

NOT TO BE PUBLISHED

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sutter)

THE PEOPLE,

Plaintiff and Respondent,

v.

AARON RICHARD OUELLETTE et al.,

Defendants and Appellants.

C065374

(Super. Ct. No.
CRF072832)

Six percipient witnesses testified consistently to all or part of the narrative the prosecution argued to the jury -- that two inebriated gang members robbed a man on a bike in the middle of the night in a dark alley, kicked him in the head and ribs as he lay on the ground, jumped in their truck and rolled over him several times, moved forward then stopped and looked under the truck, accelerated down the street with the man stuck in the tire well, turned the corner, parked the truck, and took off running. Following a joint trial, a jury convicted defendants Aaron Richard Ouellette and Michael Angelo Sanudo of first

degree murder, robbery, active participation in a criminal street gang, and assault, and found true the special circumstance that the murder was committed during a robbery.

Ouellette testified he did not rob the decedent, Willie Dean Roberts, Jr., did not intend to hurt him, and did not know that he had run over him or dragged him under the truck for approximately 730 feet. Sanudo did not testify, but his lawyer argued he committed no crime; rather, he was unfortunately at the wrong place at the wrong time. On appeal, both defendants attempt to retry their case, casting aspersions on the credibility of the percipient witnesses and insisting that the killing was an accident unrelated to any gang activity. They raise a host of meritless challenges to the jury instructions and the sufficiency of the evidence. We affirm.

FACTS

Two skilled defense lawyers subjected all six percipient witnesses to grueling cross-examination. As a result, the jury was well acquainted with the weaknesses in their abilities to perceive and recall what they heard and saw in the wee morning hours of September 29, 2007. Most notably, five of the six had been drinking, and most of them testified to facts they had not disclosed to the police officers at the scene of the crimes or shortly thereafter. They were emotionally traumatized by the grisly death they witnessed and, for some, they had difficulty testifying about the events two and a half years later. Viewing the evidence, however, in the light most favorable to the

prosecution, as we must, the witnesses provide a chilling account of what defendants did and said to the victim.

Riki Clark and Erica Hill were outside Clark's apartment under a carport smoking when Roberts rode by on his bicycle. Shortly thereafter they saw three people in a fight. Hill heard defendants ask Roberts, "What do you got for us, nigger?" and then demand, "Give us what you got for us, nigger." She saw the driver, Ouellette, push Roberts off his bike. Both Clark and Hill saw defendants kicking him; Ouellette kicked Roberts in the face six to seven times while Sanudo kicked him in the ribs. Ouellette rifled through Roberts's pockets, and papers were "flying in the air" and onto the ground. Ouellette stuffed some of the items into his own pockets and Sanudo kicked Roberts again.

According to Hill, defendants then got into their truck and backed up over the victim, going forward and back about three times in the carport driveway. Roberts became lodged near the pickup's right front tire. Sanudo leaned out of the passenger window and looked toward the front of the truck. He then opened the front door, looked under the front right tire, and kicked Roberts in the head four times. Ouellette went forward and then in reverse a couple more times, but Roberts remained lodged under the pickup. Hill chased after the truck. But the driver stopped, got out, and lifted his shirt to expose what Hill thought was a gun near his belt buckle. She ran away. With Roberts still trapped, Ouellette got back into the truck and drove down the alley.

Three of the other witnesses were together at Latoya Perico's apartment. Naqueita Cox and Latoya Shaw were on the balcony overlooking the alley when they heard tires screeching. Cox reported that it sounded like teenagers "burning rubber." She testified that the truck stopped and either the driver or the passenger got out, looked at the body under the truck, and then got back into the truck. Shaw testified they both got out of the truck to look under it, and they got back in together. Perico testified that after hearing Cox shout that someone was trapped under the truck, she ran outside and saw two men get out of the truck, get back in, and drive away.

Christina Dearden was the sixth neighbor to testify. From her bedroom, she heard screeching tires. She looked out her window and saw a white driver and a Mexican passenger get out of a truck. At the preliminary hearing she testified that the passenger looked under the truck and ran away while the driver walked away, but at trial she testified it was the passenger who looked under the truck and walked away while the driver immediately ran away.

As mentioned above, defendants attempted to impeach all six witnesses by demonstrating inconsistencies in their testimony and their failure to disclose pertinent details on the night of the murders. All but Dearden had been drinking. Moreover, defendants insisted that the forensic evidence did not support the eyewitness accounts.

For example, the pathologist testified that Roberts's injuries were consistent with being trapped under the truck and

dragged, and not with being run over multiple times as Hill had testified. Moreover, there was no blood or body tissue in the driveway area where defendants purportedly ran over the victim. Nor was there any blood on either of defendants' shoes or fingerprints on any of the contents of the victim's wallet.

The first police officer on the scene noticed a large pool of blood, a bicycle, and papers in the alley. He followed the trail of blood to a blue pickup truck parked approximately 730 feet away. He saw the bottom of Roberts's shoe sticking out from beneath the truck. Roberts remained pinned under the front tire. Other officers found Roberts's wallet in the alley with some of its contents strewn next to it.

A toxicologist testified that based on blood samples taken the next morning from defendants, Ouellette's blood alcohol level would have been about .19 percent and Sanudo's would have been about .15 percent at the time of the incident.

