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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE,

Plaintiff and Respondent,

v.

DANIEL MURILLO SALGADO,

Defendant and Appellant.

E053873

(Super.Ct.No. RIF148839)

OPINION

APPEAL from the Superior Court of Riverside County. Jean P. Leonard, Judge.

Affirmed.

R. Clayton Seaman, Jr., under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Lilia E. Garcia, and Lynne G. McGinnis, Deputy Attorneys General, for Plaintiff and Respondent.

A jury found defendant and appellant, Daniel Murillo Salgado (defendant), guilty as charged of one count of first degree murder, one count of discharging a firearm at an occupied motor vehicle, two counts of attempted murder, and one count of discharging a firearm from a motor vehicle. In connection with each count, the jury also found true various sentence enhancements based on defendant's alleged use of a firearm and criminal street gang involvement. In addition, the jury found true the special circumstance allegation in connection with the murder and attempted murder charges that defendant was motivated to commit the crimes because of the victims' race. Based on the jury's guilty verdicts and true findings, the trial court sentenced defendant to serve a total term in state prison of life without the possibility of parole on the first degree murder conviction, and a consecutive term of 117 years to life on the remaining counts, sentence enhancements, and special circumstance findings.

The charges all stem from a shooting that took place in the afternoon on October 5, 2002, in Riverside when a white truck in which defendant was the front passenger chased a red Camaro down city streets. During the pursuit, defendant fired shots at the Camaro. One bullet hit 13-year-old Markess Lancaster in the chest, and he died from that injury.

Defendant raises three claims of error in this appeal. First, he contends the trial court should have instructed the jury that the driver and other passenger in the Camaro were accomplices of defendant because someone in the Camaro reputedly fired a shot at defendant and his four companions in the white truck and thereby committed a

provocative act murder. Because they were accomplices, defendant contends the trial court should also have instructed that the testimony of the two Camaro witnesses had to be corroborated. Next, defendant contends the trial court erred by precluding defendant from mentioning a polygraph examination. According to defendant the polygraph was pertinent to explain why Jesus Gomez, the subject of the polygraph and a passenger in the white truck at the time of the shooting, had changed his story. Finally, defendant contends there was insufficient evidence to support the jury's true findings on the hate crime special circumstance and sentence enhancements, and therefore the trial court erred in denying defendant's motions for acquittal on those allegations.

We disagree with defendant's claims of error, and therefore we will affirm.

FACTS

On October 5, 2002, Tyshawn Guidry, Raymond Atkins, and Markess Lancaster, all of whom are African Americans, drove to a liquor store in Riverside in Guidry's red Camaro. After parking the car, Guidry got out and walked toward the liquor store entrance. On his way, he passed by three Hispanic men standing near a white Chevy extended cab pickup truck. Guidry noticed a fourth man sitting in the back seat of the pickup truck. Guidry made eye contact with one of the men, later identified as the driver of the truck, whom Guidry described as "mad dogging" him. Guidry went inside the store. While in line to pay for his purchase, Guidry noticed the man in front of him was wearing a tank top and had tattoos, one of which was "SUR." When he left the store and walked back toward his car, Guidry noticed the man with the SUR tattoo had joined the

three other men standing near the white pickup truck. All the men were turned facing toward Guidry and staring at him.

Guidry saw the four men get into the pickup truck and join the fifth man, who had remained seated in the back passenger seat. The man with the SUR tattoo, whom Guidry had seen inside the liquor store, was seated in the front passenger seat of the pickup truck. Guidry got into his car and was getting ready to back out of the parking space when he looked in the rearview mirror. The white pickup truck carrying the five Hispanic males had pulled up and stopped behind Guidry's Camaro. After a few seconds, the pickup truck drove off. Jesus Gomez, one of the rear passengers in the pickup truck, claimed the people in Guidry's Camaro flashed gang signs at them as they passed by the Camaro. According to Guidry, no one in either vehicle flashed gang signs.

