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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY GARCIA et al.,

Defendants and Appellants.

D058280

(Super. Ct. No. SCS219199)

APPEAL from judgments of the Superior Court of San Diego County, Timothy R. Walsh, Judge. Judgments affirmed as modified, with directions.

A jury convicted Sidro gang leader Larry Garcia and fellow Sidro gang member Eric Rodriguez of conspiring to assault, and murdering, another Sidro gang member, Araceli Granados, after Garcia discovered Granados and other members of the gang had engaged in "illegal taxing" (discussed, *post*). Specifically, the jury found Garcia guilty of conspiracy to assault Granados (count 1: Pen. Code, § 182, subd. (a) (undesigned statutory references will be to the Penal Code unless otherwise specified)) and also convicted him of first degree murder (count 2: § 187, subd. (a)). The jury found true (1)

the gang enhancement allegations in counts 1 and 2 that Garcia committed the crimes for the benefit of a criminal street gang (§ 186.22, subd. (b)(1), hereafter § 186.22(b)(1)), and (2) the allegations in counts 1 and 2 that he personally used a deadly and dangerous weapon (a knife) to commit the crimes (§ 12022, subd. (b)(1)). Garcia admitted the truth of allegations he had a prison prior (§§ 667.5, subd. (b), 668) and a strike prior (§§ 667, subds. (b)-(i), 1170.12, 668).

The jury found Rodriguez was guilty of conspiracy to assault Granados (count 1: § 182, subd. (a)) and also convicted him of second degree murder (count 2: § 187, subd. (a)). The jury found true the gang enhancement allegations in both counts that Rodriguez committed the crimes for the benefit of a criminal street gang.

The court sentenced Garcia in this case to an aggregate state prison term of 50 years to life plus 12 years, consisting of 25 years to life for the first degree murder conviction doubled to 50 years under the Three Strikes law as a result of his prior strike conviction, plus a consecutive term of 10 years for the gang enhancement a consecutive term of one year for the deadly weapon enhancement, and a consecutive term of one year for the prison prior. The court imposed, but stayed under section 654, (1) the middle term of 16 months for the conspiracy conviction, (2) a consecutive middle term of three years for the gang enhancement, and (3) a consecutive term of one year for the deadly weapon enhancement.

The court sentenced Rodriguez to an aggregate state prison term of 15 years to life plus 10 years, consisting of 15 years to life for the second degree murder conviction, plus a consecutive term of 10 years for the gang enhancement. The court imposed, but stayed

under section 654, (1) a term of two years for the conspiracy conviction, and (2) a consecutive middle term of three years for the gang enhancement.

Contentions

Garcia and Rodriguez separately appeal. Garcia contends (1) his convictions of conspiracy to assault Granados and first degree murder must be reversed due to the absence of corroborating evidence independent of the accomplice testimony of three witnesses—Monica Cobian, Rosamelia Cordova, and Sergio Navarro— connecting him to the commission of those crimes; and (2) the 10-year gang enhancement is not authorized by law and must be reversed and "replaced by an order imposing a 15-year minimum parole eligibility period consistent with section 186.22, subdivision (b)(5) [(hereafter referred to as section 186.22(b)(5))]."

Rodriguez contends (1) there was insufficient evidence to sustain the finding that he aided and abetted the murder or conspired to commit murder because the evidence demonstrated he was merely present at the scene or at most aided and abetted the assault; (2) the court deprived him of a fair trial and the right to present a defense by excluding testimony about the third party culpability of a murdered gang member nicknamed "Goofy"; (3) the court deprived him of due process, a fair trial, and the right to present a defense when it excluded evidence about Garcia and the victim Granados possibly being involved in Goofy's murder, evidence that would have raised a reasonable doubt as to Rodriguez's guilt and shown Garcia was acting independently when he killed Granados with a knife; and (4) the 10-year gang enhancement should not have been imposed

because he was sentenced to a term of life with the possibility of parole for the murder conviction.

We modify the judgments to delete the 10-year gang enhancements imposed for Garcia's first degree murder conviction and Rodriguez's second degree murder conviction. As so modified, the judgments are affirmed. We order the court to amend the abstracts of judgment accordingly.

FACTUAL BACKGROUND¹

A. The People's Case

The Mexican Mafia controls most of the street gangs in Hispanic neighborhoods in Southern California, as well as most of the Hispanic criminal activity in the prison system. Every Mexican Mafia member has a person, called a key-holder (in Spanish, llavero), underneath him whom the member has placed in charge of a certain neighborhood with full authority to conduct business for that member. The key-holders, each of whom runs a crew of five to 10 people, thus control the Hispanic street gangs on behalf of the Mexican Mafia members.

One of the jobs of a crew is the collection of a "tax" or kickback from those who conduct criminal activity, such as drug dealing, within the Mexican Mafia member's territory. To collect the tax, gang members may steal money or other property from those involved in the criminal activity. The tax belongs to, and must be given to, the key-

¹ Our discussion here of the evidence presented in this case is abbreviated because Garcia and Rodriguez challenge the sufficiency of the evidence, and a more detailed discussion of the evidence will appear as needed in the discussion section of this opinion.

holder, the person who runs the neighborhood in which it is collected. The Mexican Mafia member who is in charge of a particular territory must authorize the tax collection activity. A gang member who engages in unauthorized taxing can be "checked," which means beaten up, injured, or, in severe cases, killed.

