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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE, Plaintiff and Respondent, v. BRITIN AMIEL RILEY, Defendant and Appellant.	D058999 (Super. Ct. No. FVI800042)

APPEAL from a judgment of the Superior Court of San Bernardino County, Eric M. Nakata, Judge. Affirmed.

A jury convicted Britin Amiel Riley of first degree murder (count 1), five counts of attempted murder (counts 2-6), two counts of shooting at an occupied motor vehicle (counts 7-8), and one count of street terrorism (count 9). The jury also found true a street gang enhancement on counts 1 through 8, and that Riley had a prior serious felony conviction, a prior strike conviction, and a prison prior. Riley appeals, contending: (1) the trial court failed to sua sponte instruct the jury on principles of accomplice testimony; and (2) his conviction must be reversed because the trial court erred in

admitting evidence obtained from a wiretap of his cell phone. He also requests that we review in camera the affidavit in support of the wiretap of his phone and the transcript of in camera proceedings held in the trial court to determine whether probable cause supported the issuance of the wiretap order and whether the trial court properly ordered the affidavit sealed. We affirm the judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Riley was a member of the Rolling 40s Crips gang. On a night in December 2007, he went to a party with Jerard Mitchem, Tamika Lott, and Cherray Rice. When the party ended, the group, along with others from the party, went to a nearby *ampm* gas station. Mitchem, Lott and Rice went into the *ampm* while Riley stayed in the car. Lott and Rice got into an altercation with two people associated with the Fruit Town Brims, a Blood gang. Mitchem tried to break up the fight. Eventually, Mitchem, Lott and Rice got back into the car. The group, with Riley driving, Rice in the front passenger seat and Mitchem and Lott in the backseat, left the gas station.

As they were driving, Mitchem, Rice and Lott told Riley about the altercation at the *ampm*. Riley became angry and said, "Let's get them." He stopped at another gas station and then eventually headed back to the *ampm* where the altercation took place. By that point, the crowd at the *ampm* had dispersed, but Riley spotted two cars across the street at a Walgreens and said, "There they go right there."

Riley pulled out a gun, put it on his lap and followed the two cars out of the Walgreens parking lot. He sped up until he was alongside one of the cars he was following and told Rice to put her seat all the way back and roll down the window. Rice

and Lott were screaming and told Riley not to do it, but Riley fired multiple shots into the neighboring car. He then caught up to the second car and fired shots into that car. One of the bullets hit 15-year-old Mylela Ransom in the head, killing her almost instantly.

Riley testified on his own behalf. He stated that he saw Rice with a gun earlier in the evening of the shootings, but Rice told him she did not have the gun when she got into his car. Riley testified that he was intending to drive home when he saw two cars approaching. He claimed that he was trying to let the two cars pass when Rice unexpectedly fired shots at the cars.

DISCUSSION

I. *Failure to Instruct on Principles of Accomplice Testimony*

Riley contends the trial court erred in failing to sua sponte instruct the jury on the principles of accomplice testimony because Rice, Mitchem, and Lott were accomplices as a matter of law or the jury should have been permitted to determine whether they were accomplices before considering their testimony. We conclude the evidence in this case did not permit a finding that Rice, Mitchem, and Lott were Riley's accomplices and, even assuming the evidence permitted such a finding, the assumed error was harmless.

An accomplice is a person "who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given." (Pen. Code, § 1111; undesignated statutory references are to this code.) To be chargeable with an identical offense, a witness must be considered a principal under section 31. (*People v. Horton* (1995) 11 Cal.4th 1068, 1113-1114.) "Principles" include "[a]ll persons concerned in the commission of a crime, . . . whether

they directly commit the act constituting the offense, or aid and abet in its commission . . . ." (§ 31.) A mere accessory is not an accomplice. (*People v. Horton*, *supra*, at p. 1114.) An accomplice must have "'guilty knowledge and intent with regard to the commission of the crime.'" (*People v. Hoover* (1974) 12 Cal.3d 875, 879.)