The pickup truck pulled out of the parking lot and on to the street. Guidry pulled out too and eventually passed the pickup truck. Jesus Gomez claimed that all three people in the Camaro flashed gang signs as they passed the white pickup truck. As he continued down the street, Guidry noticed that he was being followed by the pickup truck.

Guidry sped up, at one point driving 85 miles per hour, and the truck kept up with him. As he turned on to another street, he and the driver of the truck both ran through a red light. The white truck continued to chase Guidry until he slowed down to make a right turn on to another street. As Guidry was making the turn, the pickup truck pulled up on his left. Guidry saw a hand holding a gun come out of the passenger window. The

man holding the gun was the man with the SUR tattoo who had been in line in front of Guidry at the liquor store, later identified as defendant. Jesus Gomez also identified defendant as the person in the white pickup truck who had a gun. Gomez did not actually see defendant pull the trigger, but he did hear gunfire. Guidry said that five or six rounds were fired. As Guidry completed the turn, Lancaster said he had been hit. Guidry drove to a hospital where Lancaster died a short time later.

Additional facts will be recounted below as pertinent to the issues defendant raises in this appeal.

DISCUSSION

1.

SUA SPONTE DUTY TO INSTRUCT THAT OCCUPANTS OF CAMARO WERE ACCOMPLICES OF DEFENDANT

Defendant contends that a witness is an accomplice if that person is subject to prosecution for the same offense as the defendant at the time the acts were committed. Based on that definition, defendant contends the occupants of the Camaro were his accomplices, and therefore their testimony had to be corroborated, because they also could have been prosecuted for murder under the provocative act murder theory. Relying on that reasoning, defendant contends the trial court had a sua sponte duty to instruct that if the jury determined Guidry and Atkins (the two other people in the Camaro at the time of the shooting) were accomplices to the charged crimes, they could not find defendant guilty based solely on their testimony. We disagree.

We begin our discussion with the principle that a trial court must instruct sua sponte only where there is substantial evidence to support such an instruction. In other words, an accomplice instruction must be given sua sponte if there is substantial evidence that a witness is an accomplice. (*People v. Boyer* (2006) 38 Cal.4th 412, 466.)

Although we do not share defendant's view regarding accomplice liability based on provocative act murder, we will not address that aspect of his claim. Assuming defendant's provocative act murder theory is correct, it is not supported by any evidence. Provocative act murder refers to "that category of intervening-act causation cases in which, during commission of a crime, the intermediary (i.e., a police officer or crime victim) is provoked by the defendant's conduct into [a response that results] in someone's death." [Citation.]" (*People v. Concha* (2009) 47 Cal.4th 653, 663.) Typically the response consists of firing a gun at the defendant but killing someone else.

There is no evidence in this case to support liability based on provocative act murder. In order to extend liability for Lancaster's death to Guidry and Atkins, who were Lancaster's companions in the Camaro, there would have to be substantial evidence to show that someone in the Camaro fired or threatened to fire the first shot and thereby provoked defendant to shoot back and kill Lancaster. Although Travis Lawson testified in pertinent part that he saw shots fired by a person leaning out of the passenger window of the Camaro, that testimony does not establish the provocative act because it does not

indicate who fired or threatened to fire the first shot.¹ Moreover, the consensus at trial was that Lawson was mistaken and that the shots were all fired from the vehicle in which defendant was riding. The only other evidence regarding who fired the first shot is the testimony of Jesus Gomez who said no shots were fired from the Camaro. The trial court instructed the jury that if they found Gomez was an accomplice, they could not convict defendant based only on his testimony.

To the extent defendant bases his provocative act murder theory on some act purportedly committed by the people in the Camaro other than firing a weapon, we must reject that claim. Although there is evidence that defendant and his friends believed the occupants of the Camaro had flashed gang signs and thereby instigated the ultimate confrontation, we conclude as a matter of law that such acts are not sufficiently provocative to warrant a deadly response. Provocative act murder requires that the killing be a reasonable response to an act that is likely to cause death. (*People v. Concha, supra*, 47 Cal.4th at p. 662.) Flashing gang signs is not an act likely to cause the death of the person at whom the signs were flashed. Therefore, the shooting cannot be a reasonable response to that act.

