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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

STEPHANO GONZALEZ et al.,

Defendants and Appellants.

D058120

(Super. Ct. No. SCE295678)

APPEALS from a judgment of the Superior Court of San Diego County, Allan J. Preckel, Judge. Affirmed.

I.

INTRODUCTION

Defendants Stephano Gonzalez and Josue Gonzalez appeal from a judgment entered after they and a third codefendant were convicted by a jury of assault with a

deadly weapon and attempted robbery. The jury also found true allegations that Josue<sup>1</sup> personally used a deadly weapon and personally inflicted great bodily injury on the victim.

On appeal, Josue contends that the trial court erred in excluding a statement that Stephano made to law enforcement officers after the incident in which he admitted that he had been wearing one of two black shirts that officers found in the truck that the defendants were in at the time they were apprehended. According to Josue, Stephano's statement inculpated Stephano as the direct attacker and exculpated Josue. Josue maintains that in excluding the statement at issue, the court prevented Josue from presenting a full defense, and thereby violated his rights to due process and a fair trial.

In addition, both Josue and Stephano contend that the trial court erred in denying their motions to sever their trials from the trials of their codefendants, although on different grounds.

Finally, Stephano contends that there is insufficient evidence to support his convictions for assault and attempted robbery under an aiding and abetting theory.

We conclude that none of the appellants' contentions warrants reversal of the judgment.

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<sup>1</sup> We refer to the appellants by their first names for purposes of clarity.

## II.

### FACTUAL AND PROCEDURAL HISTORY

#### A. *Factual background*

On November 2, 2009, at approximately 10 p.m., Arina Kurbis was dropping off her boyfriend, George Camacho, at his home. As Kurbis pulled her car into Camacho's driveway, Camacho noticed a man rummaging through a neighbor's truck, which was parked across the street from Camacho's house. Camacho jumped out of his girlfriend's car and yelled, " 'Hey, what are you guys doing?' " The man who had been rummaging through the neighbor's truck and another man ran up the street and jumped into a white Toyota Tacoma that was waiting close by. The truck drove off. As the truck drove away, Camacho ran after it with his cell phone in his hand. He was able to note that the first two characters of the truck's license plate were "8D."

The Tacoma traveled about 60 to 70 feet before the driver stopped, put it in reverse, and drove, in reverse, toward Camacho. Camacho dialed 911. The Tacoma stopped in front of Camacho. When the Tacoma came to a stop, the man who had been rummaging through Camacho's neighbor's truck jumped out, holding a car club. The man demanded that Camacho give him the cell phone. Camacho refused and threw the cell phone into a nearby yard. The man then struck Camacho on the back of the head with the car club and demanded Camacho's wallet. The man struck Camacho on the side of his head.

Kurbis saw another man get out of the Tacoma and watched that man kick and punch Camacho. Both men then got back into the Tacoma from the passenger side, and the Tacoma drove away.

Kurbis and Camacho went to the home of one of Camacho's neighbors. While the neighbor attended to Camacho's wounds, someone called 911.

Sheriff's deputies Chris Katra and Patrick Fox were on patrol when they received a call about an assault. The deputies were given a description of the suspects and the suspects' vehicle. As the deputies drove to the scene of the incident, they noted a white Toyota truck with a license plate that started with the characters that Camacho had seen. It appeared to the deputies that that there were three Hispanic males inside the truck.

The deputies pulled the truck over at gunpoint. At first, the driver stopped the vehicle, but after sprinkling something out of the window of the truck, he drove off. After a brief pursuit, the driver of the truck stopped again. Officers approached the truck and arrested its occupants, Josue, Stephano, and Manuel Porrashavez. Porrashavez had been driving, Josue had been in the front passenger seat, and Stephano had been in the rear passenger seat. Josue was shirtless, and Stephano was wearing a tank top. Deputies found two black shirts inside the truck. One was on the front passenger seat and the other was covering a car club on the floorboard of the front passenger seat.

Camacho identified Josue as the person who had hit him with the car club, and said that he was 90 percent sure of his identification. When officers showed Camacho

the shirts that they found in the truck, Camacho said that the attacker had been wearing one of the shirts.

