' only if a reasonable jury could find it persuasive. [Citation.] The trial court's determination of whether an instruction should be given must be made without reference to the credibility of the evidence. [Citation.] The trial court need not give instructions based solely on conjecture and speculation. [Citation.]" (*People v. Young* (2005) 34 Cal.4th 1149, 1200 (*Young*)). "It is error to give an instruction which, while correctly stating a principle of law, has no application to the facts of the case. [Citation.]" (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129; accord, *People v. Perez* (2005) 35 Cal.4th 1219, 1227.)

A. Procedural Background Regarding Jury Instructions

Following the close of evidence, at a discussion between the court and counsel regarding jury instructions, defense counsel objected to any robbery instructions being given due to the lack of evidence of robbery or attempted robbery. The court disagreed and said it would instruct the jury on robbery and attempted robbery. Thereafter, the prosecutor requested the court to instruct the jury that appellant could be convicted of felony murder as an aider and abettor. The prosecutor argued that Reeves's testimony was sufficient to establish that appellant and another assailant were involved in an attempted robbery and that appellant was not the shooter. Defense counsel conceded the prosecution had given the defense notice it might proceed on an aiding and abetting theory. The court stated it would wait to decide whether there was sufficient evidence to instruct the jury on aiding and abetting and felony murder as an aider and abettor until after closing arguments.

The court instructed the jury regarding felony murder in the commission of an attempted robbery by a defendant who committed the fatal act (CALCRIM No. 540A),⁴

⁴ The CALCRIM No. 540A instruction given states:

“The defendant is charged in [c]ount 1 with first degree murder, under the theory of felony murder.

“To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

“1. The defendant attempted to commit Robbery;

“2. The defendant intended to commit the crime of Robbery;

“AND

“3. While attempting to commit Robbery, the defendant did an act that caused the death of another person.

“A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

“To decide whether the defendant attempted to commit robbery, please refer to the separate instructions that I will give you on that crime. You must apply those instructions [concerning robbery and attempted robbery] when you decide whether the People have proved first degree murder under a theory of felony murder.

“The defendant must have intended to commit the felony of Robbery before or at the time of the act causing death.

robbery (CALCRIM No. 1600), and attempted robbery (CALCRIM No. 460). It did not at that time instruct the jury on felony murder in which a coparticipant committed the fatal act (CALCRIM No. 540B) or on aiding and abetting (CALCRIM No. 401).

In his closing argument, the prosecutor asserted appellant was the shooter and was guilty of first degree premeditated murder or felony murder in the commission of an attempted robbery. The prosecutor did not argue appellant was guilty of felony murder as a nonshooter aider and abettor.

On the seventh day of its deliberations, the jury sent the following question to the court: “If, during an attempted armed robbery by two perpetrators, one perpetrator fatally shoots the victim; could the second perpetrator be charged with 1st degree murder? Or charged with 2nd degree murder?” Outside the presence of the jury, the court stated the jury’s note raised the issue of whether the court should instruct pursuant to CALCRIM Nos. 400 and 401 (aiding and abetting), as well as CALCRIM No. 540B (felony murder where a coparticipant allegedly committed the fatal act). Defense counsel argued there was no evidence to support those instructions. The prosecutor disagreed, stating, “I think the evidence supports it, although in my closing argument at that point in time I didn’t.” The prosecutor argued that, in addition to evidence that appellant was the shooter, there was evidence that appellant was one of two perpetrators who attempted to rob Barrett prior to the shooting, thus supporting a felony murder aiding and abetting instruction. Defense counsel argued the sole evidence identifying appellant as one of Barrett’s assailants was Smith’s testimony that appellant was the shooter and no one testified appellant was not the shooter. The court ruled there was sufficient evidence to instruct the jury with CALCRIM Nos. 400, 401, and 540B and so instructed them.⁵

“It is not required that the person die immediately, as long as the act causing death and the felony are part of one continuous transaction.”

