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COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

THE PEOPLE,

Plaintiff and Respondent,

v.

JOEL ELIAS SANCHEZ,

Defendant and Appellant.

D060315

(Super. Ct. No. INF051951)

APPEAL from a judgment of the Superior Court of Riverside County, Stephen J. Gallon, Judge. Affirmed.

A jury convicted Joel Elias Sanchez of the second degree murder of Manuel Torres and found true the allegations that he personally discharged a firearm and committed the murder for the benefit of a criminal street gang. Sanchez appeals, contending the trial court erred in: (1) refusing to instruct the jury regarding accomplice testimony; and (2) excluding evidence of the toxicology analysis performed on Torres. Sanchez also asserts that cumulatively, the two errors deprived him of his right to due process.

As we shall explain, we reject Sanchez's individual claims of error. Because there were no individual errors, there is no cumulative error and we need not address this argument.

## FACTUAL AND PROCEDURAL BACKGROUND

The prosecutor established the facts of the shooting through Sanchez's recorded interviews with police, and the testimony of his cohort, Gary Bailey, as read to the jury from an earlier proceeding.

At the time of trial, Bailey was 18 years old and testified under a grant of immunity. Bailey claimed that he and Sanchez were members of the Varrío Mecca Vineyards gang, and that he considered Sanchez an acquaintance. On August 28, 2005, Bailey met with Sanchez to hang out and smoke methamphetamine. They saw fellow gang members Flaco and Kiwi and were all talking when a van, driven by Torres, drove in "booming" loud music. Torres parked the van and walked away from it.

Flaco asked Bailey to help him remove the speakers from the van, but Bailey refused. Flaco removed the speakers from the van by himself, took them to a truck and drove away. After Kiwi left, Bailey and Sanchez looked inside the van to see what they could steal. They entered the van to remove another speaker and the CD player. However, the men ran away when Sanchez saw Torres approaching.

As the men hid behind a bush, Sanchez suggested to Bailey that they rob Torres at gunpoint by stating, "Let's go put the strap [gun] on. We will take everything he has." Bailey told Sanchez to "Fuck that." The men walked back and saw the van pulling out. They watched the van leave and then walked to a dumpster by another parking lot. The

van approached quickly and left about a 15-foot skid mark when it stopped. Bailey told Sanchez that they needed to leave. When Sanchez refused to leave, Bailey ran away without him.

Bailey ran about 20 feet, then turned around and saw Sanchez with a gun in his hand and his arm extended at a downward angle. Bailey heard Torres say, "No. It's okay. No tambien. No. No. Tambien. Tambien. It's okay." Tambien means "it's okay" in Spanish. Bailey kept running and heard the shot. He later saw Sanchez run away. The day after the shooting, Bailey turned himself into the police.

Sanchez similarly told the police that he was in a parking lot with Flaco and some other people when a van drove up with a loud stereo system. He claimed that Flaco wanted to show a "little homie" how to jack things. After the driver left the van, Flaco removed a speaker from the van, put it in a truck that pulled up and left. During the interviews, Sanchez referred to Bailey as "Bobo."

Sanchez claimed that Bailey was inside the van trying to take out the stereo when Sanchez saw Torres return, causing him and Bailey to run away. They ran toward a dumpster as Torres followed them in his van. As the men hid behind the dumpster, Sanchez observed the van drive in, Torres get out, and come towards them walking quickly while carrying a knife. Sanchez claimed that Bailey ran away because he was scared. Sanchez, however, did not run away because he thought Torres would chase him.

Sanchez claimed that Torres asked who stole his "system" as he quickly approached Sanchez carrying a folding knife. Sanchez pulled the gun out of his pocket, pointed it at Torres, fired a single shot and then ran away. Sanchez denied that Torres put

his hands up or said, "hey" or "okay." Sanchez asserted he did not know why he did not run away with Bailey, and claimed that he did not intend to "jack" Torres. Sanchez repeatedly claimed that he did not intend to kill Torres and that he acted in self defense. Sanchez claimed that he cleaned the gun with his shirt and then tossed it into the grass by a park. The police found an open, tri-fold knife and a shell casing from an expended bullet near the dumpster.

Presumably rejecting Sanchez's claim of self defense, the jury convicted him of second degree murder and found true the firearm and gang enhancements. The trial court sentenced Sanchez to prison for a total indeterminate term of 40 years to life.