Both Garcia, who was known in the Sidro gang as "Termite," and Rodriguez, known as "Nino," were admitted members of the San Ysidro or Sidro criminal street gang, located in the community of San Ysidro, documented by the San Diego Police Department. In 2007 Garcia was a key-holder and crew leader for Richard "Pops" Buchanan, a Mexican Mafia member from Otay.

Garcia's Sidro gang crew included "Nino" Rodriguez, Rodriguez's sister Rosamelia "Muneca" Cordova, Sergio "Shadow" Navarro, Ramon "Sneaky" Mariscal, Francisco "Perro" Valadez, and Araceli "Mousey" Granados, all of whom were members of that gang. Monica Cobian, who in 2007 had a sexual relationship with Garcia, associated with Garcia's crew.

In March 2007 (all further dates are to calendar year 2007), Granados, Mariscal, and Valadez participated in unauthorized taxing, with Granados using Cordova's name, by taking two ounces of methamphetamine, worth \$1,600 on the street, from a methamphetamine dealer nicknamed "Wily." Granados, Mariscal, and Valadez later got into trouble with Garcia for the unauthorized taxing.

On March 31, in the afternoon, Garcia was in a motel room at the International Inn in San Ysidro, partying and using drugs with Cobian, Leticia Hernandez, and Hernandez's boyfriend. Cobian overheard a telephone conversation between Garcia and

Mariscal, who was in a nearby motel called the Economy Inn with Rodriguez and two women from Las Vegas (Lizbeth Ortiz and Norma Rodriguez), about Granados being in trouble for taxing. Mariscal testified he told Garcia during that conversation that Granados had arrived in Mariscal's motel room. Garcia indicated to Mariscal that he was coming over to the Economy Inn. According to Cobian, Garcia told her he needed to talk to Granados and he wanted Cobian to come along and slap Granados if she got too loud or out of line when he was talking to her. Cobian testified she drove Garcia about one block to the Economy Inn in Hernandez's car as it was getting dark.

Navarro testified that at the Economy Inn Garcia told Granados she was leaving with him, and Granados became upset and said she did not want to go with him. Garcia told her, "Well, we're your homeboys; you're coming with us." Granados and Garcia got into Navarro's car with Navarro, who was driving. Garcia told Rodriguez to go with Cobian, and Rodriguez got into the car Cobian was driving.

According to Cobian, before Garcia drove away with Granados and Navarro, Garcia called Rodriguez for a suggestion about where they should all go. Rodriguez asked Cobian, who suggested they go to a ranch in Otay. Rodriguez relayed that suggestion to Garcia. Cobian overheard Garcia tell Rodriguez he would meet them there. The two cars then drove from the Economy Inn to the ranch.

After Garcia, Rodriguez, Granados, and the others left for the ranch, Cordova arrived at the Economy Inn to meet with Garcia at his request. Cordova called Rodriguez, told him she was at the Economy Inn, and asked where everyone was. Rodriguez told Cordova they were going to the ranch, and Cordova told him she would

be on her way up there. During this phone call, Cordova also spoke with Cobian, who told her Garcia wanted her to "check" Granados, meaning "beat her ass." Cordova then headed for the ranch.

Sometime after midnight on April 1, Cobian stopped the car she was driving on the dirt road leading up to the ranch at the fork in the road, and Navarro pulled his car up behind hers and parked to her right. Cobian testified she got out of the car, approached Navarro's driver's-side window, and saw Garcia and Granados talking in the back seat. She stated that Rodriguez got out of the car she had been driving and got into Navarro's front passenger seat. Garcia asked Granados about Valadez ("Perro") and what was going on when Granados and Valadez were taxing people. Granados said something about Rodriguez and Garcia said he did not care who was there or what happened, and he just wanted to know where Valadez was.

Cobian testified she and Granados began to argue because she (Cobian) assumed Granados was there to beat her up. Cobian opened the back passenger door of Navarro's car, and Granados and Garcia got out. Cobian was "really annoyed" with Granados because their being there had to do with Granados and what she did with Valadez. As Cobian started to walk away, Granados cursed at her, grabbed her arm, and tried to turn Cobian around. Cobian turned around and slapped Granados in the face. Navarro intervened and Granados calmed down. Granados turned to Garcia and asked him what was it that he wanted to know. Garcia told Granados he wanted to find Valadez and Granados agreed to take him to Valadez.

According to Cobian, everyone then got back into the two cars. Rodriguez and Cobian got back into the car she had been driving, and Navarro, Garcia, and Granados got back into Navarro's car. As they were driving away, Cordova called Rodriguez to say she was almost there. In her testimony, Cobian indicated she took the call and told Cordova they were leaving and she had slapped Granados. Cordova replied, "No. No. Just stay there. Just stay there. I'm almost there." Cordova testified that Cobian was mad and screaming, she told Cordova she had already hit Granados, and she asked Cordova to hurry up because Garcia wanted her there. Cordova told Cobian she was almost there.

At a narrow part of the road, the two cars encountered the lifted truck in which Cordova was riding, and Cordova called again and asked that they turn around. According to Navarro, Garcia got out of his car, Cordova got out of the truck, and Garcia and Cordova spoke while Granados, who was acting nervous, remained in the back seat of Navarro's car. Garcia got back into Navarro's car, Navarro and Cobian made U-turns, and the three vehicles drove back toward the ranch and parked where Cobian and Navarro had previously parked.