Camacho was taken to the hospital where he received 12 staples in his head and four stitches to his ear.

B. *Procedural background*

The San Diego County District Attorney filed an information charging Josue and Stephano with one count of burglary (Pen. Code, § 459; count 1);<sup>2</sup> one count of assault with a deadly weapon (§ 245, subd. (a)(1); count 2); and one count of attempted robbery (§§ 664, 211; count 3).<sup>3</sup> The information further alleged that with respect to count 2, Josue personally inflicted great bodily injury (§§ 1192.7, subd. (c)(8) & 12022.7, subd. (a)), and with respect to count 3, that Josue personally used a deadly weapon (§ 12022, subd. (b)(1)) and personally inflicted great bodily injury (§ 12022.7, subd. (a)). The information also alleged that Josue had previously suffered a strike conviction (§§ 667, subds. (b)-(i), 668) and a prior serious felony conviction (§§ 667, subd. (a)(1), 668, 1192.7, subd. (c)).

A jury acquitted Josue and Stephano on count one, but convicted them on counts 2 and 3. The jury also found true the enhancement allegations alleged against Josue as to

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<sup>2</sup> Further statutory references are to the Penal Code unless otherwise indicated.

<sup>3</sup> Manuel Porrashavez was also charged in this case, but he did not appeal his conviction.

counts 2 and 3. Josue admitted that he had suffered the prior strike conviction and prior serious felony conviction.

The trial court sentenced Josue to 14 years in state prison and sentenced Stephano to three years in state prison.

Josue and Stephano filed timely notices of appeal from the judgment.

### III.

#### DISCUSSION

A. *Even if the trial court erred in excluding Stephano's statement to the effect that he had been wearing a black shirt earlier that night, the error was not prejudicial*

Josue argues that the trial court erred in excluding a statement that Stephano made to police after his arrest to the effect that on the evening of the attack on Camacho, Stephano had been wearing one of the black shirts found in truck. Josue also contends that the court erred in denying Josue's motion for a new trial based on the erroneous exclusion of this statement. Josue asserts that Stephano's statement was admissible as a statement against Stephano's penal interest under Evidence Code section 1230. He further asserts that by excluding Stephano's statement, the trial court violated his right to due process and his right to present a full defense.

#### 1. *Additional background*

Before trial, the prosecutor requested that the defendants be tried jointly, and indicated that she did not intend to seek to admit as part of her case-in-chief any postarrest statements that the defendants had made. At trial, the prosecutor did not seek

to introduce the defendants' statements. However, during cross-examination of one of the deputies, Josue's attorney sought to elicit the statement that Stephano had made to the effect that Stephano had been wearing one of the black shirts that the deputies found in the Tacoma. Outside the presence of the jury, Josue's attorney said, "The question I wanted to ask Deputy Katra was this: Did Mr. Stephano Gonzalez state that he was wearing a black shirt? Mr. Stephano Gonzalez had indicated yes, he was wearing a black shirt, and that he took it off because he got hot, and the black shirt was still in the truck." Stephano's attorney asked to be permitted to research the matter over the lunch break.

When court reconvened after the lunch break, Josue's attorney reiterated that he wished to introduce Stephano's statement as a statement against penal interest. Stephano's attorney objected to introduction of the statement on the ground that it was not a statement against penal interest because at the time Stephano made the statement, he would not have known that the statement was against his penal interest. The trial court sustained Stephano's attorney's objection without additional comment.

After another witness testified, Josue's attorney again raised the issue of the court's decision to exclude Stephano's statement. The court explained that it was "not convinced that it's a declaration against Mr. Stephano Gonzalez's penal interest," and also indicated that even if the court had made a finding that the statement was against Stephano's penal interest, the court would have sustained the objection under Evidence Code section 352. Josue's counsel then argued that the statement was an admission, because the witnesses' physical descriptions of the assailant matched Stephano, and the shirt that Camacho

identified looked like something Stephano, and not Josue, could have worn, because of its size. Counsel said, "[A]s [to] the clothing, that's the only admission by anybody here, of the three defendants, that they actually possessed and wore the black shirt."