⁵ The CALCRIM No. 400 instruction given stated:

“A person may be guilty of a crime in two ways. One, he may have directly committed the crime. I will call that person the perpetrator. Two, he may have aided and abetted a perpetrator who directly committed the crime. A person is equally guilty of the

Thereafter, the court permitted the prosecutor and defense counsel to present additional argument to the jury. The prosecutor argued that based on Reeve's identification of appellant as one of Barrett's two assailants, each of whom had guns, the jury could convict appellant of felony murder as an aider and abettor by concluding he and another person at the scene were working together to commit a robbery during which a death occurred. Alternatively, the prosecutor argued the jury could find appellant guilty of first degree premeditated murder based on Smith's identification of appellant as the shooter. Defense counsel argued that the felony murder aiding and abetting instructions did not apply to this case because that theory was inconsistent with the prosecution's theory of the case, and because Smith, the sole witness to connect appellant to the scene of the crime, testified appellant was the shooter. Defense counsel also argued there was no evidence that appellant was the shooter or that a robbery was committed.

crime whether he committed it personally or aided and abetted the perpetrator who committed it.”

The CALCRIM No. 401 instruction given stated:

“To prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

“1. The perpetrator committed the crime;

“2. The defendant knew that the perpetrator intended to commit the crime;

“3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;

“AND

“4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

“Someone aids and abets a crime if he knows of the perpetrator's unlawful purpose and he specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

“If you conclude that [the] defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor.

“However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him an aider and abettor.”

The next day, the court discovered it had made a mistake in the supplemental instructions by omitting a requirement from the CALCRIM No. 540B instruction.⁶ Over a defense objection, the court read the corrected portion of CALCRIM No. 540B to the jury.⁷ Thereafter, defense counsel unsuccessfully moved for a mistrial on the ground that

⁶ On June 28, 2010, pursuant to CALCRIM No. 540B, the court instructed the jury as follows:

“The defendant may also be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator.

“To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

“1. The defendant attempted or aided and abetted to commit attempted Robbery;

“2. The defendant intended to commit or intended to aid and abet the perpetrator in committing attempted Robbery;

“3. If the defendant did not personally commit attempted Robbery, then a perpetrator, whom the defendant was aiding and abetting, personally committed attempted Robbery

“AND

“4. While committing attempted Robbery, the perpetrator did an act that caused the death of another person.

“A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.

“To decide whether the defendant and the perpetrator attempted to commit Robbery, please refer to the separate instructions that I have given you on those crimes. To decide whether the defendant aided and abetted a crime, please refer to the separate instructions that I have given you on aiding and abetting. You must apply those instructions when you decide whether the People have proved first degree murder under a theory of felony murder.

“The defendant must have intended to commit, or aid and abet the felony of attempted Robbery before or at the time of the act causing the death.

“The defendant may not be found guilty of aiding and abetting murder in the second degree under the law of implied malice as set forth in instruction 520 on malice aforethought.”

⁷ On June 29, 2010, the court corrected a portion of the CALCRIM No. 540B instruction it had previously given, and read the corrected portion to the jury. As corrected, the instruction stated:

the prosecution asked the jury to convict appellant of premeditated murder based on his being the shooter and the supplemental instructions given were unsupported by substantial evidence.

On June 30, 2010, at the end of the day, the jury notified the court it had reached a verdict. The next day, the verdict was read and the jury found appellant guilty of first degree murder and attempted second degree robbery, but returned no verdict on the possession of a firearm by a felon and gang participation counts. It found not true the personal and intentional use of a firearm allegation. Thereafter, defense counsel moved again for new trial; the court denied the motion after concluding there was sufficient evidence of aiding and abetting to support the supplemental instructions given.

B. *Analysis*

1. Attempted Robbery and Felony Murder Instructions

Appellant contends the court erred in instructing the jury on attempted robbery and felony murder because, although he and another assailant were intending to assault Barrett, there was insufficient evidence they were intending to steal any of Barrett's property.

“The defendant may also be guilty of murder, under a theory of felony murder, even if another person did the act that resulted in the death. I will call the other person the perpetrator.

“To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

“1. The defendant attempted to commit robbery or aided and abetted an attempt to commit Robbery;

“2. The defendant intended to commit robbery or intended to aid and abet the perpetrator in committing Robbery;

“3. If the defendant did not personally attempt to commit Robbery, then a perpetrator, whom the defendant was aiding and abetting, personally attempted to commit Robbery;

“AND

“4. While attempting to commit Robbery, the perpetrator did an act that caused the death of another person.