Cordova got out of the truck, reached inside Navarro's car through the rear passenger door, and pulled Granados out by her hair. Still holding Granados by her hair, Cordova began punching Granados, who had stumbled to the ground, with her free hand. According to Cobian, Cordova punched Granados repeatedly for about 30 seconds as the others watched. According to Navarro, Garcia ordered the attack on Granados because of her role in the unauthorized taxing.

After the beating, Granados, stood up, dusted herself off, and began cursing everyone. According to Cobian and Navarro, Granados began walking away, saying she was going to report them to the police. Cordova testified this made her feel paranoid because she had violated her probation. According to Cobian, Rodriguez picked up two or three pebbles, threw them in Granados's direction, said, "Oh, nothing really happened to you," and told her to come back.

Cobian asked Garcia whether he was going to let her walk away. Garcia looked at Cobian and then he and Rodriguez quickly walked over to Granados. According to Cobian, Rodriguez said, "Just come back. You're not going to walk." Garcia and Rodriguez, both of whom were wearing gloves, grabbed Granados's sweatshirt and began pulling her back to the group. According to the testimony of Cobian and Cordova, Rodriguez took two steps back, Garcia turned and stabbed Granados repeatedly and rapidly in the chest, and Granados fell to the ground.

Deputy Medical Examiner Christopher Swalwell of the San Diego County Medical Examiner's Office testified that Granados sustained three stab wounds: two to her chest and one to the base of her neck. An autopsy revealed that the fatal stab wound penetrated the heart and cut the pulmonary vein leading to Granados's right lung, causing her to bleed to death.

According to Cobian and Navarro, Garcia ordered the others to leave after he stabbed Granados, and everyone drove away leaving Granados's body on the ground.

Later that morning, between 7:00 and 8:00 a.m., Simon Ahn discovered Granados's body while driving to the ranch where he boarded a horse. He reported the discovery to the ranch managers, one of whom called the police.

That same day, Detective Curt Goldberg of the San Diego County Sheriff's Department arrived at the murder scene. During the investigation that followed, Detective Goldberg interviewed Mariscal and learned that Garcia, Rodriguez, and Navarro were involved in the murder of Granados.

On April 23 Navarro's car was searched when he met with his parole agent and was arrested for a parole violation. Dana Castro, a criminalist with the San Diego Sheriff's Regional Crime Laboratory, found blood on the back seat and a knife with blood on it. DNA could not be extracted from the blood on the knife. The blood on the back seat of Navarro's car belonged to Granados.

San Diego Police Department Detective Steven Riddle, a gang expert, opined that the stabbing of Granados was for the benefit of the Sidro gang.

On May 27, following the arrests in this case, jail deputies recovered a note on yellow paper that was passed from Garcia to William Daughrity, another inmate. The note was addressed to Richard "Pops" Buchanan, a Mexican Mafia member. In it, Garcia informed Buchanan that Cobian, Navarro, and Cordova testified against him at his preliminary hearing. Using code language, Garcia asked that Cobian, Navarro, and Cordova be killed or that threats be made to keep them from testifying at his trial.

B. Garcia's Defense Case

Garcia presented no evidence.

C. Rodriguez's Defense Case

Private Investigator Trevor Sesma reviewed the cell phone that belonged to Rodriguez and was impounded by the police. The phone directory, the record of text messages, and the record of calls did not reveal any contact with Garcia. Sesma found contacts on the cell phone for Granados, Mariscal, and Navarro, among others.

DISCUSSION

I

GARCIA'S APPEAL

A. Sufficiency of the Evidence (Corroboration of Accomplice Testimony)

Garcia contends his convictions of conspiracy to assault Granados and first degree murder must be reversed due to the absence of corroborating evidence that is independent of the accomplice testimony of three prosecution witnesses—Cobian, Cordova, and Navarro—and connects him to the commission of those crimes.² We reject this contention.

² Rodriguez, in his opening brief, apparently attempts to join in Garcia's arguments by summarily stating he "joins all of the arguments of [Garcia] that may benefit him." However, he did not supply any argument on the issue of accomplice testimony corroboration as it applies to his unique circumstances. Joinder is broadly permitted (Cal. Rules of Court, rule 8.200(a)(5)), "but each appellant has the burden of demonstrating error and prejudice" (*People v. Nero* (2010) 181 Cal.App.4th 504, 510, fn. 11; *Paterno v. State of California* (1999) 74 Cal.App.4th 68, 106 ["Because of the need to consider the particulars of the given case, rather than the type of error, the appellant bears the duty of spelling out in his brief exactly how the error caused a miscarriage of justice."]); *People v. Coley* (1997) 52 Cal.App.4th 964, 972). To the extent Rodriguez's cursory joinder is an attempt to challenge the sufficiency of the evidence corroborating the accomplice testimony of Cobian, Cordova, and Navarro as that testimony pertains to him, his reliance

1. *Applicable legal principles*

When assessing a challenge to the sufficiency of the evidence, we apply the substantial evidence standard of review, under which we view the evidence "in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, 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." (*People v. Johnson* (1980) 26 Cal.3d 557, 578; *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) "The same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence." (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Generally, the uncorroborated testimony of a single witness is sufficient to sustain a conviction or true finding on an enhancement allegation, "unless the testimony is physically impossible or inherently improbable." (*People v. Scott* (1978) 21 Cal.3d 284, 296.) We do not reweigh the evidence, resolve conflicts in the evidence, or reevaluate the credibility of witnesses. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206; *People v. Jones* (1990) 51 Cal.3d 294, 314.) "Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

However, a conviction cannot be based on an accomplice's testimony unless "other evidence tending to connect the defendant with the commission of the offense corroborates that testimony." (*People v. McDermott* (2002) 28 Cal.4th 946, 985-986; see

solely on Garcia's arguments and reasoning is insufficient to satisfy his burden on appeal. Accordingly, we consider this issue only as to Garcia. (See *Nero*, at p. 510, fn. 11.)