The trial court eventually responded, "So, anyway, I'm—I'm less than impressed . . . in terms of the probative value of that statement separate and apart from whether or not it's a statement against the speaker's penal interest. [¶] I do view the statement as substantially prejudicial as against Stephano Gonzalez, and that's why I say, number 1, I'm not particularly impressed that it meets the foundational requirements of a declaration against penal interest. And even if I were, on [an Evidence Code section] 352 analysis, I would and do still sustain [Stephano's attorney's] objection." The court also pointed out that Stephano had not identified which of the two black shirts found in the truck he had been wearing.

During closing argument, Josue's attorney argued that Stephano had been the attacker. As part of this argument, Josue's counsel noted that the physical description of the attacker and the size of the black shirt identified by Camacho as having been worn by his attacker pointed to Stephano being the culprit, and not Josue.

After trial, Josue's attorney filed a motion for a new trial, arguing that the court's exclusion of Stephano's statement denied Josue his right to present a defense. The court denied the motion.

2. *Analysis*

- a. *Even if the court erred in not admitting the statement, any error was harmless*

Evidence Code section 1230 states in part: "Evidence of a statement by a declarant having sufficient knowledge of the subject is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and the statement, when made . . . so far subjected him to the risk of civil or criminal liability . . . that a reasonable man in his position would not have made the statement unless he believed it to be true ."

Josue complains that the trial court erred in determining that Stephano's statement was not a statement against penal interest.<sup>4</sup>

We need not decide whether the trial court abused its discretion in excluding Stephano's statement on the ground that it was not a statement against Stephano's penal interest, because we conclude that even if the court's decision to exclude the statement was erroneous, any such error was harmless beyond a reasonable doubt.<sup>5</sup> Specifically, there was abundant evidence that Josue not only participated in the crimes, but that he was the person who attacked Camacho. Most significantly, both Camacho and Kurbis

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<sup>4</sup> Both parties agree that Stephano was unavailable to testify because he invoked his right not to testify at trial.

<sup>5</sup> Because Josue contends that the trial court's exclusion of Stephano's statement violated his right to due process and right to present a full defense, his claim is one of federal constitutional dimension. We therefore apply the standard set forth in *Chapman v. California* (1967) 386 U.S. 18, 24. Under *Chapman*, federal constitutional error does not require reversal where the reviewing court concludes the error was "harmless beyond a reasonable doubt." (*Ibid.*)

identified Josue as the attacker. Camacho was 90 percent sure of his identification of Josue. In addition, the club that the attacker used was found on the floorboard where Josue had been sitting at the time police pulled the Tacoma over.

Stephano's statement that he had been wearing one of the black shirts would have added little to evidence that was already before the jury. Both Josue and Stephano appeared to have removed their shirts before being pulled over, and deputies found two black shirts in the truck. From this, the jury could have readily inferred that Stephano had been wearing one of the black shirts. His statement would merely have confirmed this obvious inference. In addition, the jurors were able to view the two black shirts (including the markings on the shirts and their relative sizes), as well as the defendants, and were free to draw their own conclusions as to whether they believed that Josue, or rather, Stephano, had been wearing the shirt with the marking that Camacho identified as having been worn by his attacker. Although Stephano's admission that he had been wearing one of the two shirts may have corroborated the circumstantial evidence that the prosecution presented concerning the shirts, it would have added virtually nothing with respect to assisting the jury in its analysis of which defendant had been wearing which shirt, or in its determination as to whether Josue was guilty of personally assaulting Camacho. We can therefore say with confidence that even if the trial court had permitted Josue's attorney to elicit Stephano's statement that he had been wearing one of the black shirts earlier in the evening, the result in this case would have been the same, including the jury's true findings on the enhancements alleged as to Josue, alone.

b. *The trial court did not err in denying Josue's motion for a new trial*

In a related contention, Josue maintains that the trial court erred in denying his motion for a new trial on the ground that Stephano's statement was admissible under Evidence Code section 1230. Josue acknowledges that a trial court has broad discretion in ruling on a motion for a new trial, and that a court's ruling will not be disturbed unless there has been a clear abuse of that discretion. (See *People v. Ault* (2004) 33 Cal.4th 1250, 1260.) He contends, however, that because the trial court "prejudicially denied Josue his right to present a full defense at least to the enhancements to Counts 2 and 3," the trial court abused its discretion in denying his motion for a new trial.

