

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**

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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

In re J.C, a Person Coming Under the  
Juvenile Court Law.

THE PEOPLE,

Plaintiff and Respondent,

v.

J.C.,

Defendant and Appellant.

D059916

(Super. Ct. No. J228653)

APPEAL from a judgment of the Superior Court of San Diego County, Dwayne K. Moring, Judge. Affirmed.

In March 2011 a petition was filed alleging that 16 year-old J.C. entered a building with the intent to commit a felony (Pen. Code, § 459; count 1). (All further undesignated statutory references are to the Penal Code.) The petition further alleged that J.C. committed an assault on the victim, Jesse G., by means of force likely to produce great bodily injury (§ 245, subd. (a)(1); count 2) and attempted to kidnap Jesse G. (§§ 207, subd. (a), 664; count 3). The petition also alleged two misdemeanor violations: that J.C.

possessed specified instruments with an intent to commit vandalism or graffiti (§ 594.2, subd. (a); count 4), and unlawfully resisted a peace officer (§ 148, subd. (a)(1); count 5). As to counts 1 through 3 it was alleged that J.C. committed those offenses for the benefit of a criminal street gang (§ 186.22, subd. (b)(1)).

Following a bench trial, the court made true findings as to counts 2 and 5. The court found counts 1 and 3, and the gang enhancement, had not been proven. Count 4 was dismissed on the People's motion after presentation of the People's case-in-chief.

On appeal, J.C. asserts (1) there was not sufficient evidence that he aided and abetted another individual in the assault on Jesse G, and (2) the court should have struck Jesse G.'s testimony because he was unavailable during the defense's case, thereby violating his right to due process and to confront witnesses. We affirm.

## FACTUAL BACKGROUND

### *A. People's Case*

Carmen Cincotta shared an apartment with several individuals, including Carmen Medina and her mother, Maria Medina, and 15-year-old Jesse G. Carmen Medina was dating an individual named Mario Rodriguez. However, there were rumors that she was also dating Jesse G. and that Mario was jealous.

Mario had a relationship with J.C. that people described as "brothers" or "stepbrothers." Mario and J.C. were frequent visitors to Cincotta's home.

On March 8, 2011, Cincotta was at home and received a text message from J.C. asking if he could come over. Cincotta responded that it was okay.

Maria Medina was in the living room with her daughter, Ana. Someone rang the doorbell and Ana looked to see who it was. She saw only J.C. After J.C. entered, Mario entered.

When Mario entered, Maria could see that he was upset. Mario went directly to the bedroom, while J.C. stayed in the living room. When Mario went to Cincotta's bedroom door, he had a raised and angry voice and said he needed to talk to Jesse G. Jesse G. came out of the bedroom and he and J.C. started arguing. Mario grabbed Jesse G. by the neck and started shoving him out of the house. Cincotta came out of her bedroom and saw this. J.C. prevented anyone from interfering by standing between Mario and Jesse G. and the rest of the people in the room. The front door was open and Mario told J.C., "We have to get him." Cincotta pulled Jesse G. back into the apartment. Mario was screaming, "We need to get him out of this house." There was a struggle as Mario was trying to pull Jesse G. out of the house and Cincotta was pulling him inside. Mario hit Jesse G. in the mouth.

Maria scolded J.C. for bringing Mario to the apartment and told him to leave. J.C. went outside. Mario left with J.C. Jesse G. sustained a chipped tooth and bruises on his neck, arms and ribs.

San Diego County Sheriff's Deputy Joe Barry was called to the scene. He spoke with Jesse G., who told him he had been confronted by Mario and J.C. They told him he needed to leave with them so they could beat him up. Jesse G. left the bedroom and Mario assaulted him and tried to drag him outside the house. J.C. said, "Let's go. We'll

take him to Malo's house." J.C. also said as he was leaving, "This is our territory, fool. This is IB."

"Malo" is a known gang member from the Imperial Rascals.

*B. Defense Case*

About two weeks before the incident, Carmen Medina and Jesse G. moved in with Cincotta. Prior to the incident, Mario never made it known that he was upset about the rumors concerning Jesse G. and Carmen Medina. Cincotta did not know if J.C. was aware Mario was upset in the days prior to the incident.

