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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

RAYNALDO SALAZAR,

Defendant and Appellant.

D060127

(Super. Ct. No. SWF028526)

APPEAL from a judgment of the Superior Court of Riverside County, Eric G. Helgesen, Judge. (Retired judge of the Tulare Mun. Ct. assigned by the Chief Justice pursuant to art. VI, § 6 of the Cal. Const.) Judgment affirmed.

Raynaldo Salazar appeals from a judgment entered upon his conviction for the first degree murder of Raimundo Lopez and being a felon in possession of a firearm, and the true finding that he personally discharged a firearm causing death. Salazar appeals, contending the trial court erred by sua sponte failing to instruct the jury: (1) on the principles of accomplice testimony; and (2) consistent with CALJIC No.

8.71 that any doubt as to the degree of murder had to be resolved in his favor. We reject his contentions and affirm the judgment.

### FACTUAL AND PROCEDURAL BACKGROUND

Because Salazar does not challenge the sufficiency of the evidence to support his convictions, we summarize the pertinent facts to provide background for our discussion of his contentions on appeal.

On May 16, 2009, Lopez and his friend, Juan Flores, attended a party. Both men had a lot of alcohol to drink and were "buzzed." That same evening, Lopez's friend, Joseph Shepherd, was having a gathering at his home across the alley located at 613 Mistletoe Avenue. Lopez and Flores decided to visit their friends that lived at Shepherd's home by going through the alley and jumping a wall.

Later that evening, a fight broke out between Lopez and Salazar's brother, Richard. Shepherd became scared and left his house during the fight to pick up David Padilla. He wanted Padilla to confront the men and get them out of the house. In the meantime, Lopez and Flores got Richard up against a pole and were "pound[ing]" him. Valentin Esquivel, who was also at Shepherd's home, helped Richard get to Richard's mother's house just down the street. Richard called his brother, Salazar, about the fight and Salazar indicated he would come over.

When Padilla and Shepherd got to Shepherd's house, they saw Lopez holding an aluminum bat. Lopez admitted to Padilla that he used the bat to beat up Richard. At some point, Padilla pepper sprayed Lopez in the face because he believed that Lopez was going to hit him with the bat. At about this time, Salazar arrived in a van.

Salazar got out of the van and asked, "Who jumped my brother?" Shepherd told Salazar he did not know, but Esquivel pointed out Lopez and yelled, "'That's the guy that jumped your brother.'"

Lopez ran inside the house followed by Padilla, Salazar and Shepherd. Lopez and Salazar then ran outside. Padilla noticed that Salazar had a revolver in his right hand. Padilla observed Salazar point the gun at Lopez, heard a gunshot and saw that Lopez had been struck in the back. Shepherd also saw Salazar shoot Lopez. However, Shepherd testified that the murder weapon was a black gun, while Padilla claimed the weapon was chrome.

Lopez and Salazar continued to run after the shot rang out with Lopez jumping over the backyard wall as Salazar continued to chase him. Salazar yelled at Lopez from the top of the wall, then jumped down and gave Shepherd the gun with instructions to hide it. Shepherd jumped the wall and dropped the gun where Lopez was laying. Lopez died from a perforating gunshot wound through his heart and lung. Shepherd left after the shooting and hid from police because he was scared and had drugs at his house. Ultimately, Shepherd came forward about two weeks before trial started.

The day after the shooting, Esquivel was with Salazar, Padilla, and Padilla's step-brother, Juan Baltazar. Esquivel heard Salazar claim that he "fucked up" when he shot Lopez and that he should have just "pistol whipped him." Baltazar also told the police about this conversation and recalled hearing the shooter state, "I fucked up."

Shepherd testified at trial under a grant of immunity based on his drug dealings and weapons possession. A day or two into trial, Esquivel also received immunity for things he had done on or before the night of the shooting. Padilla, however, was never granted immunity or promised that he could not be prosecuted for anything, including the pepper spray incident.

## DISCUSSION

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

Salazar contends the trial court erred in failing to sua sponte instruct the jury on the principles of accomplice testimony because the jury could have found that Padilla and Shepherd were accomplices to Lopez's murder as aiders and abettors of an assault on Lopez, or on the theory that the murder was a natural and probable consequence of the assault. We conclude that the evidence in this case did not permit a finding that Padilla or Shepherd were Salazar's accomplices in Lopez's murder; 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.) "Principals" 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.) An aider and abettor is guilty not only of the intended crime, but also any other offense that is the natural and probable consequence of the intended offense. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1117.)