§ 1111.) "The corroboration required of accomplice testimony . . . need only connect the defendant to the crime sufficiently that we may conclude the jury reasonably could have been satisfied that the accomplice was telling the truth." (*People v. Letner and Tobin* (2010) 50 Cal.4th 99, 185-186.) "[T]he corroborating evidence may be circumstantial, of little weight by itself, and related merely to one part of the accomplice's testimony." (*Id.* at p. 186; see also *People v. Abilez* (2007) 41 Cal.4th 472, 505 [such corroborative evidence may be slight or entirely circumstantial and entitled to little consideration when standing alone, and need not by itself establish every element of the crime].) The trier of fact's finding on the issue of corroboration may not be disturbed on appeal unless the corroborating evidence should not have been admitted or does not reasonably tend to connect the defendant with the commission of the crime. (*People v. Szeto* (1981) 29 Cal.3d 20, 25.)

2. *Analysis*

The court instructed the jury that Cobian, Cordova, and Navarro were accomplices whose testimony alone could not support a conviction of the crimes charged unless it was corroborated by independent evidence that the jury believed and that connected the defendant to the commission of the crime. We conclude sufficient evidence supports the accomplice testimony of these prosecution witnesses.

According to the testimony of Cobian and Cordova, Garcia stabbed Granados repeatedly and rapidly in the chest. Specifically, Cobian testified she saw Garcia "stab [Granados] three rapid times in her chest." The prosecutor asked Cordova, "What kind of hand movements did you see Termite [(Garcia)] doing?" Cordova responded that Garcia

was making "[h]and movements" and was "[p]unching" Granados with his right arm as he was "bear hugging her" with his left arm. Cordova further testified that Garcia delivered the "punches" to the front of Granados's body. The prosecutor also asked Cordova, "Did you know [Garcia] to carry knives?" Cordova replied, "Yeah."

The foregoing accomplice testimony of Cobian and Cordova regarding Garcia's act of repeatedly stabbing Granados in the chest, including Cobian's testimony that Garcia stabbed Granados *three* times, was corroborated by the expert testimony of Dr. Swalwell, whose testimony showed Granados sustained *three* stab wounds: two to her chest and one to the base of her neck. The corroborative testimony of Dr. Swalwell connects Garcia to the crimes sufficiently that we may conclude the jury reasonably could have been satisfied that Cobian and Cordova were telling the truth. (See *People v. Letner and Tobin, supra*, 50 Cal.4th at pp. 185-186.) As already discussed, the California Supreme Court has explained that the corroborating evidence may be circumstantial, of little weight by itself, and related merely to *one* part of the accomplice's testimony. (*Id.* at p. 186; see also *People v. Abilez, supra*, 41 Cal.4th at p. 505.) Here, the corroborative testimony of Dr. Swalwell meets this test.

In addition, the blood evidence independently corroborates Cobian's, Navarro's, and Cordova's testimony. Cobian testified that when she and Navarro stopped their vehicles while driving on the dirt road just before they arrived at the murder scene, she got out of her vehicle and saw Garcia sitting in the back seat of Navarro's car with Granados. Cobian also indicated that, later, after he stabbed Granados, Garcia left in Navarro's car. Navarro also testified that Garcia left in Navarro's car. Specifically,

Navarro testified, "Termite comes running back inside the car—in my car and he said, '[L]et's go, let's go,' so I turned the car on and started driving off." It is undisputed that Granados was left on the ground to die. Criminalist Dana Castro later found blood on the back seat of Navarro's car. The prosecution also presented evidence establishing the blood on the back seat of Navarro's car belonged to Granados. Furthermore, Castro testified she found a knife, which tested presumptively positive for blood, in a toolbox in the rear cargo area of Navarro's car. However, the evidence showed that DNA could not be extracted from the blood on the knife.

Disregarding the evidence regarding the discovery of the bloody knife, the evidence that blood belonging to Granados was found on the back seat of Navarro's car where Garcia had been sitting circumstantially corroborates Cobian's and Navarro's testimony that Garcia got back inside Navarro's car after he stabbed Granados. It also circumstantially supports Cordova's testimony showing that, during the stabbing, Garcia was "bear hugging" Granados. A rational jury could reasonably conclude beyond a reasonable doubt that Granados's blood got onto Garcia's person as he was bear hugging and stabbing her and that Garcia left some of her blood on the back seat of Navarro's car when he got back inside that car to flee from the scene of the assault and murder.