For the reasons set forth in the previous section, even if we were to assume that the trial court abused its discretion in excluding Stephano's statement about the black shirt, the error did not prejudice Josue or render his trial unfair. Therefore, the trial court did not abuse its discretion in denying Josue's motion for a new trial on the ground that the court excluded Stephano's statement.

B. *The trial court did not abuse its discretion in denying the defendants' motions to sever their trials from the trials of their codefendants*

Both Josue and Stephano argue that the trial court erred in denying their respective motions to sever their trials from the trials of their codefendants. Each presents different grounds to support his contentions that severance of the defendants' trials was required in this case.

1. *Legal standards pertaining to motions to sever*

"Section 1098 provides in pertinent part: 'When two or more defendants are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order[s] separate trials.' [Citation.]" (*People v. Tafoya* (2007) 42 Cal.4th 147, 162 (*Tafoya*)). "Defendants 'charged with common crimes involving common events and victims' present a ' "classic case" ' for a joint trial. [Citation.]" (*Ibid.*)

"Nonetheless, a trial court, in its discretion, may order separate trials ' "in the face of an incriminating confession, prejudicial association with codefendants, likely confusion resulting from evidence on multiple counts, conflicting defenses, or the possibility that at a separate trial a codefendant would give exonerating testimony." [Citations.]' [Citation.]" (*Tafoya, supra*, 42 Cal.4th at p. 162, italics omitted.) "A trial court's denial of a severance motion is reviewed 'for abuse of discretion based on the facts as they appeared at the time the court ruled on the motion.' [Citations.] A trial court's erroneous refusal to sever a defendant's trial from a codefendant's requires reversal if the defendant shows, to a reasonable probability, that separate trials would have produced a more favorable result [citations], or if joinder was so grossly unfair that it deprived the defendant of a fair trial [citations]." (*Ibid.*)

2. *The trial court did not abuse its discretion denying Josue's motion to sever his trial from the trials of his codefendants*

Josue contends that he was denied the right to due process and the right to a fair trial by the trial court's denial of his motion to sever his trial from the trials of his codefendants. He argues that the evidence against him was strong in comparison to his codefendants, and that as a result, he had to defend against not only the prosecution's case, but also his codefendants, both of whom pointed the finger at him. He further argues that in a separate trial he would have been permitted to present Stephano's statement in which Stephano admitted that he had been wearing a black shirt on the night in question. According to Josue, these errors were not only independently prejudicial to him, but that together, the errors "synergistically prejudiced" him.

With respect to Josue's contention that the trial court's denial of his severance motion forced Josue to have to "defend himself against [the People] and his codefendants" because all three were focused on his guilt, we reject the contention that the court abused its discretion in this regard. This was a "classic case" for joinder, in that the defendants were charged with common crimes arising out of common events. Further, "a joint trial is not unfair simply because the codefendants 'have antagonistic defenses and one defendant gives testimony that is damaging to the other and thus helpful to the prosecution. [Citation.]' [Citation.] If the likelihood of antagonistic testimony alone required separate trials, they 'would appear to be mandatory in almost every case.' [Citation.]" (*People v. Keenan* (1988) 46 Cal.3d 478, 500 (*Keenan*)).

In *Keenan*, the Supreme Court considered whether the trial court abused its discretion in denying a severance motion on the ground that a codefendant "did not simply seek to exculpate himself by laying blame on defendant," but "his 'antagonistic defense' of duress or menace allowed him to present prejudicial evidence and argument of uncharged conduct by defendant, which would not have been admissible against defendant in a separate trial." (*Keenan, supra*, 46 Cal.3d at p. 500, italics omitted.) Even given the fact that the codefendant presented an antagonistic defense that allowed him to present *prejudicial evidence of uncharged conduct* by the defendant, the Supreme Court concluded that the trial court had not abused its discretion in denying the severance motion. (*Ibid.*)

Josue argues that because the case against him was stronger than the case against his codefendants, the trial court should have granted his motion to sever his trial from theirs. Given that the circumstances in *Keenan* did not require that the trial court grant the severance requested in that case, we conclude that the situation in this case, in which Josue's codefendants argued that the evidence demonstrated that Josue was the attacker, did not require that the trial court sever his trial from his codefendants.