Because there is no evidence to support defendant's theory of accomplice liability, we must reject his first claim of error.

¹ The absence of evidence showing that the occupants of the Camaro fired the first shot is what distinguishes the facts in this case from those in *In re Aurelio R.* (1985) 167 Cal.App.3d 52, on which defendant relies. (*Id.* at p. 55.)

2.

EXCLUSION OF POLYGRAPH EVIDENCE

Although raised as separate issues, defendant contends the trial court erred by precluding him from mentioning a polygraph examination in his cross-examination of Jesus Gomez and his direct examination of Investigator Heard. Again, we disagree.

The pertinent facts are that Jesus Gomez initially denied being involved with the shooting. Gomez then changed his story and identified defendant as the shooter. Later during a polygraph examination conducted by Investigator Heard, Gomez again changed his story and admitted he was the shooter after the investigator accused Gomez of not being truthful. Gomez then later recanted that statement and again named defendant as the shooter.

Defendant wanted to bring out the fact that Gomez changed his story in response to Investigator Heard's accusation during the polygraph examination that Gomez was not being truthful. The trial court ruled that defendant could not mention the polygraph examination at trial. Defendant asserts various reasons why the trial court's ruling was incorrect. We disagree with defendant.

Our analysis begins and ends with Evidence Code section 351.1, subdivision (a), which states, "Notwithstanding any other provision of law, the results of a polygraph examination, the opinion of a polygraph examiner, *or any reference to* an offer to take, failure to take, *or taking of a polygraph examination*, shall not be admitted into evidence in any criminal proceeding, including pretrial and post conviction motions and hearings,

or in any trial or hearing of a juvenile for a criminal offense, whether heard in juvenile or adult court, unless all parties stipulate to the admission of such results. [Emphasis added.]”

In short, and simply stated, any reference to taking of a polygraph examination is inadmissible in a criminal case unless the parties stipulate otherwise. The parties did not stipulate that reference to the polygraph examination was admissible in evidence in this case. Defendant’s contrary claims notwithstanding, the trial court properly excluded reference to the polygraph examination during defendant’s cross-examination of Jesus Gomez, and direct examination of Investigator Heard.

3.

DEFENDANT’S MOTION FOR ACQUITTAL

Defendant moved for acquittal on the so-called hate crime special circumstance allegation in count 1 (Pen. Code, § 190.2, subd. (a)(16)) and sentence enhancements alleged in connection with counts 1 through 5 (Pen. Code, § 422.75, subd. (c)) on the ground that the prosecution’s evidence was insufficient to show defendant acted out of racial hatred or animus. Defendant argued in the trial court, as he does in this appeal, that the prosecutor’s evidence was directed at showing racial animus on the part of some members of the Hispanic gang in which defendant was a member, but the evidence failed to show defendant harbored such animus and that he acted with the specific intent to kill based on that racial animus. The trial court denied defendant’s motion for acquittal. We

conclude the trial court correctly denied that motion because substantial evidence supports the special circumstance and enhancement true findings.

“‘The standard applied by a trial court in ruling upon a motion for judgment of acquittal pursuant to [Penal Code] section 1118.1 is the same as the standard applied by an appellate court in reviewing the sufficiency of the evidence to support a conviction, that is, ‘whether from the evidence, including all reasonable inferences to be drawn therefrom, there is any substantial evidence of the existence of each element of the offense charged.’” [Citation.] ‘The purpose of a motion under [Penal Code] section 1118.1 is to weed out as soon as possible those few instances in which the prosecution fails to make even a prima facie case.’ [Citations.] The question ‘is simply whether the prosecution has presented sufficient evidence to present the matter to the jury for its determination.’ [Citation.] The sufficiency of the evidence is tested at the point the motion is made. [Citations.] The question is one of law, subject to independent review. [Citation.]” (*People v. Stevens* (2007) 41 Cal.4th 182, 200.)