B. *Count 2 Gang Enhancement*

Citing *People v. Lopez* (2005) 34 Cal.4th 1002 (*Lopez*), Garcia also contends the consecutive 10-year gang enhancement the court imposed under section 186.22(b)(1) is not authorized by law and must be reversed and "replaced by an order imposing a 15-year minimum parole eligibility period consistent with section [186.22(b)(5)]." The Attorney

General concedes the error and asserts that, as a result of the holding in *Lopez*, "the 15-year minimum eligible parole date was subsumed in the term of 25 years to life [Garcia] received for the first degree murder," and, thus, the abstract of judgment should be modified to delete the 10-year gang enhancement imposed under section 186.22(b)(1).

In *Lopez*, the California Supreme Court explained that "section 186.22, subdivision (b) establishes alternative methods for punishing felons whose crimes were committed for the benefit of a criminal street gang. Section 186.22, subdivision (b)(1)(C) (section 186.22(b)(1)(C)) imposes a 10-year enhancement when such a defendant commits a violent felony. Section 186.22(b)(1)(C) does not apply, however, where the violent felony is 'punishable by imprisonment in the state prison for life.' [(§ 186.22(b)(5).)] Instead, section [186.22(b)(5)] applies and imposes a minimum term of 15 years before the defendant may be considered for parole." (*People v. Lopez, supra*, 34 Cal.4th at p. 1004.)

Under this Supreme Court authority, we conclude the court erred in imposing the additional 10-year term for the gang enhancement under section 186.22(b)(1) because Garcia's first degree murder conviction carries a life term, and, thus, the 50-year minimum parole eligibility requirement imposed by the court for that offense precludes application of the 10-year term for the gang enhancement. (§ 186.22(b)(5); *People v. Lopez, supra*, 34 Cal.4th at p. 1004.) We, therefore, strike the 10-year gang enhancement from Garcia's sentence for count 2.

II

RODRIGUEZ'S APPEAL

A. Sufficiency of the Evidence (Count 2: Second Degree Murder Conviction)

Rodriguez claims the evidence is insufficient to support his conviction of second degree murder based on Garcia's stabbing of Granados after Cordova assaulted her. Specifically, he contends there was insufficient evidence to sustain the finding that he aided and abetted the murder or conspired to commit murder because the evidence demonstrated he was merely present at the scene or at most aided and abetted the assault. He asserts "there was insufficient credible evidence to support a finding [he] shared the intent to kill with [Garcia], or that the murder was a natural and probable consequence of the assault [on Granados]." We conclude these contentions are unavailing because the prosecution presented substantial evidence from which a rational jury could reasonably find beyond a reasonable doubt both that Rodriguez shared Garcia's intent to kill Granados and aided and abetted her murder, and that the stabbing was a reasonably foreseeable consequence of the assault on Granados that immediately preceded the stabbing and was the object of the count 1 conspiracy to commit assault of which Rodriguez was also convicted.

1. *Aider and abettor liability*

"Because section 31³ defines as principals all who directly commit a given offense or who aid and abet in its commission, the same criminal liability attaches whether a defendant directly perpetrates the offense or aids and abets the perpetrator." (*People v. Montoya* (1994) 7 Cal.4th 1027, 1038-1039, italics omitted.)

A person incurs criminal liability as an aider and abettor when he or she (1) by act or advice, aids, promotes, encourages or instigates the commission of the crime; (2) with knowledge of the perpetrator's unlawful purpose; and (3) with the intent or purpose either to commit, or to facilitate or encourage commission of, the crime. (*People v. Cooper* (1991) 53 Cal.3d 1158, 1164, citing *People v. Beeman* (1984) 35 Cal.3d 547, 561.)

"When the definition of the offense includes the intent to do some act or achieve some consequence beyond the *actus reus* of the crime [citation], the aider and abettor must share the specific intent of the perpetrator." (*People v. Beeman, supra*, 35 Cal.3d at p. 560.) "[A]n aider and abettor will 'share' the perpetrator's specific intent when he or she knows the full extent of the perpetrator's criminal purpose and gives aid or encouragement with the intent or purpose of facilitating the perpetrator's commission of the crime." (*Ibid.*)

"Whether [a] defendant aided and abetted a crime is a question of fact, and on appeal all conflicts in the evidence and reasonable inferences must be resolved in favor of

³ Section 31 provides: "All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, . . . are principals in any crime so committed."

the judgment." (*People v. Campbell* (1994) 25 Cal.App.4th 402, 409.) While a defendant's mere presence at the scene of an offense is not sufficient in itself to sustain a conviction of aiding and abetting its commission, it is a circumstance that will tend to support a finding that the accused was an aider and abettor. (*Ibid.*; *People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) Companionship, and conduct before and after the offense, are also relevant factors the trier of fact may consider in determining whether the accused aided and abetted the commission of a crime. (*People v. Campbell*, at p. 409; *People v. Miranda*, at p. 407.)

a. *Natural and probable consequences doctrine*

"The liability of an aider and abettor extends also to the natural and reasonable consequences of the acts he knowingly and intentionally aids and encourages." (*People v. Beeman, supra*, 35 Cal.3d at p. 560.)

"Under the natural and probable consequences doctrine, an aider and abettor is guilty of not only the offense he intended to facilitate or encourage, but also of any reasonably foreseeable offense committed by the actual perpetrator. The defendant's knowledge that an act which is criminal was intended, and his action taken with the intent that the act be encouraged or facilitated, are sufficient to impose liability on him for any reasonably foreseeable offense committed as a consequence by the perpetrator." (*People v. Miranda, supra*, 192 Cal.App.4th at pp. 407-408.)