If there is sufficient evidence to find a witness was an accomplice to the crime, the trial court has a sua sponte obligation to instruct the jury appropriately. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.) The failure to instruct based on section 1111 is an error of state law, subject to harmless error analysis under *People v. Watson* (1956) 46 Cal.2d 818, 836-837. (*People v. Whisenhunt* (2008) 44 Cal.4th 174, 214.) The failure to give an instruction on accomplice testimony is harmless where the witness's testimony was sufficiently corroborated. (*People v. Zapien* (1993) 4 Cal.4th 929, 982.) "Corroborating evidence may be slight, may be entirely circumstantial, and need not be sufficient to establish every element of the charged offense." (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271.) Corroborating evidence "is sufficient if it tends to connect the defendant with the crime in such a way as to satisfy the jury that the accomplice is telling the truth." (*People v. Fauber* (1992) 2 Cal.4th 792, 834.)

Here, Riley claims that Rice, Lott, and Mitchem were accomplices because Rice and Lott were involved in the verbal altercation at the *ampm*, all three continued discussing the altercation in the car as they drove away, and all three were in the car before, during and after the shooting. However, "[m]ere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." (*In re*

Michael T. (1978) 84 Cal.App.3d 907, 910-911.) There is no evidence that Rice, Lott or Mitchem aided, promoted or encouraged the crime. In fact, Rice and Lott were screaming and told Riley not to shoot. Further, Lott told Riley that the people in the other cars were not involved in the altercation at the *ampm*. There was also no evidence suggesting that Rice, Lott and Mitchem had knowledge or intent with regard to the commission of the crime. Thus, the evidence in this case did not permit a finding that Mitchem, Rice and Lott were accomplices to Riley's crimes.

Even assuming, however, that the evidence could have supported a finding that Mitchem, Rice and Lott were accomplices, the asserted instructional error was harmless because their testimony was sufficiently corroborated. "A defendant's own testimony may be sufficient corroborative testimony, and false or misleading statements made to authorities may constitute corroborating evidence." (*People v. Vu* (2006) 143 Cal.App.4th 1009, 1022.) Here, Riley's testimony was largely consistent with Mitchem's, Rice's and Lott's testimony, except that Riley claimed that Rice was the shooter. Thus, Riley's own testimony connected him to the crime and corroborated the testimony of the other witnesses. Further, after the crime, Riley made false statements to the police about his whereabouts on the night of the shootings. In contrast to his trial testimony, Riley told officers that at the time of the shootings, he was at home with his wife. False and contradictory statements of a defendant, including attempts to give a false alibi, are corroborative evidence. (*People v. Santo* (1954) 43 Cal.2d 319, 327.) Accordingly, we conclude that even if the trial court should have given an instruction on accomplice

testimony, the alleged error was harmless because the witnesses' testimony was sufficiently corroborated.

II. *Wiretap Challenges*

A. Background

Approximately five days after the night of the crimes, the District Attorney applied for a wiretap on Riley's cell phone. The application was supported by an affidavit from Deputy Joseph J. Catalano II.

Deputy Catalano averred that at the time of the filing of his affidavit, he had been a deputy for the San Bernardino County Sheriff's Department for eight and a half years and had responded to hundreds of calls relating to various crimes, including murders, attempted murders, and assaults with deadly weapons. Many of the crimes were gang related.

Based on the investigation of the crimes involved in this case, Deputy Catalano believed that a wiretap of Riley's cell phone would provide evidence of Riley's participation in Ransom's murder and his gang activity. In that regard, Deputy Catalano stated that "[t]here [was] probable cause to believe that particular communications concerning the [alleged] offense(s) w[ould] be obtained through the interception of the wire, electronic page, and/or electronic cellular telephone communications." He further explained that the wiretap was necessary to identify "members and associates of the Rollin[g] 40's Crips Criminal Street Gang who [were] involved in the [m]urder of [] Ransom" and "[t]he location(s) of evidence, including the firearm, used in the [m]urder."