For the same reasons, the trial court's denial of Josue's motion to sever his trial from the trials of his codefendants on this ground did not ultimately render Josue's trial unfair or a denial of due process (see *People v. Burney* (2009) 47 Cal.4th 203, 237). The jury clearly weighed the evidence and in fact, acquitted Josue on count 1. Further, the jury convicted all three defendants of the crimes, determining that all three were culpable,

not only Josue. Although the jury did find true the allegations that Josue personally committed the offenses, the evidence in this regard was substantial, and would have been presented in a separate trial. We conclude that Josue would not have obtained a more favorable result in a separate trial.

We also reject the notion that the denial of Josue's severance motion deprived Josue of a fair trial and due process because it precluded him from being able to present evidence of Stephano's statement about wearing one of the black shirts found in the truck. As an initial matter, it does not appear that Josue raised this as a ground for severance in his motion to sever. Thus, the court could not have abused its discretion in denying severance based on this ground at the time it ruled on Josue's severance motion. Nevertheless, we look to see whether the trial court's refusal to sever Josue's trial from his codefendants requires reversal because separate trials would have produced a more favorable result or because the joinder was so grossly unfair that it deprived him of a fair trial. As we have previously noted, the fact that Josue was not able to elicit information about Stephano's statement to the effect that Stephano had been wearing one of the black shirts found in the truck that night did not prevent Josue from presenting a full defense, and did not render his trial unfair—i.e., it is not reasonably probable that absent a joint trial, Josue would have obtained a more favorable result (see *People v. Massie* (1967) 66 Cal.2d 899, 923-924).

Both Camacho and Kurbis identified Josue as the attacker. Camacho was 90 percent sure of his identification of Josue. As noted above, even if Stephano's statement

that he had been wearing one of the black shirts might have been admitted in a separate trial, it would have added little, if anything, to the evidence that was presented to the jury in the joint trial. Both Josue and Stephano appeared to have removed their shirts before being pulled over, and deputies found two black shirts in the truck. Stephano's statement would merely have confirmed that he had been wearing one of the two shirts—although not identifying which of the two shirts. Without this, a jury hearing that Stephano admitted to having worn one of the shirts would have had to go through the same steps that the jury in this trial had to do—i.e., view the evidence and weigh the testimony of the eyewitnesses to determine whether they believed that Josue had been wearing the shirt that Camacho identified his attacker as having worn. We conclude that a separate trial would not have resulted in a more favorable outcome for Josue, even if he had been permitted to present Stephano's statement in a separate trial.

We further conclude that the combined effect of his codefendants pointing the finger at Josue as the attacker, together with the exclusion of Stephano's statement, did not mean that Josue was prejudiced by being tried jointly with his codefendants. The evidence of Josue's role as the direct perpetrator of these crimes was strong.

Both the victim and an eyewitness identified Josue as the attacker. The circumstantial evidence also pointed to Josue having been directly involved in the attack against Camacho. Given the state of the evidence that would have been admitted at a separate trial, it is simply not reasonable to conclude that Josue would have obtained a more favorable result in a separate trial.

3. *The trial court did not abuse its discretion in denying Stephano's motion to sever his trial from the trials of his codefendants*

Stephano acknowledges that the statutory requirements for joinder under section 954 were met because the offenses at issue were all of the same class of crimes. He argues, however, that his codefendant, Porrachavez, might have provided exonerating testimony if Porrachavez's trial had been held before Stephano's, and that by not granting a severance, the trial court abused its discretion and denied Stephano his right to due process and right to a fair trial.

A trial court has the discretion to order separate trials when it appears that one codefendant may give exonerating testimony with respect to another codefendant. (See *People v. Massie, supra*, 66 Cal.2d at p. 917.) In *People v. Isenor* (1971) 17 Cal.App.3d 324, 332 (*Isenor*), the appellate court set forth the following six factors that a court should consider in determining whether to sever trials based on a claim that a codefendant will provide exonerating testimony: "(1) Does the movant desire the testimony of the codefendant; (2) will the testimony be exculpatory; (3) how significant is the testimony; (4) is the court satisfied that the testimony is bona fide; (5) on the basis of the showing at the time of the motion, how strong is the likelihood that, if the motion were granted, the codefendant will testify; and (6) what is the effect of granting in terms of judicial administration and economy? [Citation.]"