On the day of the incident, Cincotta never told J.C. not to bring Mario with him. With regard to the incident, Cincotta testified that J.C. did not assist Mario in any way in his attack on Jesse G.

DISCUSSION

*I. SUFFICIENCY OF THE EVIDENCE THAT J.C. AIDED AND ABETTED MARIO IN HIS ASSAULT ON JESSE G.*

J.C. asserts that there is insufficient evidence to support the court's finding that he aided and abetted Mario in his assault on Jesse G. Specifically, J.C. asserts the evidence does not show he knew of and shared Mario's criminal intent to assault Jesse G. or that he facilitated Mario in the commission of the crime. This contention is unavailing.

*A. Standard of Review*

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.)

### B. *Applicable Law*

A person aids and abets the commission of a crime when he or she, acting (1) with knowledge of the perpetrator's unlawful purpose, and (2) with intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. (*People v. Croy* (1985) 41 Cal.3d 1, 11-12; *People v. Beeman* (1984) 35 Cal.3d 547, 561; see also CALCRIM No. 401.) Direct evidence of the mental state is rarely available and may be shown with circumstantial evidence. (*Beeman, supra*, at pp. 558-559.)

"Mere 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, 911.)

"Whether a person has aided and abetted in the commission of a crime ordinarily is a question of fact. . . . [¶] . . . [¶] Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense. [Citations.] In addition, flight

is one of the factors which is relevant in determining consciousness of guilt." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094-1095.)

### C. Analysis

Here there is ample evidence both that J.C. shared Mario's criminal intent and facilitated the crime. He texted Cincotta and asked if he could come over, without telling her that Mario was also with him. When there was a knock on the door, Ana only saw J.C. because Mario was behind him. Thus, J.C. made it possible for Mario to enter the apartment. They entered the apartment together and left together after the assault occurred. Maria testified that J.C. stood between Mario and everyone else in the room to block anyone from interfering while Mario assaulted Jesse G. As Mario was trying to drag Jesse G. outside, J.C. said, "Let's go. We'll take him to Malo's house." J.C. also said as he was leaving, "This is our territory, fool. This is IB." This constitutes sufficient evidence J.C. facilitated Mario's assault on Jesse G. Additionally, that same evidence is sufficient to show that J.C. shared Mario's intent to assault Jesse G.

J.C. relies heavily on *People v. Hill* (1946) 77 Cal.App.2d 287 (*Hill*) in support of his contention he did not have knowledge of Mario's intent to assault Jesse G. However, *Hill* does not support J.C.'s position.

In *Hill*, the defendant was asked by the principals to drive around to look for some girls. (*Hill, supra*, 77 Cal.App.2d at p. 291.) After defendant was told to pull up to a nearby bar and wait inside the car, two of the car's occupants entered the bar and robbed the bartender at gunpoint. (*Id.* at p. 288.) Once they exited they found the defendant asleep in the driver's seat. (*Ibid.*) At trial, the two men who robbed the bar exonerated

the defendant, testifying that they asked him to drive around looking for girls and that they did not tell him they were going to rob a bar. (*Id.* at p. 291.) The Court of Appeal held that the defendant's mere presence, without a showing of his knowledge of the perpetrators plans was insufficient to show he aided and abetted the crime. (*Id.* at p. 294.)

Here, however, as detailed, *ante*, there was ample evidence J.C. knew of Mario's plan to assault Jesse G.

J.C.'s reliance on *In re Michael T.*, *supra*, 84 Cal.App.3d 907 is also misplaced. In that case, the principal fatally shot a liquor store clerk. Shortly before the shooting occurred, the minor warned two people outside the liquor store that a shooting was going to happen. Later in the evening, the minor told some people, "We got the guy." (*Id.* at p. 909.) However, aside from his statements and his presence near the scene of the crime, there was no evidence the minor participated in the murder by rendering physical aid or encouragement. (*Id.* at p. 910.) The Court of Appeal concluded that the evidence was insufficient to show the minor aided and abetted the murder. (*Id.* at p. 911.)

Here, however, J.C.'s participation went beyond mere presence at the scene. He aided the crime by making it possible for Mario to enter the apartment and then prevented anyone from interfering with the assault. There was substantial evidence J.C. aided and abetted the assault on Jesse G.

## II. ADMISSION OF JESSE G.'S STATEMENTS TO DEPUTY BARRY

J.C. asserts that the court erred in admitting Jesse G.'s extrajudicial statements through the testimony of Deputy Barry. We reject this contention.