The elements of aider and abettor liability under the natural and probable consequences doctrine are: (1) the defendant by act or advice aided, promoted, encouraged, or instigated the commission of the intended target crime; (2) the defendant

acted with knowledge of the perpetrator's unlawful purpose; (3) the defendant acted with the intent or purpose either to commit, or to facilitate or encourage commission of, the target crime; (4) the defendant's confederate committed an offense (the nontarget offense) other than the target crime; and (5) the nontarget offense committed by the confederate was a natural and probable consequence of the target crime the defendant aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262; *People v. Miranda, supra*, 192 Cal.App.4th at p. 408.)

The natural and probable consequences doctrine applies to conspiracy as well as to aiding and abetting. (*People v. Prettyman, supra*, 14 Cal.4th at pp. 260-261; *People v. Hardy* (1992) 2 Cal.4th 86, 188-189 [conspirator is vicariously liable for "the unintended acts by coconspirators if such acts are in furtherance of the object of the conspiracy, or are the reasonable and natural consequence of the object of the conspiracy," and the conspirator intended his coconspirator's act to achieve the object of the conspiracy, even if the conspirator did not know of the act and was not present when it was committed].

In determining whether the nontarget offense committed by the defendant's confederate was a natural and probable consequence of the target crime the defendant aided and abetted, the question is not whether the defendant *actually* foresaw the confederate's commission of the nontarget offense, but whether, judged objectively, the commission of the nontarget crime was *reasonably* foreseeable. (*People v. Medina* (2009) 46 Cal.4th 913, 920; *People v. Miranda, supra*, 192 Cal.App.4th at p. 408.) Thus, "[l]iability under the natural and probable consequences doctrine 'is measured by whether a reasonable person in the defendant's position would have or should have

known that the charged offense was a reasonably foreseeable consequence of the act aided and abetted.' " (*People v. Medina*, at p. 920, quoting *People v. Nguyen* (1993) 21 Cal.App.4th 518, 535.)

To be reasonably foreseeable, the consequence of the confederate's act " "need not have been a strong probability; a *possible* consequence which might reasonably have been contemplated is enough." " " (*People v. Medina, supra*, 46 Cal.4th at p. 920, quoting *People v. Nguyen, supra*, 21 Cal.App.4th at p. 535, italics added.)

Whether the consequence of the confederate's act was reasonably foreseeable is a factual issue to be resolved by the jury based on its evaluation of all the factual circumstances of the individual case. (*People v. Medina, supra*, 46 Cal.4th at p. 920.)

2. *Analysis*

a. *Rodriguez's aiding and abetting murder liability*

After examining the whole record in the light most favorable to the judgment, we first conclude Rodriguez's second degree murder conviction should be affirmed because the prosecution presented substantial evidence from which a rational jury could find beyond a reasonable doubt that Rodriguez shared Garcia's intent to kill Granados and aided and abetted her murder.

In support of his principal contention that there is no evidence he "attempted to aid and abet murder or shared the intent to kill with [Garcia]," Rodriguez asserts he "did not appear to be involved in the initial plotting prior to leaving the [Economy Inn] motel." He also asserts that, although prior to the assault he did get into Navarro's car in which Garcia was taking Granados to the scene of the assault and stabbing, "there was no

evidence [he] did anything in the car other than watch the arguing and the fighting amongst the women." Conceding that his presence might have "encouraged the brawling" and that he and Garcia "caught up" with Granados and "grabbed her sweatshirt" after Cordova assaulted Granados and she started walking away while threatening to call the police, there is "no evidence . . . that the grabbing was intended to, or in fact did, facilitate the stabbing."

Rodriguez disregards substantial circumstantial evidence showing that he shared Garcia's intent to kill Granados and aided and abetted her murder. The testimony of Cobian, Mariscal, and Navarro established that Granados got into trouble with Garcia—who (as discussed, *ante*) was the leader of the Sidro gang crew to which Rodriguez, Granados, Cordova, Navarro, and Mariscal belonged—for unauthorized taxing. The prosecution's gang expert testified that a gang member who engages in unauthorized taxing can be "checked," a gang term meaning beaten up, injured, or, in severe cases or for perceived disrespect, killed. Navarro specifically testified that Garcia "call[ed] the shots" and set up the attack on Granados because of her role in the unauthorized taxing.

Navarro testified that at the Economy Inn Garcia and Granados—who did not want to go with Garcia—got into Navarro's car, which Navarro was driving. According to Cobian, Garcia told Rodriguez to go with Cobian, and Rodriguez got into the car she was driving.

Cobian testified that Garcia then called Rodriguez for a suggestion about where they should all go; Rodriguez asked Cobian, who suggested they go to the ranch in Otay;

and Rodriguez relayed that suggestion to Garcia. Cobian stated she overheard Garcia tell Rodriguez he would meet them there. According to Cobian, as the two cars were driving from the Economy Inn to the ranch, Cordova called Rodriguez from the Economy Inn and asked him where everyone was, and Rodriguez told her they were going to the ranch. Cordova testified that she also spoke with Cobian by phone from the Economy Inn, and Cobian told her Garcia wanted her (Cordova) to go to the ranch and check Granados.