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.)

An aider and abettor is one who aids, promotes, encourages or instigates a crime with knowledge of the unlawful purpose of the perpetrator and the intent to assist in the commission of the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 560.) Here, after Lopez "jumped" Richard, Esquivel helped Richard to the home of Richard's mother where Richard called Salazar. At this time, Padilla and Shepherd were still at

Shepherd's house and there is no evidence suggesting that they knew Richard had called Salazar or why Salazar had arrived.

After Salazar got out of the van, he alerted everyone about his possible desire for revenge when he asked, "Who jumped my brother?" There is no evidence, however, that Shepherd or Padilla said anything to aid, promote or encourage Salazar. While Salazar points out that he, Shepherd and Padilla all followed Lopez when Lopez ran inside the house, there is no evidence suggesting that Padilla and Shepherd did so knowing Salazar intended to kill Lopez and that they intended to commit, encourage or facilitate this crime, necessary elements for aiding and abetting liability. (*People v. Beeman, supra*, 35 Cal.3d at p. 560 [To establish criminal liability on an aiding and abetting theory, the person must "act with knowledge of the criminal purpose of the perpetrator *and* with an intent or purpose either of committing, or of encouraging or facilitating commission of, the offense."].)

Assuming Padilla and Shepherd chased after Lopez intending to assist Salazar in committing an assault or battery on Lopez, they could be liable for the murder if the murder was a natural and probable consequence of an assault or battery that they aided and abetted. (*People v. Prettyman* (1996) 14 Cal.4th 248, 262.) Salazar contends that the murder was a natural and probable consequence of an intended assault or battery because there were guns in the house and Padilla and Shepherd had seen Salazar with a gun in the past; thus, it was reasonably foreseeable that Salazar would produce a gun during an assault on Lopez. Salazar, however, provided no citation to the record to support the suggestion that he knew about the guns in Shepherd's house or that Padilla

and Shepherd had seen him with a gun in the past, and our review of the record did not reveal support for these claims.

Even assuming, however, that the evidence could have supported a finding that Padilla and Shepherd were Salazar's accomplices under the natural and probable consequences doctrine, the asserted instructional error was harmless. Padilla testified that after the shooting, he and Baltazar stopped at a house to see if Salazar was hiding there. When he and Baltazar entered the house, they saw a woman, some kids, Esquivel and Salazar. Padilla asked Salazar, "[Y]ou just shot this guy, you know, why would you shoot him? What happened?" Salazar responded that "he didn't mean to. It wasn't supposed to happen that way." Padilla admitted he did not tell investigators about this conversation immediately after the shooting, but that he disclosed the conversation during his June 10 interview.

Esquivel and Baltazar similarly recounted this conversation at trial. Esquivel testified that while he was with Padilla, Baltazar and Salazar, he heard Salazar claim that he "fucked up" when he shot Lopez and that he should have just "pistol whipped him." The jury also heard Baltazar's police interview and heard Deputy James Peters testify regarding the interview. During his police interview, Baltazar stated that Padilla talked to the shooter and that the shooter said, "I fucked up" in a sad or scared way. Esquivel and Baltazar's statements regarding the conversation corroborated Padilla's recount of the conversation and also corroborated Padilla and Shepherd's testimony that Salazar was the shooter. (*People v. Hayes, supra*, 21 Cal.4th at p. 1271 [corroborating evidence may be slight and entirely circumstantial].)

## II. *Failure to Give CALJIC No. 8.71*

Salazar contends the trial court neglected its sua sponte duty to charge the jury with CALJIC No. 8.71, which instructs jurors that if they unanimously agree he committed murder but have a reasonable doubt whether murder was of the first or of the second degree, they should give him the benefit of the doubt and return a verdict of second degree murder. As we shall explain, the other instructions given by the trial court adequately covered this legal principle.