“A person may be guilty of felony murder even if the killing was unintentional, accidental, or negligent.”

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) specific intent to rob; and (2) a direct, unequivocal, but ineffectual overt act towards the commission of the intended robbery. (*People v. Dillon* (1983) 34 Cal.3d 441, 455-456; *People v. Vizcarra* (1980) 110 Cal.App.3d 858, 861.)

We conclude there is substantial circumstantial evidence to support the inference that appellant and another assailant attempted to rob Barrett. First, the wiretap evidence established that four months prior to the Barrett incident, appellant talked about robbing people of jewelry. Second, on the night of the incident, Barrett was wearing a gold chain and Bamm-Bamm pendant; after being shot, he was holding the chain and pendant in his hand. Third, Smith testified that Barrett’s two assailants, including appellant, clawed and pulled at Barrett’s upper chest, shoulders, neck area and shirt. Similarly, Reeves testified that appellant and the other assailant reached toward Barrett’s chest while pushing him up against the wall.⁸ Fourth, Reeves testified without objection that, after he reported Barrett’s shooting to police, someone who had been at the bar told him Barrett had been shot and robbed. Finally, evidence was presented that approximately two weeks after the Barrett incident, appellant robbed Thomas of a gold chain and pendant. Taken together, this evidence permits the inference that appellant and the other assailant attempted to rob Barrett of the Bamm-Bamm pendant and provides ample support for jury instructions on the theories of attempted robbery and felony murder in the commission of an attempted robbery.

2. Jury Instructions on Aiding and Abetting and Felony Murder as a Nonkilling Accomplice

Appellant contends the court’s supplemental jury instructions on aiding and abetting and felony murder as a nonkilling accomplice were erroneously given to the jury

⁸ Appellant’s assertion that evidence the assailants were clawing at Barrett’s upper chest, neck, and shirt is consistent with an assault, but not with an attempt to steal, borders on frivolous.

because there is no substantial evidence that appellant was a nonshooting perpetrator of the crime that resulted in Barrett's death.

An aider and abettor may be criminally liable not only for the criminal acts he or she encourages, but also for criminal acts that were the natural and probable consequences of those crimes. (*People v. Avila* (2006) 38 Cal.4th 491, 567.) "Neither mere presence at the scene of a crime, nor the failure to take steps to prevent a crime, is alone sufficient to establish that a person is an aider and abettor. Such evidence may, however, be considered together with other evidence in determining that a person is an aider and abettor. [Citation.]" (*In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460.)

Appellant argues the only "solid evidence"⁹ was the eyewitness testimony of Smith, which established him as the shooter. He asserts no eyewitness identified him as a nonshooting aider and abettor and the surveillance videos from the vicinity of the crime scene did not establish he was one of the perpetrators. Appellant concedes he was linked to the crime scene vicinity by cell phone evidence and evidence that he occasionally had possession of the getaway car. However, he argues that, without solid evidence that he was one of the two assailants involved in Barrett's shooting, this evidence together with evidence that he robbed Thomas of jewelry and that Barrett was wearing jewelry similar to that stolen from Thomas could not establish his liability as an aider and abettor.

Appellant relies on *People v. Singleton* (1987) 196 Cal.App.3d 488 (*Singleton*). In that case, the defendant was a passenger in a car driven by Bedell. The car was stopped, the defendant and Bedell were searched, and cocaine was found stuffed in the defendant's boot. The defendant claimed Bedell gave the cocaine to her. Bedell claimed he found the cocaine on the ground and gave it to the defendant to hide when he saw the police car approach. (*Id.* at pp. 490-491.) In closing argument, the prosecutor argued the aiding and abetting instructions given supported the inference that the defendant could have intended to aid an undefined seller of cocaine whom he referred to as "Mr. X," but that the defendant was not aiding and abetting Bedell. (*Id.* at p. 492.) The *Singleton* court

⁹ Appellant does not define "solid evidence"; it appears he equates solid evidence with eyewitness testimony.

found there was sufficient evidence for the aiding and abetting instructions based on the theory that Bedell was a cocaine dealer who the defendant aided and abetted, but there was no evidence to support the prosecution's theory that the defendant aided and abetted a "phantom" Mr. X drug dealer. (*Id.* at p. 493.) Based on the circumstances of the case, it found the error prejudicial. (*Id.* at pp. 493-494.)