Cobian also testified that, when she and Navarro stopped their cars on the dirt road before they arrived at the scene of the assault and stabbing, she and Rodriguez got out of her car, she walked up to Navarro's driver's-side window, Rodriguez got into the front passenger's seat of Navarro's car, and she heard Garcia, who was sitting next to Granados behind Navarro, ask Granados about what was going on when she and Valadez were taxing people.

The foregoing substantial evidence shows Rodriguez knew about and participated in Garcia's plan to check Granados for the illegal taxing by having Cordova physically assault her at the ranch in Otay. This evidence supports Garcia's and Rodriguez's convictions of conspiracy to assault Granados.

The prosecution also presented substantial circumstantial evidence that Rodriguez shared Garcia's intent to kill Granados and aided and abetted her murder. It is undisputed that, after everyone arrived at the scene of the crime, Garcia and Rodriguez watched as Cordova pulled Granados out of Navarro's car by her hair and physically attacked her. It is also undisputed that, after the beating, Granados angrily stood back up and began walking away, cursing everyone and saying she was going to report them to the police.

Cobian testified that she asked Garcia whether he was going to let Granados walk away. Garcia looked at Cobian, and then he, followed by Rodriguez, quickly walked over to Granados. According to Cobian, Rodriguez said to Granados, "Just come back. You're not going to walk." Garcia and Rodriguez, both of whom were wearing gloves, immediately grabbed Granados's sweatshirt—Rodriguez holding her left arm and Garcia holding her right arm as Granados struggled to get away from them—and began pulling her back to the group. According to Cobian and Cordova, Rodriguez took two steps back while still holding Granados's left arm, and Garcia, who was "bear hugging" Granados from behind, stabbed her three times in the chest.

From the foregoing substantial evidence, a rational jury could find beyond a reasonable doubt that, when Granados threatened Garcia and the other members of his Sidro gang crew, including Rodriguez, by telling them she was going to report them to the police, what began as an assault on Granados as punishment for her unauthorized taxing escalated to murder to prevent her from contacting the police. Rodriguez's act of holding Granados in position with gloved hands while Garcia—who also was wearing gloves—fatally stabbed her, demonstrates he shared Garcia's criminal intent to silence Granados by killing her.

We need not discuss *Pinell v. Superior Court* (1965) 232 Cal.App.2d 284 and *In re Juan G.* (2003) 112 Cal.App.4th 1, which Rodriguez cites, as those decisions are limited to the facts presented in those cases.

b. Rodriguez's vicarious murder liability as Garcia's coconspirator (reasonable foreseeability of the murder as a natural and probable consequence of the assault)

We also conclude Rodriguez's second degree murder conviction must be affirmed because the prosecution presented substantial evidence from which a rational jury could find beyond a reasonable doubt that Garcia's stabbing of Granados was a reasonably foreseeable consequence of the gang-related checking assault that was the object of the count 1 conspiracy offense of which both Rodriguez and Garcia were convicted.

We have already concluded that substantial evidence establishes that Rodriguez and Garcia participated in a conspiracy to assault Granados to punish her for her unauthorized taxing. The target crime, the criminal assault, was the object of that conspiracy. Substantial evidence supports a finding that the nontarget crime, murder, was a natural and probable consequence of the target crime because the murder was a reasonably foreseeable consequence of the assault. As already noted, the prosecution presented expert testimony that a gang member who engaged in unauthorized taxing could be checked by being beaten up or, in severe cases or for perceived disrespect, killed.

Here, the checking ordered by Garcia, and known and intended by Rodriguez who (like Garcia) committed various overt acts in furtherance of the conspiracy, might have been limited to the physical assault carried out by Cordova had Granados accepted the beating without complaint. However, the evidence shows, and it is undisputed, that she did not passively accept the beating, and, instead, cursed Garcia, Rodriguez, and the rest of her fellow Sidro gang crew members and threatened to report them to the police. The

evidence shows that, in the gang culture in which Rodriguez and Garcia operated, the killing of Granados was the next logical step in protecting the gang by controlling a fellow gang member who had turned against and threatened it.

Rodriguez contends his murder conviction should be reversed because "[t]here was no evidence [he] had knowledge of the knife prior to [Garcia's] using it," and, thus, there is insufficient evidence to support a finding that Garcia's stabbing Granados was a reasonably foreseeable consequence of the assault on Granados. This contention is unavailing.

In *People v. Montano* (1979) 96 Cal.App.3d 221, abrogated by statute on another ground as this court explained in *In re John R.* (1981) 116 Cal.App.3d 940, 944, the trial court found the defendant guilty of attempted murder as an aider and abettor. (*Montano*, at p. 223; see discussion of *Montano* in *People v. Medina, supra*, 46 Cal.4th at p. 926.) The prosecution presented evidence that the defendant and a codefendant, both members of the same gang, tricked a member of another gang into getting in their car by claiming to be members of the victim's gang. (*Montano*, at p. 224.) After they drove the victim to a remote area where another codefendant met them, the two codefendants ordered the victim out of the car and took him to a nearby tree, while the defendant remained inside the car. (*Ibid.*) The first codefendant produced a handgun and gave it to the second codefendant, who shot the victim. (*Ibid.*) At the urging of the first codefendant, the second codefendant shot the victim again. (*Ibid.*) On appeal, defendant claimed there was insufficient evidence to support his attempted murder conviction as an aider and

abettor, contending he had only aided or encouraged a battery, and he had had no knowledge of his codefendant's intent to shoot the victim. (*Id.* at pp. 225-226.)