A gang expert testified that both defendants were active Norteño gang members on September 29, 2007. Both had admitted to being gang members on multiple occasions. They had gang tattoos, accompanied other gang members, and frequented gang areas. The expert explained the primary activities of the Norteño gang included battery, mayhem, assault with a deadly weapon, attempted murder, and murder. He testified to numerous predicate offenses, which are not challenged on appeal. When given a hypothetical situation involving facts similar to what occurred in the alley on September 29, he opined that the crime was committed in association with the Norteño street gang,

furthered the criminal conduct of the Norteño street gang, and benefited the Norteño street gang.

Ouellette testified in his own defense. He disputed the eyewitness testimony and asserted that all six witnesses were wrong. He did not initiate a fight with Roberts, he did not threaten him verbally, he did not kick or stomp him, he did not take anything from him, he did not intend to hurt him, and he did not know the man was stuck under the truck. Rather, he claimed it was Roberts who had started the fight after he asked Roberts for a cigarette. Ouellette merely tried to defend himself; indeed, he could not strike the victim because his arm was injured. He was intoxicated when he got into the truck, the radio was blasting, and when he had difficulty steering the truck on the wet pavement he believed he had a flat tire. He parked the truck in front of Sanudo's mother's apartment and ran because he was being pursued by people he did not know, and as an intoxicated parolee, he wanted to avoid arrest.

The prosecution introduced evidence of gang indicia Sanudo possessed in jail, including a picture of his son in a red jersey with the number 14 on it. The color red and the number 14, the gang expert instructed the jury, were commonly associated with the Norteños. Sanudo was also in possession of a letter that outlined the history of the Norteño gang.

Sanudo did not testify, but his son's godmother testified that she gave her godson the red shirt, and she had no familiarity with gangs or the symbolism associated with the

color or number. His girlfriend testified that Sanudo had never claimed to be a Norteño.

The jurors deliberated for 13 hours over two days and asked for Hill's testimony to be reread. They found defendants guilty of murder and found the robbery special circumstance true, but acquitted on both the torture and gang special circumstance allegations. The jury found them guilty of robbery but found not true the allegations that the defendants inflicted great bodily injury during the robbery and committed the robbery to promote a gang. The jury found defendant Sanudo guilty but acquitted Ouellette of active participation in a criminal street gang. They were both acquitted of assault with a deadly weapon, but convicted of the lesser included offense of simple assault.

The court sentenced defendants to life in prison without the possibility of parole. All other terms of imprisonment were stayed. (Pen. Code, § 654.)¹

DISCUSSION

I

Instructional Error

A. Lesser Included Offense by Tacking on the Enhancement

Criminal defendants have tried time and time again to append the enhancing allegations to the charged offense. And, over time, the California Supreme Court has rejected a stream of creative variations of the same argument in very different

¹ All further statutory references are to the Penal Code unless otherwise indicated.

contexts. For example, sentence enhancements are not the “functional equivalent” of elements of the greater offenses for double jeopardy purposes (*Porter v. Superior Court* (2009) 47 Cal.4th 125, 137-138 (*Porter*)), nor do convictions on offenses and enhancements offend the prohibition for multiple convictions (*People v. Sloan* (2007) 42 Cal.4th 110, 119-120 (*Sloan*)). Despite an unbroken line of persuasive authority to the contrary, defendants boldly ask us to chart a new course in light of *Apprendi v. New Jersey* (2000) 530 U.S. 466 [147 L.Ed.2d 435] (*Apprendi*) and its progeny by finding that the great bodily injury enhancement is an element of the crime of robbery and therefore the trial court erred by failing to instruct sua sponte that assault was a lesser included offense of robbery. The California Supreme Court has soundly and repeatedly rejected the very premise of defendants’ argument.

In *People v. Wolcott* (1983) 34 Cal.3d 92 (*Wolcott*), the defendant contended that the trial court should have instructed the jury sua sponte that assault with a deadly weapon is a lesser included offense in a charge of robbery enhanced by use of a firearm. (*Id.* at p. 96.) Rejecting the defendant’s attempt to merge the allegations pertaining to the charged offense with the allegations pertaining to an enhancement, the court held that among other glaring deficiencies a “use” enhancement is “not part of the accusatory pleading for the purpose of defining lesser included offenses” (*Ibid.*) The Supreme Court relied on the fact that the majority of Court of Appeal decisions have held that “an allegation of firearm

use for purposes of Penal Code section 12022.5 is not to be considered in determining whether the accusation encompasses a lesser included offense.' [Citations.]" (*Wolcott*, at pp. 100-101.)

On this point the *Wolcott* decision remains intact. As the Court in *Sloan, supra*, 42 Cal.4th at p. 119, footnote 4 reiterated, "*Wolcott* . . . held that enhancements are not considered part of an accusatory pleading for purposes of defining or instructing sua sponte on lesser offenses of which a defendant might be convicted." More emphatically, the court admonished, "Appellant cites no cases, and our research discloses none, that permit considering enhancements for determining lesser included or necessarily included offenses for any purpose." (*Id.* at p. 120.)