Singleton is distinguishable. In that case, there was no evidence supporting the prosecution's aiding and abetting theory. Here, evidence was presented that two persons assaulted and attempted to rob Barrett, and Barrett was shot and killed by one of the assailants. Reeves identified appellant as resembling one of the two assailants.¹⁰ As appellant concedes, he was linked to the crime scene vicinity by cell phone evidence and by evidence that he occasionally had possession of the getaway car. Barrett was shot twice, and ballistics testing was inconclusive as to whether one gun had fired both bullets, permitting a reasonable inference that one or both of Barrett's assailants had guns. In closing argument, the prosecutor argued that both assailants had guns. We conclude the evidence supports the reasonable inference that if appellant was not the shooter, he aided the other assailant who shot Barrett. No instructional error is shown.

II. *The Court Properly Precluded Admission of Photographs*

Next, appellant contends the court erred in precluding the defense from introducing photos of two third party suspects, Dennis Anderson and Gregory Walker, so that jurors could consider whether they were the two perpetrators depicted in the

¹⁰ Appellant discredits Reeves's testimony by arguing that Reeves "also said that he 'really didn't see [the assailants'] face[s],' and that he could not identify anyone. Reeves never said that the taller man was the shooter or even the man with the gun. In fact, Reeves said that he saw neither the shooting nor the gun." Appellant asserts the "only reasonable inference the jury could have drawn" is that Reeves could not confidently identify appellant as one of the perpetrators. Although Reeves's testimony was conflicting as to the identity of the perpetrators, the conflict goes to the credibility of his testimony. Reeves's testimony that appellant resembled one of Barrett's assailants provided substantial evidence to support the court's aiding and abetting instruction. As we noted previously, the trial court's determination of whether an instruction should be given must be made without reference to the credibility of the evidence. (*Young, supra*, 34 Cal.4th at pp. 1200-1201.)

surveillance videos taken near the crime scene. Appellant contends the photos were admissible under state law to establish third party culpability and were admissible under federal constitutional law because they were critical to his defense.

On cross-examination, gang expert Do testified Anderson was affiliated with Chopper City, a gang affiliated with CDP. Do also testified he knew Walker was a CDP member, had recently pled guilty to a gun offense, and was Hughes's half brother. Thereafter, outside the presence of the jury, defense counsel made an offer of proof to show the jury a photo of Anderson on the grounds that defense counsel believed Anderson was the "real shooter" and was depicted in the surveillance video. The prosecutor noted, the night before, when eyewitness Stribble was shown Anderson's photo, he said Anderson was not the shooter. Defense counsel maintained Anderson "looks exactly like the image in the surveillance video" and sought, during cross-examination of Do, to lay a foundation for admission of the Anderson photo by linking Anderson to the charged offenses. The court permitted defense counsel to attempt to make such a foundational showing.

On continued cross-examination, Do said he had seen appellant and Anderson together and had seen Anderson and Hughes together, and it would "not be uncommon" for Anderson and Hughes to know each other. Do also said gang members rob people of their medallions because doing so gives them "high stature," and Anderson was a gang member interested in high stature. Do said he did not recognize Walker or anyone else in the surveillance videos in this case and had never seen Walker and Anderson together.

Thereafter, defense counsel again sought admission of the Anderson photo on the grounds that the defense strongly believed Anderson was the "real shooter" and was depicted in the surveillance video. The court ruled the Anderson photo was inadmissible as evidence of third party culpability, as a statement against penal interest, and under Evidence Code section 352.

Subsequently, at an Evidence Code section 402 hearing outside the presence of the jury, Smith was shown two photos of Anderson and said they did not depict the person she saw on the night of the shooting. When shown two still photos taken from one of the

surveillance videos depicting two persons, Smith said the person on the right in each photo was the shooter.