We review a claim of instructional error de novo. (*People v. Posey* (2004) 32 Cal.4th 193, 218.) "Review of the adequacy of instructions is based on whether the trial court 'fully and fairly instructed on the applicable law.' [Citation.]" (*People v. Ramos* (2008) 163 Cal.App.4th 1082, 1088.) In determining whether error has been committed in giving jury instructions, we consider the instructions as a whole and assume jurors are intelligent persons, capable of understanding and correlating all jury instructions which are given. (*Ibid.*) "Instructions should be interpreted, if possible, so as to support the judgment rather than defeat it if they are reasonably susceptible to such interpretation." [Citation.]" (*Ibid.*)

In *People v. Dewberry* (1959) 51 Cal.2d 548 (*Dewberry*), our high court ruled that a criminal defendant is entitled to the benefit of a jury's reasonable doubt as to all crimes with lesser included offenses. (*Id.* at pp. 556, 557.) The court held that "when the evidence is sufficient to support a finding of guilt of both the offense charged and a lesser included offense, the jury must be instructed that if they entertain a reasonable doubt as to which offense has been committed, they must find the defendant guilty

only of the lesser offense. [Citations.]" (*Id.* at p. 555.) The trial court is required to give the *Dewberry* instruction sua sponte (*People v. Crone* (1997) 54 Cal.App.4th 71, 76 (*Crone*)); however, the omission of such an instruction can be cured by the reading of other jury instructions (*id.* at p. 77). Because second degree murder is a lesser included offense of first degree murder (*People v. Cooper* (1991) 53 Cal.3d 771, 827), we agree with Salazar that the trial court had a duty in this case to instruct the jury in accordance with *Dewberry* but conclude the omitted instruction was adequately covered by the other instructions the court gave.

Here, the trial court instructed the jury that Salazar was presumed innocent and that the People needed to prove his guilt beyond a reasonable doubt (CALCRIM No. 220), to find Salazar guilty of murder, the People must prove certain elements (CALCRIM No. 520), and that provocation may reduce a murder from first degree to second degree (CALCRIM No. 522). The court also instructed the jury with CALCRIM No. 521, which the Attorney General asserts adequately conveyed the *Dewberry* principle that if it found Salazar had murdered Lopez but had reasonable doubt about the degree of the murder, it had to find him guilty of second degree murder. We agree.

CALCRIM No. 521 instructed the jury that if it found Salazar had committed a murder, it must decide whether it was murder of the first or second degree. The instruction defined first and second degree murder and then told the jurors that: "The People have the burden of proving beyond a reasonable doubt that the killing was first degree murder rather than a lesser crime. If the People have not met this burden, you

must find the defendant not guilty of first degree murder." In other words, the jurors were instructed that if they had any doubt as to the degree of murder, they must find Salazar not guilty of first degree murder. Thus, although CALJIC No. 8.71 and CALCRIM No. 521 use different language, both instructions convey the same general legal principle that if the jury finds the defendant has committed murder, it cannot convict the defendant of first degree murder if it is not convinced beyond a reasonable doubt. Accordingly, we conclude the trial court properly instructed the jury.

Salazar's reliance on *Crone* to show uncured error in the omission of CALJIC No. 8.71 is misplaced. (*Crone, supra*, 54 Cal.App.4th 71.) The *Crone* court found that the other general instructions on the burden of proof did not adequately instruct the jury on what to do if it had a reasonable doubt whether the defendant committed the greater or lesser offense where the defendant was charged with both the greater offense and the lesser included offense. (*Id.* at pp. 76-77) Nonetheless, where, as here, a defendant is charged with a greater offense, which has one or more uncharged lesser included offenses, the *Crone* court acknowledged that CALJIC No. 17.10 satisfies the *Dewberry* requirement. (*Id.* at p. 76.)

The relevant portion of CALJIC No. 17.10 states: "If you are not satisfied beyond a reasonable doubt that the defendant is guilty of the crime charged, you may nevertheless convict [him][her] of any lesser crime, if you are convinced beyond a reasonable doubt that the defendant is guilty of the lesser crime." CALJIC No. 17.10 is similar to CALCRIM No. 640, which was provided to the jury in this case, and instructed the jurors that the court "can accept a verdict of guilty or not guilty of

second degree murder only if all of you have found the defendant not guilty of first degree murder . . . " Thus, CALCRIM No. 640 when viewed in conjunction with CALCRIM No. 521 and the other instructions addressed above, adequately covered the *Dewberry* principle that if the jury found Salazar had murdered Lopez but had reasonable doubt about the degree of the murder, it had to find him guilty of second degree murder.

#### DISPOSITION

The judgment is affirmed.

McINTYRE, J.

WE CONCUR:

McCONNELL, P. J.

O'ROURKE, J.