Similarly, in *People v. Bright* (1996) 12 Cal.4th 652 (*Bright*), disapproved on other grounds in *People v. Seel* (2004) 34 Cal.4th 535, 550, footnote 6, the defendant again attempted to combine the offense with an enhancement, this time to set the stage for a double jeopardy claim. The Legislature had determined that an attempted murder that was premeditated merited greater punishment than other attempted murders. The jury convicted the defendant of attempted murder but hung on the enhancement. The defendant claimed that the failure to convict him of the greater offense amounted to an acquittal for double jeopardy purposes.

Not so, concluded the Supreme Court once again. "Under both federal and California law, greater and lesser included

offenses constitute the 'same offense' for purposes of double jeopardy." (*Bright, supra*, 12 Cal.4th at p. 660.) And it is true that, pursuant to section 1023, an acquittal is a bar to another prosecution for any necessarily included offense a defendant might have been convicted of under the charges set forth in the accusatory pleading. (*Bright*, at pp. 660-661.) The court rejected, however, the defendant's suggestion that the offense, coupled with the enhancing allegation, constituted a greater degree of the offense of attempted murder. "[W]e conclude that the provision of section 664, subdivision (a), prescribing a punishment of life imprisonment with the possibility of parole for an attempt to commit murder that is 'willful, deliberate, and premeditated' does not establish a greater degree of attempted murder but, rather, sets forth a penalty provision prescribing an increased sentence (a greater base term) to be imposed upon a defendant's conviction of attempted murder when the additional specified circumstances are found true by the trier of fact." (*Bright*, at p. 669.) "Thus, the circumstance that the jury has returned a verdict on the underlying offense, but is unable to make a finding on the penalty allegation, does not constitute an 'acquittal' of (or otherwise bar retrial of) the penalty allegation on the ground of double jeopardy." (*Id.* at pp. 661-662.)

Defendants insist that the logic of *Wolcott* and *Bright* has been repudiated by the United States Supreme Court in *Apprendi, supra*, 530 U.S. 466. In *Apprendi*, the high court described sentence enhancements as the "functional equivalent" of elements

of greater offenses. (*Id.* at p. 494, fn. 19.) Thus, in defendants' view, enhancements merge into the offenses and the consolidated greater offenses are born. The California Supreme Court has considered and rejected the creative engineering of the *Apprendi* functional equivalent model to fit scenarios far removed from the context in which *Apprendi* was designed.

After all, *Apprendi* itself involved a constitutional challenge to imposition of increased punishment for an enhancement in the absence of a jury finding beyond a reasonable doubt. For purposes of the Fifth Amendment right to due process and the Sixth Amendment right to a jury trial made applicable to the states through the Fourteenth Amendment, the United States Supreme Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." (*Apprendi, supra*, 530 U.S. at p. 490.)

Defendants have transported the "functional equivalent" idea into far-off frontiers with little, if any, success. Divorced from *Apprendi's* constitutional moorings, the California Supreme Court recently "rejected the notion that the high court's 'functional equivalent' statement requires us to treat penalty allegations as if they were actual elements of offenses for all purposes under state law." (*Porter, supra*, 47 Cal.4th at p. 137.) In *People v. Izaguirre* (2007) 42 Cal.4th 126, the court "held that *Apprendi* did not convert conduct enhancements into offenses for purposes of our rule that multiple convictions

may not be imposed for necessarily included offenses.” (*Porter*, at p. 137, citing *Izaguirre*, at p. 134.) Similarly, in *Porter*, the court rejected the claim that *Apprendi* converted the penalty allegations into actual elements of greater offenses for purposes of the statutory double jeopardy protection of section 1023. (*Porter*, at p. 138.)

Thus, *Apprendi* has not rocked the strong foundation established in *Wolcott*, and reinforced in *Bright*, that “allegations of sentencing enhancements should not be considered in applying the accusatory pleading test to determine a trial court’s sua sponte duty to instruct the jury regarding lesser included offenses.” (*People v. Reed* (2006) 38 Cal.4th 1224, 1235 (conc. & dis. opn. of Moreno, J.)) We agree with the Attorney General that there is nothing in the reasoning of *Apprendi* or its progeny that undermines the validity of *Wolcott*. The court did not have a sua sponte obligation to instruct on simple assault because the great bodily injury enhancement is not properly considered an element of the crime of robbery.

B. Corpus Delicti and Proof Beyond a Reasonable Doubt

The trial court instructed the jury in the language of CALCRIM No. 220 that the prosecution bears the burden of proof beyond a reasonable doubt, that the jury must consider all of the evidence, and that defendants are entitled to an acquittal unless the evidence proves they are guilty beyond a reasonable doubt.

The proof beyond a reasonable doubt burden of proof was reiterated in CALCRIM No. 359. Nevertheless, defendants contend

that CALCRIM No. 359 impermissibly diluted the prosecution's burden of proof. The instruction reads: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime or a lesser included offense was committed. [¶] That other evidence may be slight and need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

According to defendants, the culprit that dilutes the prosecution's burden of proof is the language "the degree of the crime may be proved by the defendant's statements alone." Defendants insist the jury's most essential task in this trial was to determine the degree of the murder, and their out-of-court statements alone do not constitute proof beyond a reasonable doubt that they committed murder in the first degree. Thus, in their view, CALCRIM No. 359 gave the jury the unconstitutional option to convict them of first degree murder based on scant evidence of their out-of-court statements that does not amount to proof beyond a reasonable doubt. They hold up *Francis v. Franklin* (1985) 471 U.S. 307 [85 L.Ed.2d 344] (*Franklin*) as the legal authority requiring us to reverse their

judgments of conviction. *Franklin*, properly read, does not compel reversal.