Thereafter, defense counsel requested that the court admit the Anderson photos so the jury could consider whether Anderson looks very similar to the image depicted in the surveillance video. Defense counsel argued the police had received a tip Anderson was the shooter and the photos of Anderson looked like one of the persons in the surveillance video. Moreover, Anderson had a history of gun possession, violence and robberies, belonged to a gang, visited appellant in jail, and could “just as easily” as appellant have been at the crime scene. In denying the motion to admit the Anderson photos, the court noted that eyewitnesses Smith and Stribble emphatically rejected Anderson as the shooter and admission of the photos would permit the jury “to be collectively a third witness” as to the shooter’s identity. The court also ruled that, pursuant to Evidence Code section 352, the Anderson photos were irrelevant, lacked probative value, and their admission would likely confuse and distract the jury.

Subsequently, defense counsel sought to admit a photo of Walker on the grounds that Walker is a CDP member, looks like one of the perpetrators in the surveillance video, and visited appellant in jail. Moreover, based on cell phone records, Walker was in phone contact with appellant on the night of the shooting, suggesting they were not together at that time. The prosecutor objected that the Walker photo was irrelevant and its admission would mislead the jury. The court refused to admit the Walker photo on the grounds that it was irrelevant and permitted the jury to engage in “rank speculation.”

“ [T]o be admissible, evidence of the culpability of a third party offered by a defendant to demonstrate that a reasonable doubt exists concerning his or her guilt, must link the third person either directly or circumstantially to the actual perpetration of the crime. In assessing an offer of proof relating to such evidence, the court must decide whether the evidence could raise a reasonable doubt as to defendant’s guilt and whether it is substantially more prejudicial than probative under Evidence Code section 352.

[Citations.]’ [Citation.]” (*People v. McWhorter* (2009) 47 Cal.4th 318, 367-368.)

“ [T]he third-party evidence need not show “substantial proof of a probability” that the

third person committed the act; it need only be capable of raising a reasonable doubt of defendant's guilt.' [Citation.] ' . . . The evidence must meet minimum standards of relevance: "evidence of mere motive or opportunity to commit the crime in another person, without more, will not suffice to raise a reasonable doubt about a defendant's guilt: there must be direct or circumstantial evidence linking the third person to the actual perpetration of the crime." [Citation.] . . . [Citation.]' [Citation.]" (*Id.* at p. 368.) "[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code,] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code,] § 352)." (*People v. Hall* (1986) 41 Cal.3d 826, 834.)

A trial court's determination of the admissibility of third party culpability evidence is reviewed under the abuse of discretion standard. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.) Pursuant to that standard, " "a trial court's ruling will not be disturbed, and reversal of the judgment is not required, unless the trial court exercised its discretion in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice." [Citation.]' [Citations.]" (*People v. Lewis* (2009) 46 Cal.4th 1255, 1286.)

Appellant argues (1) the Anderson photos were admissible as third party culpability evidence because Anderson strongly resembled the two perpetrators depicted in the surveillance videos and still photos; (2) Do's testimony that he had seen Anderson and Hughes together and their gangs were affiliated, linked Anderson to the getaway car owned by Hughes; and (3) Anderson had a motive to commit the charged offenses since he was a gang member who was interested in gang stature. Appellant also argues (1) the photos of Walker were admissible as third party culpability evidence because they strongly resembled the perpetrators depicted in the surveillance videos and still photos; (2) Walker belonged to the same gang as appellant and visited appellant in jail; and (3) based on the cell phone records, Walker was not with appellant at the time of the shooting.

We conclude the court did not abuse its discretion in precluding admission of the Anderson and Walker photographs. There was insufficient evidence linking Anderson or Walker to the shooting, and no witness testified that Walker or Anderson shot Barrett or were at the crime scene. The offers of proof indicated that Walker and Anderson resembled appellant and knew or were associated with appellant and Hughes. However, this evidence did not link Anderson or Walker to this particular case. We conclude the excluded evidence was insufficient to raise a reasonable doubt as to appellant's guilt. Moreover, given the tenuous connection of the Anderson and Walker photos to the case, the court properly exercised its discretion under Evidence Code section 352 in determining the probative value of the photos was outweighed by the risk that they would likely confuse and mislead the jury.