## DISCUSSION

### *I. Accomplice Instruction*

Defense counsel requested that the court instruct the jury with CALCRIM No. 334, which directs jurors on deciding whether a person is an accomplice and tells them that accomplice testimony must be corroborated. The trial court refused the instruction, finding there was no evidence showing Bailey to be an accomplice in the charged crime of murder.

Sanchez claims the trial court erred in concluding that Bailey was not an accomplice as a matter of law and that the evidence was such that the jury could have concluded that Bailey was an accomplice. He asserts that the trial court's failure to give any accomplice instructions was prejudicial error. We conclude that the evidence in this case did not permit a finding that Bailey was Sanchez's accomplice in Torres'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 (*Horton*)). "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. (*Horton*, 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.)

A witness's status as an accomplice "is a question for the jury if there is a genuine evidentiary dispute and if 'the jury could reasonably [find] from the evidence' that the witness is an accomplice." (*People v. Howard* (1992) 1 Cal.4th 1132, 1174.) If, however, the facts are not in dispute, "the question is legal and to be determined by the trial judge." (*People v. Daniels* (1991) 52 Cal.3d 815, 867.)

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, the evidence was insufficient to establish that Bailey acted as an accomplice to Torres's murder as an aider and abettor. 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.) Bailey's testimony that after Sanchez showed him the gun and suggested robbing Torres, the men walked back to observe the van pulling out is possibly sufficient to show Bailey was an accomplice to an attempted robbery. (*People v. Lindberg* (2008) 45 Cal.4th 1, 24 ["An attempted robbery requires a specific intent to commit robbery and a direct, ineffectual act (beyond mere preparation) toward its commission."].) This evidence, however, does not show Bailey acted as an accomplice to murder.

After the men observed the van pull out, Bailey testified that they walked to a dumpster and when Sanchez refused to leave, Bailey ran away without him. Significantly, Sanchez pulled out the gun after Bailey had started to flee. Similarly,

Sanchez repeatedly told the police that while hiding behind the dumpster with Bailey, Bailey ran away *before* he pulled out his gun. Thus, the evidence shows that Bailey did nothing that could be interpreted as aiding, promoting, encouraging or instigating Torres's murder.

Sanchez asserts that Bailey was an accomplice to the murder under the natural and probable consequences line of cases because it is reasonably foreseeable that a person may be killed during the commission of an armed robbery. Here, however, Sanchez did not commit an armed robbery and he has not explained how the evidence shows that Torres's murder was the natural and probable consequence of any attempted robbery.

Pointing out that Bailey and Sanchez were fellow gang members, Sanchez next asserts that Bailey was an accomplice to the murder because of the gang nature of the crime. Sanchez essentially argues that any time a gang member uses a gun to commit a crime while in the presence of other gang members, the other gang members are accomplices because their presence supports and emboldens the shooter. The cases cited by Sanchez, however, do not support this broad proposition and are distinguishable on their facts. (See *People v. Gonzales* (2001) 87 Cal.App.4th 1, 9-10; *People v. Montes* (1999) 74 Cal.App.4th 1050, 1054-1056.)

Even assuming the evidence could have supported a finding that Bailey was Sanchez's accomplice, the asserted instructional error was harmless. Sanchez's statements to the police closely tracked Bailey's testimony and amply corroborated Bailey's testimony. Sanchez focuses on Bailey's claim that after Sanchez pulled out his

gun, Torres repeatedly stated, "no" or "it's okay." This argument, however, overlooks the law that corroborating evidence may be slight (*People v. Brown* (2003) 31 Cal.4th 518, 556) and need not corroborate all of the accomplice's testimony (*People v. Heishman* (1988) 45 Cal.3d 147, 164-165; see also CALCRIM No. 334).

## II. *Toxicology Results*

### A. Background

The prosecutor moved in limine to exclude the results of a toxicology analysis performed on Torres that revealed methamphetamine in Torres's system and a blood alcohol level of 0.10 percent. The trial court excluded the evidence finding defense counsel had not shown its relevance. The following day, defense counsel requested that he be allowed to introduce Torres's blood alcohol level to show that Torres's actions resulted from being over the legal limit for alcohol. The prosecutor asserted that defense counsel was attempting to "dirty the victim" and expert testimony was necessary to explain what impact the drugs or alcohol had on Torres and that the blood had been properly drawn. The trial court took the matter under submission and eventually ruled that the toxicology results were irrelevant "absent some additional evidence or something that would point to relevance."