In *Franklin*, the jury was given contradictory, mandatory, and confusing instructions. Like here, the jury was properly instructed on the prosecution's burden of proof beyond a reasonable doubt. But the jurors were also told that "[t]he acts of a person of sound mind and discretion are presumed to be the product of the person's will, but the presumption may be rebutted. A person of sound mind and discretion is presumed to intend the natural and probable consequences of his acts but the presumption may be rebutted.'" (*Franklin, supra*, 471 U.S. at p. 311.) The test is what a reasonable juror could have understood the charge to mean. (*Id.* at p. 315.) "The federal constitutional question is whether a reasonable juror could have understood the two sentences as a mandatory presumption that shifted to the defendant the burden of persuasion on the element of intent once the State had proved the predicate acts." (*Id.* at p. 316.)

The majority concluded, "The challenged sentences are cast in the language of command. They instruct the jury that 'acts of a person of sound mind and discretion are *presumed* to be the product of the person's will,' and that a person '*is presumed* to intend the natural and probable consequences of his acts,' . . . These words carry precisely the message of the language condemned in *Sandstrom v. Montana* (1979) 442 U.S. [510,] 515 [61 L.Ed.2d 39] ('"The law presumes that a person intends the ordinary consequences of his voluntary acts"'). The jurors

'were not told that they had a choice, or that they *might* infer that conclusion; they were told only that the law presumed it. It is clear that a reasonable juror could easily have viewed such an instruction as mandatory.' *Ibid.*" (*Franklin, supra*, 471 U.S. at p. 316.)

The permissive language of CALCRIM No. 359 stands in stark contrast to the mandatory language condemned in *Franklin*. In our case, the jury was told that defendants' statements alone "may" prove the degree of the crime. There is no mandatory presumption at issue. There is no "language of command." Rather, the jury had the option to consider defendants' out-of-court statements and to determine whether they proved the degree "beyond a reasonable doubt." Moreover, the very sentence that follows the targeted language reminds the jurors, "You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt." (CALCRIM No. 359.)

We must determine whether there is a reasonable likelihood the jury understood the instruction in a manner that violates defendants' rights. (*People v. Andrade* (2000) 85 Cal.App.4th 579, 585.) To assess that likelihood, we must consider the instructions as a whole; we cannot isolate any given instruction. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1237; *People v. Holt* (1997) 15 Cal.4th 619, 677.) There is no support in *Franklin* for defendants' argument that there is a reasonable likelihood the jurors viewed the permissive language contained in CALCRIM No. 359 as a diminution of the prosecutor's burden of proof.

We find nothing constitutionally infirm in CALCRIM No. 359. Defendants' instructional challenge is little more than a disguised challenge to the sufficiency of the evidence. They go to great lengths to describe the weaknesses in the scant evidence of their out-of-court statements. That evidence, they report, consisted exclusively of the derogatory term "nigger," followed by the query "[w]hat do you got for us?" and defendant Ouellette's purported call to his mother that he had a flat tire. The question defendants raise, however, is not whether there is sufficient evidence they committed murder in the first degree, but whether the instruction diluted the prosecution's burden of proof. We conclude that CALCRIM No. 359, as interpreted by a reasonable juror in the context of the entire charge to the jury, could not have mistakenly been understood to allow the jury to convict defendants of first degree murder by less than proof beyond a reasonable doubt.

C. Active Participation in a Criminal Street Gang

Defendants next assert that CALCRIM No. 1400 allowed the jury to convict them of active participation in a criminal street gang on a theory that has no basis in state law. It takes some patience to unravel the meaning of their argument, but once understood it can be easily and summarily rejected.

The court instructed the jury in the language of CALCRIM No. 1400 as follows: "To prove that the defendant is guilty of this crime, the People must prove that:

"1. The defendant actively participated in a criminal street gang;

"2. When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity;

"AND

"3. The defendant willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by:

"a. directly and actively committing a felony offense;

"OR

"b. aiding and abetting a felony offense."

As relevant here, CALCRIM No. 1400 explains the meaning of "a pattern of criminal gang activity" as described in subparagraph 2 and "felonious criminal conduct" as described in subparagraph 3. Defendants would have us assume the jurors jumbled the meaning of the two subparagraphs, confused the two, and created their own crime. We have no doubt that a reasonable juror would not construe the instruction as defendants suggest to reach the result they contend requires reversal.

To establish "a pattern of criminal gang activity," the jurors were told they could use the following convictions: "vehicle theft, extortion, possession of a concealed firearm in a vehicle, felony vandalism, assault with a deadly weapon or by means of force likely to cause serious bodily injury, or battery with serious bodily injury, or commission of murder, robbery, or assault with a deadly weapon or by means of force likely to cause serious bodily injury." But the crimes needed to

establish the "felonious criminal conduct" described in subparagraph 3 were quite different. Indeed, CALCRIM No. 1400 stated: "Felonious criminal conduct means committing or attempting to commit any of the following crimes: murder, robbery, assault with a deadly weapon or by means of force likely to cause serious bodily injury. [¶] To decide whether a member of the gang or the defendant committed murder, robbery, or assault with a deadly weapon or by means of force likely to cause serious bodily injury, please refer to the separate instructions that I have given you on those crimes."