Appellant relies on *Lunbery v. Hornbeak* (9th Cir. 2010) 605 F.3d 754 (*Lunbery*) in arguing that the court's exclusion of the Anderson and Walker photos violated his federal constitutional right to present a complete defense. In *Lunbery*, the Ninth Circuit concluded the trial court's exclusion, as inadmissible hearsay, of testimony by a witness who heard another person, deceased at the time of trial, state that he and his partners had committed the murder for which the defendant was being tried, deprived the defendant of the right to present a defense. (*Id.* at pp. 761-762.) The appellate court held the excluded statement "bore substantial guarantees of trustworthiness and was critical to [the defendant's] defense." (*Id.* at p. 761.) The court concluded the statement was trustworthy because it was corroborated by other evidence in the case. (*Ibid.*) *Lunbery* observed, "[b]y deeming [the] statement . . . inadmissible hearsay the state court of appeal dismissed the remaining pieces of evidence [of third party culpability] as providing only motive and opportunity to commit the crime, because there was no direct or circumstantial evidence that a third party had done so. Had [the] statement been admitted, however, this missing element would have been supplied, and the remaining pieces of the puzzle would have become more relevant." (*Id.* at pp. 761-762.)

Here, in contrast to *Lunbery*, there was no comparable evidence of a corroborative nature linking Anderson and Walker to the actual perpetration of the Barrett shooting and

attempted robbery. Thus, we conclude appellant has failed to establish that exclusion of the Anderson and Walker photos constituted evidentiary or constitutional error.

III. *Defense Counsel Was Not Ineffective in Failing to Present Evidence*

Next, appellant contends defense counsel was ineffective in failing to present evidence establishing that the San Francisco 49ers (49ers) were scheduled to play in Miami, Florida at 10:00 a.m. on Sunday, December 14, 2008, in an attempt to undermine the prosecution's theory that appellant committed the Thomas robbery.¹¹

To establish ineffective assistance of counsel, a defendant must prove that (1) counsel's representation was deficient in that it fell below an objective standard of reasonableness under prevailing professional norms, and (2) the deficient representation prejudiced the defendant, i.e., there is a reasonable probability that, but for counsel's failings, the defendant would have received a more favorable result. (*Strickland v. Washington* (1984) 466 U.S. 668, 694 (*Strickland*); *People v. Ledesma* (1987) 43 Cal.3d 171, 216-218.) Appellant has the burden of establishing that his counsel was ineffective. (*Strickland*, at p. 687; *In re Andrews* (2002) 28 Cal.4th 1234, 1253.) "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) We may reject appellant's ineffective assistance of counsel claim for failure to establish prejudice without the need to determine whether counsel's representation fell below an objective standard of reasonableness. (*People v. Boyette* (2002) 29 Cal.4th 381, 430-431.)

Appellant argues that, had the jury been apprised that the 49ers were scheduled to play in Miami at 10:00 a.m. on Sunday, December 14, 2008, it would have concluded that Vernon Davis could not have been at the club at 2:00 a.m. on that date; the Thomas robbery could not have happened at 2:00 a.m. on that date; and the cell phone evidence

¹¹ We grant appellant's October 17, 2011 request that we take judicial notice of the fact that the 49ers were scheduled to play against the Miami Dolphins in Miami at 10:00 a.m. on Sunday, December 14, 2008. (Evid. Code, § 452, subd. (h).)

linking appellant to the vicinity of the club at 2:00 a.m. on that date did not implicate him in the Thomas robbery. Appellant argues the jury would have instead concluded the Thomas robbery happened at 2:00 a.m. on Monday, December 15, as Thomas reported to Burrows. Since appellant was in the East Bay at that time, he did not commit the Thomas robbery. He asserts that, absent the inference that he robbed Thomas, it is reasonably probable he would not have been convicted of the attempted robbery and murder of Barrett. Appellant argues his defense counsel had no legitimate tactical purpose in failing to establish that the Thomas robbery did not happen on Sunday, December 14, 2008, because the evidence suggesting appellant robbed Thomas was very damaging and the defense had attempted to exclude it and, alternatively, to convince the jury it did not happen on that date.