### B. Analysis

Sanchez asserts the trial court deprived him of due process, a fair trial, and the right to present a defense when it excluded evidence that Torres had alcohol and methamphetamine in his system at the time of the shooting. He claims this evidence supported his argument that Torres acted and looked crazy in pursuing him and had the

jury heard this evidence, it might have concluded that he reacted in reasonable or unreasonable self defense, and returned a verdict of not guilty or manslaughter. We disagree.

A trial court has broad discretion to determine the relevance of evidence and to exclude evidence it deems irrelevant, confusing, cumulative, or unduly prejudicial. (*People v. Weaver* (2001) 26 Cal.4th 876, 933.) We review the trial court's determination on admissibility of evidence for an abuse of discretion, examining the evidence in the light most favorable to the court's ruling, and will reverse only if the trial " "court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice." [Citations.]" (*People v. Ochoa* (2001) 26 Cal.4th 398, 437-438, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn.14.) Application of the ordinary rules of evidence does not impair a defendant's right to present a defense (*People v. Boyette* (2002) 29 Cal.4th 381, 427-428) and we review the erroneous exclusion of evidence to determine whether it was reasonably probable a result more favorable to the defendant would have been reached in the absence of the error (*id.* at p. 429; *People v. Watson, supra*, 46 Cal.2d at p. 836).

Here, Sanchez sought to introduce the toxicology results to show that Torres acted in a crazed manner and appeared maniacal because he was high on methamphetamine and intoxicated on alcohol. The effects of drugs and alcohol have become the subject of common knowledge among laypersons. (*People v. Stitely* (2005) 35 Cal.4th 514, 550 [lay jurors can assess the effect of alcohol on impulse and inhibitions]; *People v. Yeoman*

(2003) 31 Cal.4th 93, 162 [no juror misconduct in discussing personal experiences regarding the effect of drugs].)

Sanchez, however, presented no authority that it is a matter of common knowledge that a person with the amount of methamphetamine *and* alcohol found in Torres's system would act in a crazed or maniacal manner. Rather, such evidence is irrelevant without an offer of proof because the psychological effect of a combination of methamphetamine and alcohol is not a matter of common knowledge that the average juror could be expected to understand without the aid of expert testimony. (Evid. Code, § 801.) Sanchez essentially wanted jurors to speculate regarding the combined effect of methamphetamine and alcohol on Torres; but, speculative inferences are irrelevant. (*People v. Stitely, supra*, 35 Cal.4th at pp. 549-550; see *People v. Kelly* (1992) 1 Cal.4th 495, 523 ["evidence of substance abuse, without more, would be meaningless to a jury's consideration of the victims' conduct. The court properly disallowed the evidence"].)

Sanchez's reliance on *People v. Wright* (1985) 39 Cal.3d 576 (*Wright*) for the proposition that the methamphetamine and alcohol in Torres's system supported his perception that Torres acted irrationally during the confrontation, is misplaced. The *Wright* court found that evidence the victim had used illicit drugs was admissible to support a claim that the defendant acted in self defense in response to the victim's irrational behavior. (*Id.* at pp. 583-584.) It noted, however, that without expert testimony regarding the effects the drugs would have had on the victim, the evidence "would have done little towards corroborating defendant's testimony that the victim was, as a result, irrational and aggressive." (*Id.* at p. 585.) Accordingly, *Wright* is of no assistance to

Sanchez because it did not address whether, absent foundational expert testimony, evidence of a victim's drug use is admissible to show its effect on the victim's behavior. (*People v. Jennings* (2010) 50 Cal.4th 616, 684 [cases are not authority for propositions not considered therein].) Moreover, the critical issue in this case was *how* Torres acted before the shooting, not what might have prompted him to take the actions that he did. Accordingly, on this record, we cannot conclude that the trial court abused its discretion in excluding the toxicology results in the absence of an offer of proof by the defense of expert testimony as to the effects of these levels of alcohol and methamphetamine on the victim.

#### DISPOSITION

The judgment is affirmed.

MCINTYRE, J.

WE CONCUR:

HUFFMAN, Acting P. J.

O'ROURKE, J.