Defendants argue that the jurors may have used one of their predicate offenses, that is, crimes that established a pattern of criminal gang activity in subparagraph 2, to prove the felonious criminal conduct described in subparagraph 3. Thus, they surmise that the jurors found they either directly and actively committed "a felony offense" or aided and abetted "a felony offense" not by finding they committed murder, robbery, or assault with a deadly weapon, but by relying on their aged predicate offense convictions of concealing a firearm in a vehicle on March 22, 2006 (Ouellette) and vehicle theft on January 31, 2005 (Sanudo).

We conclude that a reasonable juror would not engage in such mental gymnastics. First, as the Attorney General aptly points out, CALCRIM No. 1400 specifically instructed the jurors that in order to find "the defendant[s] willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang either by' directly and actively committing a felony or

by aiding and abetting a felony, the jury was only to consider the crimes of murder, robbery, and assault with a deadly weapon or by means of force likely to cause serious bodily injury." Those were precisely the crimes simultaneously prosecuted against defendants. Second, the prior convictions for concealing a weapon and vehicle theft, the so-called predicate offenses, were not crimes that could be considered by the jury to establish felonious criminal conduct. As a result, we conclude reasonable jurors, applying the law as embodied in CALCRIM No. 1400, would not have convicted defendants based on the commission of the predicate offenses, but understood that the crime consisted of directly committing or aiding and abetting the much more serious crimes of murder, robbery, and assault. There was no instructional error.

D. Motive

Defendant Ouellette acknowledges the legal authority at odds with his final challenge to the jury instructions, but presses us to reject *People v. Fuentes* (2009) 171 Cal.App.4th 1133 (*Fuentes*) and assume that cases which rejected the same argument for one reason would have accepted the argument for another reason. Without authority, Ouellette boldly asserts the instruction that informed the jury the prosecution did not need to prove motive (CALCRIM No. 370) impermissibly diluted the prosecution's burden to prove his active participation in a criminal street gang beyond a reasonable doubt. In the absence of any authority supporting his argument or any confidence that a reasonable juror would have relied on the motive instruction

and failed to find the elements of the charged offense beyond a reasonable doubt, we conclude Ouellette's argument is without merit.

As described above, the jury was instructed on each of the elements of the gang offense, including the specific intent requirement; that is, "When the defendant participated in the gang, he knew that members of the gang engage in or have engaged in a pattern of criminal gang activity." Missing from any of the instructions involving gang participation was any mention of motive. The trial court also instructed the jury: "The People are not required to prove that the defendant had a motive to commit any of the crimes charged. In reaching your verdict you may, however, consider whether the defendant had a motive. [¶] Having a motive may be a factor tending to show that the defendant is guilty. Not having a motive may be a factor tending to show the defendant is not guilty."

In *Fuentes*, as here, the defendant argued that the motive instruction conflicted with the instructions on the substantive offense and lessened the prosecution's burden of proof. The court disagreed. "An intent to further criminal gang activity is no more a 'motive' in legal terms than is any other specific intent. We do not call a premeditated murderer's intent to kill a 'motive,' though his action is motivated by a desire to cause the victim's death. Combined, the instructions here told the jury the prosecution must prove that Fuentes intended to further gang activity but need not show what motivated his wish to do so. This was not ambiguous and there is no reason to think the

jury could not understand it. Fuentes claims the intent to further criminal gang activity should be deemed a motive, but he cites no authority for this position. There was no error." (*Fuentes, supra*, 171 Cal.App.4th at pp. 1139-1140.)

Ouellette insists *Fuentes* was wrongly decided. He would eschew "motive" as a legal term in favor of "the real world meaning of the word." He offers an analogy to financial gain special circumstance cases as authority we should rely on to reject *Fuentes*. In those cases, he asserts the Supreme Court was comfortable interchanging "intent" and "motive." (*People v. Carasi* (2008) 44 Cal.4th 1263, 1308-1309; *People v. Staten* (2000) 24 Cal.4th 434, 461; *People v. Edelbacher* (1989) 47 Cal.3d 983, 1026-1027 (*Edelbacher*).) In his view, a defendant's motive to gain financially from a murder is no different from an intent to do so.

Ouellette contends that street terrorism, like the financial gain special circumstance, requires the jury to determine "the reason a person chooses to commit a crime." (*People v. Hillhouse* (2002) 27 Cal.4th 469, 504.) The jury was required in this case, according to Ouellette, to determine if he robbed and killed Roberts to promote the felonious conduct of the Norteño gang. The problem with Ouellette's analogy, however, is that the Supreme Court repeatedly has rejected his argument. (*Edelbacher, supra*, 47 Cal.3d at p. 1027; *People v. Riggs* (2008) 44 Cal.4th 248, 314; *People v. Crew* (2003) 31 Cal.4th 822, 845; *People v. Noguera* (1992) 4 Cal.4th 599, 637.)