The People do not dispute that the 49ers played in Miami on Sunday, December 14, 2008, that Vernon Davis played in that game, and that it is unlikely Davis was inside or outside the club at 2:00 a.m. on that date. They argue, however, it is not reasonably probable that, had the jury been apprised that the 49ers played in Miami on December 14, it would have failed to convict appellant of attempted robbery and murder of Barrett. We agree.

The evidence that Davis and the 49ers played in Miami on December 14, 2008, may have undermined Thomas's testimony that he saw Davis at the club on the night Thomas was robbed, but it does not undermine the uncontradicted evidence that the cell phone seized from appellant upon his arrest contained photos of Thomas's stolen pendant and chain and that the chain and pendant were found in appellant's rental car. Thus, the jury could reasonably have concluded that appellant robbed Thomas on a date other than December 14. The assertion in appellant's reply brief that the jury could have inferred that appellant possessed Thomas's stolen jewelry because he was a fence for stolen property, rather than because he was a robber, is purely speculative and does not suggest the jury would have reached a different result had defense counsel elicited the facts about the football game. We conclude appellant has failed to establish prejudice and, therefore, reject his claim of ineffective assistance of counsel.

IV. Defense Counsel Was Not Ineffective Regarding the Preliminary Hearing Incident

Finally, appellant contends his defense counsel committed prejudicial ineffective assistance of counsel by asking seven gang members to attend a preliminary hearing and simultaneously stand up while Smith was testifying.

Before the preliminary hearing, the trial court denied defense counsel's request for a physical lineup to be viewed by Smith. Thereafter, defense counsel asked men matching appellant's description to attend the preliminary hearing. During the preliminary hearing, when the prosecutor asked Smith whether she saw the shooter in the courtroom, defense counsel asked the men to stand. Thereafter, Smith identified appellant as the shooter. The prosecutor requested that the men be identified and arrested for intimidating a witness. The court continued the hearing until the following morning. When the preliminary hearing resumed, defense counsel explained he had asked the men to stand when Smith was asked if she recognized anyone, so that appellant would not be the only person matching the suspect's description. Defense counsel said there was no intent to intimidate the witness and there was no intimidation.

At trial, Smith, Do, and Lynch testified regarding the preliminary hearing incident. Smith stated, at the preliminary hearing when asked if she saw Barrett's shooter in the courtroom, eight or nine young African-American men, who had been seated behind appellant, stood up, folded their arms across their chests, and glared at her. Although she was not afraid for her safety, she felt very uncomfortable, angry and upset; she believed the men were trying to distract her and frighten her. Smith said she identified appellant as Barrett's shooter as the men were standing. When appellant opened his mouth, revealing his gold crowns, Smith was 100 percent sure he was the shooter.

Do testified seven CDP gang members or associates attended the preliminary hearing in support of appellant and, thereafter, were detained and photographed. Do identified photographs of the men and discussed their tattoos and gang monikers. Following Do's testimony, the parties stipulated that the gang members or associates who attended the preliminary hearing did so at defense counsel's request.

Lynch testified, at the preliminary hearing when Smith was asked to identify the shooter in the courtroom, “seven men stood up in the courtroom in unison and appeared to stare down Ms. Smith. [¶] Some of them had their arms folded, and it looked like a pretty aggressive stance.” Lynch identified the men.

During closing argument, the prosecutor noted Smith’s attention to detail and stated, “as soon as she saw him with gold teeth at that preliminary hearing under those trying circumstances,” she identified appellant as the shooter. The prosecutor further argued: “Preliminary hearing. . . . Smith is up here testifying. You heard evidence about that. And this is one of the reasons why the gang evidence came in. [¶] Seven to eight gang buddies came here, and when she was asked to identify the defendant in open court, what happened? They stood up. They folded their arms. [¶] Now, I suggest to you that they were trying to intimidate her. I suggest that they were trying to intimidate her to prevent her from making an identification. [¶] At the very least, they were there, I’m sure [defense counsel] will say, to show their support for their buddy. But did they have to stand up? Did they have to fold their arms? [¶] Imagine that. When you’re just trying to do the right thing and these people come in and they try to prevent her from identifying a person that’s committed murder. That shows . . . Smith is a courageous person who just wants to see the right thing happen.” In discussing the cell phone records for the phone seized from appellant which showed numerous calls from Esau Ferdinand, the prosecutor stated that Ferdinand was one of the persons who “showed up at the preliminary hearing to try to intimidate” Smith.