The *Montano* court rejected the defendant's contentions, reasoning that "[t]he evidence was clear that the attack upon [the victim] was an aspect of gang warfare and that he was attacked on the basis of his membership in the rival 18th Street gang. The frequency with which such gang attacks result in homicide fully justified the trial court in finding that homicide was a 'reasonable and natural consequence' to be expected in any such attack. It is, therefore, clear that [*the defendant's*] *guilt of aiding and abetting an attempted murder does not depend upon his awareness that [either codefendant], or both of them, had deadly weapons in their possession.*" (*People v. Montano, supra*, 96 Cal.App.3d at p. 227, italics added.)

Similarly here, Rodriguez's criminal liability for the murder does not depend on his awareness that Garcia had a knife in his possession before he stabbed Granados. Both the initial assault on Granados to punish her for the unauthorized taxing, and the escalation of that target crime to the nontarget crime of murder when she threatened the gang by saying she would report Rodriguez and his fellow Sidro gang members to the police, were aspects of the gang culture in which Rodriguez operated. The expert gang testimony (discussed, *ante*) supports a finding that, in that gang culture, such escalation was reasonably foreseeable to someone in Rodriguez's position. In any event, such a finding is also supported by Cordova's testimony that both Garcia and Rodriguez were known to carry knives.

B. Exclusion of Third Party Culpability Evidence

In related claims, Rodriguez next contends (1) the court deprived him of a fair trial and the right to present a defense by excluding testimony about the third party culpability of a murdered gang member named Goofy Hernandez; and (2) the court deprived him of due process, a fair trial, and the right to present a defense when it excluded evidence about Garcia and the victim Granados possibly being involved in the murder of Goofy, evidence that would have raised a reasonable doubt as to Rodriguez's guilt and shown Garcia was acting independently when he killed Granados with a knife. These claims are unavailing.

1. Background

Rodriguez's counsel moved in limine for admission of evidence of certain cell phone calls between Goofy and Garcia on February 17, within an hour of Goofy's death, that counsel argued linked Garcia and Granados with the killing of Goofy.

Noting that "we don't know what was said" during those phone calls, the court ruled the evidence was inadmissible, finding (1) the evidence was not relevant; (2) for purposes of Evidence Code section 352, the admission of the evidence would require an undue consumption of time and would be "potentially confusing to the jury"; and (3) the evidence would "cause [the jury] to speculate as to the content of the phone call[s]."

2. Analysis

In both claims, Rodriguez asserts his defense counsel attempted to introduce evidence that Garcia and Granados were involved in Goofy's murder such that, when Granados threatened to call the police, the threat to Garcia was amplified to mean not

only that she would call the police regarding her being assaulted, but that she would call the police to turn in Garcia for murdering Goofy. "This subtext," Rodriguez argues, "caused rage that made [Garcia] react independently and alone when he killed [Granados]."

In *People v. Hall* (1986) 41 Cal.3d 826, 833 (*Hall*), on which Rodriguez relies, the California Supreme Court explained the principles governing admissibility of third party culpability evidence:

"To be admissible, the 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. At the same time, we do not require that any evidence, however remote, must be admitted to show a third party's possible culpability. As this court observed in [*People v. Mendez* (1924) 193 Cal. 39], 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.*" (Italics added.)

Rodriguez's reliance on *Hall* in support of his third party culpability evidence claim is misguided because that decision makes clear that third party culpability evidence is inadmissible unless there is "direct or circumstantial evidence linking the third person to the actual perpetration of the crime." (*Hall, supra*, 41 Cal.3d at p. 833.) Here, Rodriguez has not shown, and cannot show, there is direct or circumstantial evidence linking Goofy's murder to the actual perpetration of the conspiracy and murder offenses of which Rodriguez was convicted in this case.

Furthermore, with respect to both of Rodriguez's claims, even if we were to assume for purposes of argument that the court abused its discretion by excluding the

evidence in question, we would conclude any such error was harmless under any standard of prejudice because the evidence of Rodriguez's guilt (discussed, *ante*) is overwhelming.

C. Count 2 Gang Enhancement

Last, citing *Lopez, supra*, 34 Cal.4th 1002, Rodriguez contends his count 2 10-year gang enhancement should not have been imposed because he was sentenced to a term of life with the possibility of parole for the murder conviction. As she did with respect to Garcia's virtually identical claim (discussed, *ante*), the Attorney General concedes the error.

We conclude the court erred in imposing the additional 10-year term for the gang enhancement under section 186.22(b)(1) because Rodriguez's second degree murder conviction carries a life term, and, thus, the 15-year minimum parole eligibility requirement imposed by the court for that offense precludes application of the 10-year term for the gang enhancement. (§ 186.22(b)(5); *People v. Lopez, supra*, 34 Cal.4th at p. 1004.) We, therefore, strike the 10-year gang enhancement from Rodriguez's sentence for count 2.

DISPOSITION

The judgments against Garcia and Rodriguez are modified to strike that portion of each sentence imposing the 10-year gang enhancement under section 186.22(b)(1). As so modified, the judgments are affirmed. The trial court is directed to prepare corrected abstracts of judgment reflecting the striking of the gang enhancements and to

forward the corrected abstracts of judgment to the Department of Corrections and Rehabilitation.

NARES, J.

WE CONCUR:

McCONNELL, P. J.

AARON, J.