Deputy Catalano summarized the investigative techniques that officers used during the investigation, including interviews with witnesses, review of video surveillance from the *ampm*, confidential informants, and analysis of pen registers and telephone tolls. He further explained why he believed those techniques were no longer likely to be effective or safe.

Judge Kenneth Barr authorized the wiretap on Riley's cell phone, finding there was probable cause to believe that communications concerning the alleged crimes would be obtained through the wiretap and that normal investigative procedures had been tried and had failed, were unlikely to succeed, or were too dangerous.

Prior to trial, Riley moved to suppress evidence obtained from the wiretap. The trial court denied the suppression motion, finding that there was nothing unreasonable about the wiretap procedures in this case.

B. Analysis

"'In general, California law prohibits wiretapping.'" (*People v. Leon* (2007) 40 Cal.4th 376, 383 (*Leon*), quoting *People v. Zepeda* (2001) 87 Cal.App.4th 1183, 1195.) "California's wiretap law subjects the authorization of electronic surveillance to a much higher degree of scrutiny than a conventional search warrant." (*People v. Jackson* (2005) 129 Cal.App.4th 129, 144 (*Jackson*).) The purpose of wiretap laws is twofold: " ' "(1) protecting the privacy of wire and oral communications, and (2) delineating on a uniform basis the circumstances and conditions under which the interception of wire and oral communications may be authorized." [Citation.]'" (*Id*. at p. 147, quoting *Halpin v. Superior Court* (1972) 6 Cal.3d 885, 898.)

A judge may authorize a wiretap when the judge finds: (a) there is probable cause to believe that an individual is, was, or will be committing one of the crimes specified in the statute (§ 629.52, subd. (a)); (b) there is probable cause to believe particular communications concerning the illegal activities will be obtained through the interception (§ 629.52, subd. (b)); (c) there is probable cause to believe the device is or will be used or leased by the person targeted by the wiretap (§ 629.52, subd. (c)); and (d) normal investigative procedures have been tried and failed, or appear reasonably unlikely to succeed, or would be too dangerous if tried (§ 629.52, subd. (d)). The last criterion is known as the "necessity" requirement. (*People v. Roberts* (2010) 184 Cal.App.4th 1149, 1172 (*Roberts*).)

Here, Riley argues the trial court erred by denying his motion to suppress the wiretap evidence because the affidavit supporting the wiretap: (1) contained only generalized assertions regarding whether there was probable cause to believe that evidence of a crime would be obtained by intercepting his phone calls, and (2) was insufficient to support a finding that the wiretap was necessary for the investigation. We disagree.

1. *Evidence of the Illegal Activities*

While we agree with Riley that authorization for electronic surveillance is subjected to a higher degree of scrutiny than traditional search warrants (*Jackson*, *supra*, 129 Cal.App.4th at p. 144), we disagree with his assertion that Deputy Catalano's affidavit contained nothing more than generic claims of probable cause that could apply in any case. Our review of the affidavit reveals that in addition to generally stating that

there was probable cause to believe that communications concerning the crimes would be obtained through the wiretap, Deputy Catalano also specified the information that he believed would be acquired. Specifically, he stated that the wiretap was necessary to identify "members and associates of the Rollin[g] 40's Crips Criminal Street Gang who [were] involved in the [m]urder of Mylela Ransom" and "[t]he location(s) of evidence, including the firearm, used in the [m]urder." He also stated that, based on his investigation, he believed the wiretap would reveal the identities and roles of participants in the murder. Accordingly, we reject Riley's contention that Deputy Catalano's affidavit contained nothing more than generalities in regard to the particular communications that would be obtained by the wiretap.

2. *Necessity*

The necessity requirement ensures that wiretapping is not routinely used as an initial step in a criminal investigation or when traditional investigative techniques would expose the crime. (*Leon*, *supra*, 40 Cal.4th at p. 385; *United States v. Giordano* (1974) 416 U.S. 505, 515.) It is satisfied if the affidavit "analyze[s] with particularity the limitations of each alternative investigative technique in achieving the goals of [the] investigation" and shows that ordinary investigative procedures, employed in good faith, are unlikely to be effective in the case. (*Leon*, *supra*, 40 Cal.4th at pp. 385, 389-390.) " ' "Traditional investigative techniques" include surveillance, infiltration or undercover work, questioning of participants, execution of search warrants, and the use of pen registers and trap-and-trace devices. [Citations.]'" (*Roberts*, *supra*, 184 Cal.App.4th at p. 1172.)