During his closing argument, defense counsel stated the following: “. . . I think I covered everything except this business about what happened at the preliminary hearing that ties in with the gang stuff. [¶] Word was put out by me to get people to come in that looked similar, young black kids with gold teeth to come into court to make it a little less suggestive. It didn’t work. But there was no intimidation of witnesses. [¶] . . . Smith told you she wasn’t intimidated. The only one intimidated was [the prosecutor]. He’s the one who made a whole big deal out of it and continues to make a whole big deal out of it. [¶] I suggest to you that those fellows came down here and subjected themselves to

arrest[,] not to intimidate a witness, but because they know that [appellant] didn't do it. Those guys know . . . the streets better than anybody. Believe me. . . . [¶] They didn't come here and subject themselves to arrest because they want[ed] to commit a felony in open court with me conspiring with them. That's nonsense."

Appellant contends defense counsel acted unreasonably in believing that prompting seven of appellant's fellow gang members to stand up during the preliminary hearing would be a substitute for a physical lineup, ignoring the likelihood the gang members' action would be viewed by Smith and observers as intimidating, and disregarding the likelihood that the incident would result in the admission at trial of extremely damaging evidence against appellant. Appellant maintains defense counsel's stated tactical purpose of making Smith's identification process less suggestive was not reasonable because, regardless of the presence of his fellow gang members, his seat at the defense table and being dressed in orange jail clothing made him stand out. Finally, he reasons defense counsel should have anticipated that the gang members' conduct at the preliminary hearing would be admissible at trial to establish the nature of the gang, his association with and participation in the gang, and to prove the prosecution's case against him.

Appellant also argues defense counsel's ineffective representation was prejudicial because the jurors were apprised that the men who stood up and glared at Smith were members or associates of the gang in which appellant was a member; viewed photos of the gang members' tattoos; and heard the men's conduct made Smith feel uncomfortable, angry, and upset, and that she believed they were trying to distract and frighten her. He argues, as a result, the jurors may have concluded that the conduct of appellant's supporters enhanced Smith's credibility, established his consciousness of guilt, and tended to establish his commitment to the gang and its criminal activities. He argues the jury's deliberation for nine days before returning its verdict, requests for a DVD and CD player, and read backs of testimony, suggest the case was a close one and compels the conclusion that defense counsel's unreasonable tactic at the preliminary hearing was prejudicial.

We conclude appellant has failed to demonstrate defense counsel’s conduct was prejudicial and, therefore, reject his ineffective assistance of counsel claim. First, we reject, as speculative, appellant’s assertion that the preliminary hearing incident caused the jury to rely on Smith’s identification of him to engage in unwarranted conjecture that he was one of the perpetrators, but not the shooter. Smith was not the only witness who placed appellant at the crime scene; Reeves identified appellant as one of Barrett’s assailants. Second, the jury’s failure to convict appellant of the gang charge and its finding the gang allegations untrue suggests the preliminary hearing incident did not tend to establish his commitment to the gang and its criminal activities. Third, appellant’s assertion the jury may have concluded the incident reflected appellant’s consciousness of guilt is merely speculative and belied by its mixed verdict, which demonstrates that it carefully considered the evidence. Finally, the jury was instructed, pursuant to CALCRIM No. 200, that it was not to let “bias, sympathy, prejudice, or public opinion influence [its] decision.” Absent evidence to the contrary, we presume the jury followed that instruction. (*People v. Anderson* (2007) 152 Cal.App.4th 919, 951.) We reject appellant’s assertion that the preliminary hearing undermined the jury’s ability to comply with that instruction.

DISPOSITION

The judgment is affirmed.

SIMONS, J.

We concur.

JONES, P.J.

BRUINIERS, J.