The adverse legal authority does not deter Ouellette. He believes the court rejected the argument only because the financial gain motive was included in an enhancement, not as an element of the charged offense. In that case, he maintains the jurors would not have applied the motive instruction to the enhancements. Here in "the real world," he asserts the jurors would interchange motive and intent because the motive relates to the charged offense, not an enhancement, thereby lowering the prosecution's burden of proof. We disagree and accept the compelling logic of *Fuentes*.

The court in *Fuentes* properly considered the instruction from a reasonable juror's perspective and found no ambiguity and nothing to confuse a reasonable juror. The jury was told the prosecution had to prove that the gang member intended to further gang activity, but the prosecution did not need to demonstrate what motivated his wish to do so. The court further explained: "If *Fuentes*'s argument has a superficial attractiveness, it is because of the commonsense concept of a motive. Any reason for doing something can rightly be called a motive in common language, including—but not limited to—reasons that stand behind other reasons. For example, we could say that when A shot B, A was motivated by a wish to kill B, which in turn was motivated by a desire to receive an inheritance, which in turn was motivated by a plan to pay off a debt, which in turn was motivated by a plan to avoid the wrath of a creditor. That is why there is some plausibility in saying the intent to further gang activity is a motive for committing a murder: A

wish to kill the victim was a reason for the shooting, and a wish to further gang activity stood behind that reason. The jury instructions given here, however, were well adapted to cope with the situation. By listing the various 'intents' the prosecution was required to prove (the intent to kill, the intent to further gang activity), while also saying the prosecution did not have to prove a motive, the instructions told the jury where to cut off the chain of reasons. This was done without saying anything that would confuse a reasonable juror." (*Fuentes, supra*, 171 Cal.App.4th at p. 1140.) There was no error.

II

Sufficiency of the Evidence

A. Active Participation in a Criminal Street Gang

It appears from their verdicts that this perceptive jury deciphered the important, but subtle, distinction between the substantive offense of actively participating in a criminal street gang and a gang enhancement. The crime of so-called "street terrorism" need not be gang related, whereas a gang enhancement requires a gang-related purpose. The jury convicted defendants of actively participating in a criminal street gang but acquitted them of all gang-related enhancements. Ignoring the distinction between the two, defendants contend there is insufficient evidence to sustain the jury's verdict on the substantive offense.

Well-worn principles of appellate review frame our analysis. "To assess the evidence's sufficiency, we review the

whole record to determine whether any rational trier of fact could have found the essential elements of the crime or special circumstances 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.” (*People v. Ramon* (2009) 175 Cal.App.4th 843, 850.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*People v. Albillar* (2010) 51 Cal.4th 47, 60 (*Albillar*).)

Defendants assert there was no evidence that the crimes they committed had anything to do with their present or past affiliation with a gang. They point out there was no evidence they were using gang signs, confronting a rival gang member, shouting a gang name, or “flying their colors.” Even the gang expert conceded there was no evidence of “disrespect that [he could] cite that would require retaliation.”

We agree with defendants that any connection between the robbery and murder of Roberts and the Norteños is thin indeed. If we were reviewing the sufficiency of the evidence to support a gang enhancement, we might be compelled to reverse because of

the absence of evidence that the commission of the offenses was gang related. The jury, as pointed out above, however, was shrewd enough to distinguish between a gang enhancement and the substantive offense of actively participating in a criminal street gang. Conspicuously missing from the elements of the substantive offense is evidence the offense is gang related. "Contrary to what is required for an enhancement under section 186.22[, subdivision] (b), section 186.22[, subdivision] (a) does not require that the crime be for the benefit of the gang. Rather, it 'punishes active gang participation where the defendant promotes or assists in felonious conduct by the gang. It is a substantive offense whose gravamen is the *participation in the gang itself.*' [Citation.]" (*People v. Martinez* (2008) 158 Cal.App.4th 1324, 1334.) Thus we must ascertain whether there is substantial evidence to support the three elements of the offense.

First, the prosecution must prove defendants actively participated in a criminal street gang. There was ample evidence both defendants were active participants in the Norteños, a criminal street gang. They both had admitted membership, both had numerous gang-related tattoos, both had been arrested, both had committed crimes in the company of Norteño gang members, and both had been contacted with other Norteño gang members while wearing gang colors.

Second, the prosecution must prove defendants had knowledge that the gang's members engaged in a pattern of criminal gang activity. There is substantial evidence to support the jury's

finding defendants knew the Norteño gang's members engage in or have engaged in a pattern of criminal activity. The gang expert testified to a number of predicate offenses committed by Norteños, including two that were committed by Ouellette and Sanudo themselves. Many, if not all, of the predicate offenses occurred during their tenure in the gang. Moreover, the gang expert also testified that defendants committed crimes with other gang members; they were often contacted in the presence of other Norteños; Ouellette had numerous gang member contacts in his telephone address book, and Sanudo possessed a letter that outlined the history, guidelines, and commandments of the Norteños.