In order to find the hate crime special circumstance true, the evidence had to show defendant intentionally killed the victim because of his race. (Pen. Code, § 190.2, subd. (a)(16).) Similarly, a true finding on the sentence enhancement alleged in connection with counts 1 through 5 required the prosecutor to prove that defendant committed the crime in whole or in part because of the victim’s race. (Pen. Code, § 422.75, subd. (c).) The trial court instructed the jury, in pertinent part, that if the evidence showed defendant had more than one reason to commit the murder, one of which included the deceased

person's race, that reason must have been a substantial factor motivating the defendant's conduct. "A *substantial factor* is more than a trivial or remote factor, but it does not need to be the only factor that motivated the defendant." (CALCRIM No. 729.) The trial court instructed the jury that in order to find the racial bias sentence enhancement true, the evidence had to show defendant was biased against the victim and that the bias motivation caused defendant to commit the alleged acts. If the jury found defendant had more than one reason to commit the alleged acts, racial bias must have been a substantial motivating factor in order for the jury to find the allegation true. (CALCRIM No. 1354.)

The evidence in this case is undisputed. According to the prosecution's expert witness on criminal street gangs, defendant was a member of East Side Riva (ESR), a criminal street gang whose members are Hispanic and known to have animosity toward African Americans in general, and 1200 Blocc Crips, in particular. Jesus Gomez testified that someone in the truck recognized Guidry, the driver of the Camaro, as the brother of a 1200 Blocc Crip, and when defendant and the others in the truck drove by, the occupants of the Camaro threw gang signs at them. Although the prosecutor presented evidence regarding ESR and its members, including evidence that ESR members had assaulted and shot African Americans, defendant was not responsible for, or otherwise linked to, any of that evidence. For example, the prosecutor showed photographs of graffiti found in public places, and also on items recovered from searches conducted at the homes of other

gang members, that included defendant's purported gang moniker, Sosyo.² However, there was no evidence to show defendant was responsible for any of that graffiti, or that he participated in any of the crimes committed by other gang members. Therefore, the only evidence the prosecution presented to prove the hate crime special circumstance and the racial bias sentence enhancements was that defendant was a member of a criminal street gang that was known to dislike African Americans, and he fired the shot that killed Markess Lancaster.

That evidence is sufficient. Defendant fired shots at a Camaro in which three African American males were riding. At the time defendant fired those shots, he was a member of ESR, a gang known to dislike African Americans, and he was in the company of four other ESR members. From that evidence, the jury could reasonably infer that racial bias was a substantial factor motivating defendant's action.

In arguing otherwise, defendant cites *Mitchell v. Prunty* (9th Cir. 1997) 107 F.3d 1337, 1342 in which the only evidence that connected the defendant to the charged crime was his membership in a criminal street gang. In that context the Ninth Circuit held, "Membership in a gang cannot serve as proof of intent, or of the facilitation, advice, aid, promotion, encouragement or instigation needed to establish aiding and abetting. To hold otherwise would invite absurd results. Any gang member could be held liable for any other gang member's act at any time so long as the act was predicated on the 'common

² According to the prosecution's expert witness, although the police department had "a bunch" of field interview cards with defendant's name on them, none of those cards included the gang moniker, Sosyo.

purpose of “fighting the enemy.” [Citation.]” (*Ibid.*, fn. omitted, overruled on other grounds by *Santamaria v. Horsley* (9th Cir. 1998) 133 F.3d 1242, as modified by *Santamaria v. Horsley* (9th Cir. 1998) 138 F.3d 1280.)

The fact that distinguishes this case from *Mitchell v. Prunty, supra*, is that defendant fired the shot that killed the victim. Therefore, defendant’s guilt is based on more than mere association with gang members. The evidence that defendant was a member of ESR, and in the company of other ESR members at the time he committed the crime, and that ESR is known to dislike African Americans, and the victim in this case was African American, is sufficient circumstantial evidence that racial animus was a substantial factor motivating defendant to shoot and kill Markess Lancaster. Therefore, we must conclude the trial court correctly denied defendant’s motion for acquittal on the pertinent allegations.

DISPOSITION

The judgment is affirmed.

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MCKINSTER
J.

We concur:

RAMIREZ
P. J.

MILLER
J.