"The overall burden on the government in meeting the necessity requirement for issuance of a wiretap warrant is not great. [Citation] [¶] A finding of necessity by the judge approving the wiretap application is entitled to substantial deference." (*Roberts*, *supra*, 184 Cal.App.4th at p. 1172.)

Riley contends that "a mere five days of investigation which consisted essentially of interviewing the victims and the passive receipt of confidential tips" did not satisfy the necessity requirement because officers did not exhaust traditional investigative methods. However, "'"[t]he government need not exhaust or explain its failure to exhaust every conceivable investigative procedure before resorting to wiretapping."'" (*Leon, supra,* 40 Cal.4th at p. 395, quoting *United States v. Carrillo* (D.Colo. 2000) 123 F.Supp.2d 1223, 1245.) Deputy Catalano's affidavit detailed the investigative techniques used to date and the reasons why those techniques were no longer likely to be effective or safe. Investigators interviewed witnesses, reviewed surveillance videos, worked with confidential informants, and analyzed pen registers and telephone tolls. According to Deputy Catalano, interviews, physical surveillance and grand jury proceedings would compromise the investigation by alerting participants in the crimes. Additionally, investigators were not aware of any other informants who would provide information regarding the murder and determined that the information derived from the pen registers and telephone tolls was of limited value.

The description of the investigative techniques that had been used was thorough, explicit and relevant to the investigation. Thus, the issuing judge reasonably determined that ordinary investigative procedures, employed in good faith, were unlikely to be

effective in the case and authorized the wiretap on Riley's cell phone. (*Leon*, *supra*, 40 Cal.4th at pp. 385, 389-390.) We find no error in the trial court's denial of Riley's motion to suppress the wiretap evidence.

III. *In Camera Review*

Prior to trial, Riley moved to unseal redacted portions of Deputy Catalano's affidavit supporting the electronic interception of his cell phone. The trial court denied the motion, concluding that the materials should remain sealed.

Riley requests that we review the affidavit and the transcript of in camera proceedings held in the trial court to determine whether probable cause supported the issuance of the wiretap order and whether the trial court properly ordered the affidavit sealed. The People do not oppose the request.

A wiretap order must be supported by probable cause (§ 629.52) and is subject to a much higher degree of scrutiny than a conventional search warrant (*Jackson*, *supra*, 129 Cal.App.4th at p. 144). "'"[W]hile we defer to the [trial] court's express and implied factual findings if they are supported by substantial evidence, we exercise our independent judgment in determining the legality of a search [based] on the facts so found."'" (*Roberts*, *supra*, 184 Cal.App.4th at p. 1171.)

We issued an order directing the trial court to augment the record with all materials it reviewed in camera and the transcript of the in camera proceedings. Although the trial court supplied us with the unredacted wiretap affidavit, there is some conflict in the record regarding the trial court's procedures in reviewing that affidavit. In considering Riley's motion, the trial court stated that it conducted an in camera review.

Further, on appeal, Riley requests that we "examine the sealed transcript of the confidential hearing." He, therefore, suggests that the trial court held an in camera hearing. However, in response to our request to augment the record, the superior court stated that "an 'in camera' hearing was not conducted."

In any event, we have conducted our own in camera review of the affidavit supporting the electronic interception of Riley's cell phone. We cannot, however, review the transcript of the in camera hearing, as Riley requested, because either the hearing was not conducted or the proceedings were not reported. Based on our review of the affidavit, we conclude the trial court did not err in either sealing the affidavit or its decision to keep the document sealed. The totality of the circumstances presented in the affidavit established probable cause for the intercept order.

DISPOSITION

The judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

MCDONALD, J.