And third, the prosecution must prove that defendants willfully assisted, furthered, or promoted felonious criminal conduct by members of the gang, either by directly committing a felony or by aiding and abetting the commission of a felony. This is the key element that distinguishes the substantive offense from a gang enhancement. "The plain language of the statute thus targets felonious criminal conduct, not felonious gang-related conduct." (*Albillar, supra*, 51 Cal.4th at p. 55.) And the Supreme Court was emphatic: "[T]here is nothing absurd in targeting the scourge of gang members committing *any* crimes together and not merely those that are gang related." (*Ibid.*)

Thus, defendants' arguments on appeal completely miss the mark. There is substantial evidence that Ouellette, a Norteño, engaged in a fight with Roberts and that Sanudo, another Norteño, assisted him. The jury found them both guilty of

robbery and murder, either as a direct perpetrator or as an aider and abettor. There was testimony at trial that they both kicked Roberts as he lay in the street, and either one or both of them rummaged through his pockets. This evidence is sufficient to support the jury finding that Ouellette and Sanudo, gang members, acted with the specific intent to promote, further, or assist each other in that criminal conduct. The challenge to the sufficiency of the evidence fails.

B. Sanudo's Conviction for Robbery

On appeal, Sanudo makes a very plausible closing argument to the jury that he could not have robbed Roberts because he did not know a robbery was occurring. In his selective retelling of the evidence, he came upon the scene as the scuffle had already begun, and he interceded merely to help defend his friend. He contends there is insufficient evidence his intent to steal was formed before or during the act of force, a necessary prerequisite to a robbery conviction. (*People v. Marshall* (1997) 15 Cal.4th 1, 34.)

The testimony of two eyewitnesses, Clark and Hill, is essential to our assessment of the sufficiency of the evidence. But first we must dismiss two arguments Sanudo makes repeatedly and heatedly, accentuated as they are by capitalization and rhetorical questions. He attacks the credibility of the witnesses. Two competent defense attorneys subjected the witnesses to grueling cross-examination, and all of the weaknesses in their testimony were exposed to the jury at trial. The jurors, and not the justices of the Court of Appeal, are the

triers of fact charged with the responsibility to assess credibility. On appeal, we must presume the jury found their testimony credible.

Secondly, the prosecutor's argument is not evidence. We reject Sanudo's emphatic insistence that we consider the prosecutor's argument in our evaluation of the sufficiency of the evidence.

Instead, we must review Clark's and Hill's testimony in the light most favorable to the verdict. Clark testified she saw two men bent over the man on the ground and at one point saw two men kicking the man. She could see punches and arms "flailing." She next saw the suspects rifling through the victim's pockets. The jury heard, too, that Clark had been drinking, it was dark, and she could not be sure of what she had seen.

Hill provided more details. She testified she saw an African-American male on his bicycle and two gentlemen walking up to him. She heard them call him a "nigger" and kept repeatedly asking, "What do you got for us?" and "Give us what you got for us, nigger." She insisted she heard them both talking; she could hear two different voices. Then she described what she saw: "One of the gentlemen pushed him off the bike and as he hit the ground, the other gentleman started taking the bottom of the foot, his foot, and kicking his face into the curb. And the other gentleman who pushed him off the bike started kicking him in the ribs and going through his back pockets and his front pockets and stuffing items into his own pockets." She saw them both kicking him at different times.

But she clearly stated that Ouellette (the driver) was the one who went through the victim's pockets while Sanudo (the passenger) stood one and a half feet away. Then Sanudo resumed kicking the victim as Ouellette "was stuffing things into his pocket."

Again, Hill's testimony was not without its weaknesses. She, too, had been drinking. She, too, gave different versions at different times. And her testimony conflicted with Ouellette's account that Sanudo did not arrive on the scene until after the scuffle had begun.

Nevertheless, Hill and Clark both placed Sanudo at the scene of the robbery, playing an integral role in facilitating the taking of the victim's property by kicking him on the ground before and after his friend and fellow gang member rifled through the victim's pockets and stuffed the property into his own pockets. Sanudo insists there is no evidence he knew Ouellette would rob the man after they kicked him in the head and rib cage. But that is only one inference to be drawn from the testimony.

It was the jury's prerogative to believe Hill's account that both defendants called the victim a "nigger" and taunted him with the refrain, "What do you got for us." Even if Sanudo did not say the words, the jury may have inferred that he heard Ouellette as he approached. And these exclamations certainly evidenced an intent to rob. Moreover, the jury was well acquainted with the custom and practices of Norteños, who robbed, beat, shot, and killed with some regularity. Thus, it

was hardly a stretch for the jury to infer that Sanudo would support a fellow gang member in perpetrating the robbery of a defenseless man who, after they kicked him mercilessly, lay bludgeoned in the alley. The inference was bolstered by Hill's testimony that Sanudo stood in close proximity to the victim as Ouellette went through his pockets and put the property in his own pocket, supporting the prosecution's theory that Sanudo aided and abetted the robbery.

Because "[a] reviewing court neither reweighs evidence nor reevaluates a witness's credibility" (*People v. Lindberg* (2008) 45 Cal.4th 1, 27), we are not at liberty to find the evidence insufficient "simply because the circumstances might also reasonably be reconciled with a contrary finding" (*Albillar, supra*, 51 Cal.4th at p. 60). The evidence, if not overwhelming, is substantial. There is sufficient evidence to support the jury's finding that Sanudo intended to rob the victim either before or contemporaneously with the exertion of force and fear. Reversal is not warranted.