### *A. Background*

Jesse G. was called as a witness during the People's case-in-chief. He was asked whether he made a number of statements to Deputy Barry, as described, *ante*. He denied making the statements. Defense counsel then cross-examined Jesse G. and excused him, subject to recall.

Deputy Barry was called as a witness by the People and testified as to the statements made to him by Jesse G. at the scene of the crime—the statements Jesse G. had denied making. Defense counsel objected to the testimony on hearsay and confrontation grounds. The court overruled the objection, stating, "This is a prior inconsistent statement that counsel is trying to inquire about. Again, it would be a statement that the witness, Jesse [G.], was able to explain or deny." Defense counsel then cross-examined Deputy Barry.

Defense counsel recalled Jesse G. during the defense case. Jesse G. invoked his Fifth Amendment right not to incriminate himself. Defense counsel then made a motion to strike Jesse G.'s entire testimony and any testimony by Deputy Barry regarding statements made by Jesse G. The prosecutor responded that the questions posed to Jesse G. by defense counsel were the same questions he answered during the People's case and that the defense had a fair opportunity to cross-examine him during that portion of the trial.

The court denied the motion to strike, finding, "The minor has had plenty of opportunity to cross-examine the witness. [¶] The witness's testimony is really consistent today with—as far as [the] result is concerned, as it was yesterday. Yesterday, he had no

recall. He denied making the statements. And today he does not make any statements at all. [¶] This witness has not provided any testimony that should be stricken."

### B. *Analysis*

Generally, "evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated" is hearsay and thus inadmissible. (Evid. Code, § 1200; *Correa v. Superior Court* (2002) 27 Cal.4th 444, 451 ["In general, hearsay evidence is inadmissible."]; *Kulshrestha v. First Union Commercial Corp.* (2004) 33 Cal.4th 601, 608 ["In judicial proceedings, the trustworthiness of the evidence and the reliability of the factfinding process depend upon the notion that persons who possess relevant information appear in court and undergo cross-examination."].)

In the instant case, however, the statement was admitted under Evidence Code sections 1235 and 770. Evidence Code section 1235 states: "Evidence of a statement made by a witness is not made inadmissible by the hearsay rule if the statement is inconsistent with his testimony at the hearing and is offered in compliance with Section 770." Evidence Code section 770 states: "Unless the interests of justice otherwise require, extrinsic evidence of a statement made by a witness that is inconsistent with any part of his testimony at the hearing shall be excluded unless: [¶] (a) The witness was so examined while testifying as to give him an opportunity to explain or to deny the statement; or [¶] (b) The witness has not been excused from giving further testimony in the action."

Inconsistency will be implied when a witness's trial testimony that he or she does not remember an event is deliberate evasion and untruthful. (*People v. Sapp* (2003) 31 Cal.4th 240, 296.) We review a trial court's decision to admit evidence under an exception to the hearsay rule for abuse of discretion. (*People v. Guerra* (2006) 37 Cal.4th 1067, 1113.)

In *People v. Avila* (2006) 38 Cal.4th 491, the California Supreme Court held that the trial court did not abuse its discretion in admitting a witness's prior inconsistent statement under Evidence Code sections 770 and 1235. The witness told a detective that he saw the defendant put a gun to the victim's head while she was being raped. At trial, however, the witness testified that that he did not see the defendant at the scene. (*Id.* at pp. 579-580.) The court ruled that the People had the right to rebut the witness's trial testimony with his prior inconsistent statement to the detective. (*Ibid.*)

Likewise, when Jesse G. testified in this case, he was confronted with the statements he made to Deputy Barry and he denied that he had made them. He was cross-examined by defense counsel and excused subject to recall. Then, Deputy Barry testified as to his interview with Jesse G. after the assault and Jesse G.'s statements to him. Because Jesse G.'s testimony at trial was inconsistent with his prior statements to Deputy Barry and defense counsel was given a fair opportunity to cross-examine Jesse G. and Deputy Barry, the court properly admitted the prior inconsistent statements under Evidence Code sections 1235 and 770.

DISPOSITION

The judgment is affirmed.

NARES, J.

WE CONCUR:

BENKE, Acting P. J.

McDONALD, J.