Stephano contends that at a separate trial, Porrachavez would have testified that Stephano did not assault Camacho, but instead, that Stephano merely got out of the truck

and stayed by the passenger side door of the truck while Josue assaulted Camacho. According to Stephano, this testimony would have contradicted Kurbis's testimony that two men, presumably Josue and Stephano, assaulted Camacho and attempted to rob him. Stephano argues that the *Isenor* factors weighed heavily in favor of granting him a severance so that Porrashavez could have testified in this manner at Stephano's trial. We disagree.

Porrashavez's proffered testimony would not have been sufficiently exculpatory to require a severance. Assuming that Porrashavez would have testified that Stephano did not take part in the assault, as Kurbis's testimony suggested, the proposed testimony still indicated that Stephano aided and abetted the assault against Camacho. Specifically, Stephano's actions in getting out of the truck and standing there could reasonably be interpreted as a show of force to the victim, and as providing back-up for Josue, who was fully engaged in the attack on Camacho. At a minimum, by getting out of the truck, Stephano indicated that he supported Josue's conduct and intended to encourage it, and suggests that Stephano was not a mere bystander to the attack.

Because Porrashavez's proposed testimony would not have been truly exculpatory, we conclude that the trial court did not abuse its discretion in denying Stephano's motion to sever his trial from the trial of his codefendants based on Porrashavez's proffered testimony about Stephano's role in the incident.

Even though the trial court's ruling on Stephano's motion to sever was clearly not an abuse of discretion at the time it was made, we must also determine whether the

joinder of Stephano's trial with that of his codefendants ultimately resulted in gross unfairness that deprived Stephano of due process of law. (*People v. Burney, supra*, 47 Cal.4th at p. 237.) Given our determination that the proposed testimony was not truly exculpatory, the trial court's decision not to sever the defendants' trials could not have resulted in gross unfairness. The same evidence that was presented at the joint trial would have been presented in a separate trial, and there was strong evidence in this case that the three codefendants participated in the assault and attempted robbery of Camacho, even if the evidence demonstrated that only one of them actually committed the offenses directly. The trial court's decision not to sever the trials, thereby "preventing" Porrachavez from testifying that Stephano got out of the truck and stood near the truck during Josue's attack on Camacho, was harmless beyond a reasonable doubt and did not contribute to the verdict as to Stephano.

C. *There is sufficient evidence to support the jury's verdict that Stephano aided and abetted the assault and attempted robbery*

Stephano argues that there is insufficient evidence that he aided and abetted the assault and attempted robbery of Camacho.

In determining the sufficiency of the evidence to support a conviction, "the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." (*Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "[T]he court must review the whole record in the light most favorable to the judgment below to

determine whether it discloses substantial evidence—that is, evidence which is reasonable, credible, and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal.3d 557, 578.)

Stephano focuses much of his argument on the fact that Camacho testified that only one person assaulted him and tried to rob him, and that the jury apparently believed that this person was Josue, since the jury found true the allegations that Josue personally inflicted great bodily injury in committing the crimes. Stephano acknowledges, however, that Kurbis testified that two men assaulted Camacho. She also testified that after both men had attacked Camacho, they both jumped into the truck from the passenger side and the truck drove off. There was additional testimony that Porrashavez was driving the truck when deputies pulled the truck over. One could reasonably infer from this testimony that Stephano was the second assailant. In addition, there was evidence that both Stephano and Josue had taken off their shirts, from which one could infer that both had participated in the crimes and were attempting to avoid being identified as the perpetrators by removing the clothing that they had been wearing at the time. All of this evidence is sufficient to support the jury's verdict that Stephano encouraged and facilitated the assault and attempted robbery against Camacho.

IV.

DISPOSITION

The judgment of the trial court is affirmed.

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AARON, J.

WE CONCUR:

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HUFFMAN, Acting P. J.

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McINTYRE, J.