C. Special Circumstance Murder Allegation

Sanudo repeats the same fundamental errors in attacking the sufficiency of the evidence to support the jury's finding that the murder was committed in the course of a robbery. (§ 190.2, subd. (a)(17)(A).) He ignores the deferential scope of appellate review and asks us to reweigh the evidence and reassess the credibility of the witnesses. He simply reargues his version of the facts, discounting or ignoring the substantial evidence against him.

Contrary to Sanudo's arguments on appeal, the prosecution did not have to prove that he planned to rob and kill victim Roberts before the events of the early morning hours of September 29 unfolded. It may be that the robbery and murder were crimes of opportunity and that neither Ouellette nor Sanudo premeditated the attack and robbery. The prosecution's burden to prove the special circumstance was far different. "In order to support a finding of special circumstances murder, based on murder committed in the course of a robbery, against an aider and abettor who is not the actual killer, the prosecution must show that the aider and abettor had the intent to kill or acted with reckless indifference to human life while acting as a major participant in the underlying felony." (*People v. Proby* (1998) 60 Cal.App.4th 922, 927.)

It is undisputed that Ouellette was the driver of the truck. As a result, the jury convicted Sanudo of murder as an aider and abettor. The question is whether there is substantial evidence that he was a major participant in aiding and abetting the murder-robbery and that he acted with reckless indifference to human life. "[R]eckless indifference to human life" is a "subjective appreciation, or knowledge, by the defendant" (*Lewis v. Runnels* (E.D.Cal., Dec. 21, 2009, No. CIV S-03-1410 GEB EFB P) 2009 U.S. Dist. LEXIS 118255 at p. *19, quoting *Tison v. Arizona* (1987) 481 U.S. 137, 152, 157-158 [95 L.Ed.2d 127]) "of the grave risk to human life created by his or her participation in the underlying felony" (*People v. Estrada* (1995) 11 Cal.4th 568, 578).

It can hardly be said that Sanudo played a trivial role in the brutal attack on the cyclist. He and Ouellette simultaneously and repeatedly kicked the man until he was unconscious and unable to defend himself. Sanudo's representation that he kicked the victim once or twice seriously misrepresents the record. His argument that a reasonable person would never suspect that a couple of kicks would lead to death is a hypothetical totally divorced from the reality of the evidence before us. There is ample evidence, therefore, that he was a major participant.

Moreover, the Attorney General does a remarkably thorough and lucid job of marshalling the evidence in support of the jury's finding that Sanudo subjectively appreciated the grave risk to Roberts's life by his own participation in the robbery and murder. We extract the summary aptly provided by the Attorney General. "Sanudo was aware that the pickup he was getting into had to reverse out of the parking space and into the alleyway. Sanudo knew Roberts' body was in the alley not far from the pickup. The jury could have reasonably found Sanudo became subjectively aware of a grave risk to human life once Roberts was kicked unconscious and left in the alleyway where Ouellette had to reverse his pickup into in order to leave the scene of the robbery. [¶] If not then, when Ouellette first ran over Roberts and Sanudo looked out the passenger window and saw Roberts under the pickup. [Citation.] If not then, when Sanudo opened the passenger door and kicked Roberts in an attempt to dislodge Roberts from the vehicle. [Citation.]

If not then, when Sanudo got out of the pickup, looked under the pickup, and got back in the pickup before Ouellette accelerated down the alleyway.”

In *People v. Smith* (2005) 135 Cal.App.4th 914, the court held that the jury justifiably concluded a mere lookout acted with reckless indifference by simply failing to aid the victim or summon help. (*Id.* at pp. 927-928.) Sanudo’s subjective awareness and personal participation far surpassed the lookout’s passive failure to respond. Because Sanudo was aware the man was on the ground behind the truck, saw him lodged under the tire, and nevertheless did nothing to intercede on his behalf, the evidence is more than sufficient under *Smith* to uphold the jury’s finding. The precise moment of death does not determine Sanudo’s state of mind.

III

Lastly, Sanudo attempts to incorporate the argument he made in a habeas corpus petition that his sentence is cruel and unusual. He argues that the facts and the law are obvious and no further elaboration on the facts or law is necessary. Common sense, he insists, must prevail. He urges us to reject the Attorney General’s position that the issue is not properly before us.

We must adhere to established principles of appellate review. Sanudo continues to twist the facts to fit his storyline “that he had no intent to rob the victim and no idea what was going on.” He was, in his words, “just helping his friend out of the scuffle.” As we have pointed out in

responding to the last two arguments, the jury rejected Sanudo's version of what happened. Whether a sentence is disproportionate is measured against the jury's findings of guilt, not a defendant's revisionist remake.

Given, as we have recounted above, that Sanudo aided and abetted a robbery and murder by kicking the victim, leaving him lying in the alley, jumping into a truck and watching the driver back over the body, looking under the truck and kicking the victim some more, jumping out of the truck and seeing the victim lodged under the tire, and then fleeing the scene, we conclude the sentence is neither cruel nor unusual and does not offend our constitutional sensibilities.

DISPOSITION

The judgments are affirmed.

RAYE, P. J.

We concur:

DUARTE, J.

HOCH, J.