

NOT TO BE PUBLISHED IN OFFICIAL REPORTS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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

MAURO RAMIREZ,

Defendant and Appellant.

G045434

(Super. Ct. No. 06CF3739)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County,
Gregg L. Prickett, Judge. Affirmed as modified and remanded with directions.

J. Courtney Shevelson, 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
Felicity Senoski, Deputy Attorneys General, for Plaintiff and Respondent.

* * *

INTRODUCTION

Defendant Mauro Ramirez challenges his convictions for aiding and abetting murder and attempted murder, contending there was not sufficient evidence he undertook any action to assist in the commission of those crimes. We conclude there was substantial evidence defendant aided and abetted the crimes.

Defendant also argues the trial court erred by imposing a parole revocation restitution fine in connection with a crime for which his determinate sentence was imposed but stayed. We agree that when there is no sentence that includes a period of parole, as here, a parole revocation restitution fine cannot permissibly be imposed. We therefore direct the trial court to strike the parole revocation restitution fine, but affirm the judgment in all other respects.

STATEMENT OF FACTS AND PROCEDURAL HISTORY

About 8:00 p.m. on June 10, 2006, a blue Astro minivan with tinted windows drove past Esteban Cuellar, John Kelsey, and others, who were gathered on a sidewalk in Santa Ana. Five people were inside the van, and the driver “mad dogg[ed]” Cuellar and the others. The minivan disappeared from sight, but then returned, driving toward Cuellar and the others. The minivan slowed down as it passed the group, the sliding rear door opened, and a person seated directly behind the driver fired five shots in the direction of Cuellar and the others; Cuellar died as a result of his injuries and Kelsey was injured.

The shooting occurred in an area claimed as territory by the Bishop Street criminal gang. Cuellar and Kelsey were not members of the Bishop Street gang, but they were members of a tagging crew known as Hood Muertos, which was at that time loosely associated with the Bishop Street gang.

Two weeks later, defendant and Jaime Gonzalez were taken into custody after being chased by police who were responding to a report of a man with a gun.

A police airship monitoring the chase reported that Gonzalez had stuffed something in a garbage can. A gun was recovered from the garbage can; that gun was the same one that fired the bullets killing Cuellar and injuring Kelsey.

While being interrogated by the police, defendant admitted being in the minivan when Cuellar and Kelsey were shot. Defendant also admitted the driver and the front seat passenger were Walnut Street gang members, but claimed that he did not know their names. Defendant told the police he had been “hanging out” and “kick[ing] back” with the Walnut Street gang. He claimed he was smoking crack in the rear seat of the minivan, and that they had been riding around in the minivan for about an hour before the shooting occurred. Defendant stated the other passengers in the minivan had not discussed shooting anyone; it was just something that happened on the spot. Defendant claimed he was not aware there was a gun in the minivan until the moment the shooting happened.

An expert witness for the prosecution opined that defendant was an active participant in the Walnut Street criminal street gang on the date of the shooting, and that the shooting of Cuellar and Kelsey was a crime committed for the benefit of and to promote criminal conduct by the gang. The expert also testified about gang guns, the significance of respect in the gang culture, how respect is earned through violence, and how disrespect requires retaliation.

Defendant, who was 19 years old when the crimes were committed, was charged with one count of murder (Pen. Code, § 187, subd. (a)), one count of attempted murder (*id.*, §§ 187, subd. (a), 664, subd. (a)), and one count of active participation in a criminal street gang (*id.*, § 186.22, subd. (a)). The information alleged two special circumstances in connection with the murder charge: (1) the murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside the motor vehicle, with the intent to inflict death (*id.*, § 190.2, subd. (a)(21)); and (2) the victim was killed while defendant was an active participant in

the Walnut Street criminal street gang and the murder was carried out to further the activities of the gang (*id.*, § 190.2, subd. (a)(22)). As to the murder and attempted murder charges, the information alleged that defendant had committed the crimes for the benefit of a criminal street gang (*id.*, § 186.22, subd. (b)(1)), and that he was vicariously liable for another's act of discharging a firearm, causing death (*id.*, § 12022.53, subds. (c), (d), & (e)(1)).

Defendant was convicted of all three charges, and all of the special circumstances and sentence enhancement allegations were found to be true. Defendant was sentenced to an indeterminate term of life without the possibility of parole for the murder count, and to a consecutive term of 25 years to life for vicariously discharging a firearm, causing death, and for the benefit of a gang. He was also sentenced to a consecutive life term for the attempted murder count, plus a consecutive 20-year enhancement. The trial court also imposed and stayed execution of a three-year sentence on the gang participation count, pursuant to Penal Code section 654. A \$10,000 parole revocation restitution fine was imposed in connection with the gang participation sentence. Defendant timely appealed.

DISCUSSION

I.

SUFFICIENCY OF THE EVIDENCE

Defendant argues there is not sufficient evidence that he said or did anything to aid and abet the shooting, requiring reversal of the judgment. “In determining evidentiary sufficiency, the court reviews the entire record, in the light most favorable to the judgment, for the presence of substantial evidence. Substantial evidence is evidence sufficiently reasonable, credible, and of such solid value ‘that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.’ [Citation.]” (*People v. Chatman* (2006) 38 Cal.4th 344, 389.)

Defendant was tried as an aider and abettor; there was no evidence he was the shooter. “[P]roof of aider and abettor liability requires proof in three distinct areas: (a) the direct perpetrator’s actus reus—a crime committed by the direct perpetrator, (b) the aider and abettor’s mens rea—knowledge of the direct perpetrator’s unlawful intent and an intent to assist in achieving those unlawful ends, and (c) the aider and abettor’s actus reus—conduct by the aider and abettor that in fact assists the achievement of the crime.” (*People v. Perez* (2005) 35 Cal.4th 1219, 1225.) Defendant challenges his convictions based on the alleged lack of evidence of the third element of aider and abettor liability—conduct by defendant that in fact assisted the actual shooter. (Defendant’s conviction for being an active gang participant was based entirely on his aiding and abetting the gang shooting. Therefore, his conviction on that charge stands or falls on the strength of the convictions for murder and attempted murder.)

The following evidence was sufficient to support defendant’s conviction for murder and attempted murder: Defendant admitted he was associated with the Walnut Street gang, and the prosecution’s expert witness opined that defendant was a member of the Walnut Street criminal street gang. Defendant got into a minivan with known Walnut Street gang members, and rode with them into territory claimed by the Bishop Street gang. According to the prosecution’s gang expert, at the time, tensions between the Walnut Street and Bishop Street gangs were at “an extreme level.” The minivan drove slowly past a group of people, and the driver mad dogged them. The minivan returned a few minutes later, and someone in the minivan (not defendant) fired at the group on the street, striking two of them. Two weeks later, defendant was arrested with another person who was in possession of the same gun used in the shooting.

The prosecution’s expert witness provided the following testimony regarding gang culture: An individual who claims membership in a gang, who is not actually a member of the gang, would “usually be met by some sort of violence by the true or validated members.” An affiliate or member of a gang demonstrates loyalty to the

gang by serving as a “backup” during the commission of crimes by, among other things, serving as a lookout or a getaway driver, procuring weapons, or simply being physically present when another gang member is committing a crime. Gang members do not commit crimes with people who are not part of the gang or trusted by the gang. Respect is “the be-all and end-all” in gang culture, and respect is earned by committing violent acts. Disrespect brings shame to the whole gang, as well as the individual. An act of disrespect will require a response at an equal or greater level. Gang guns are owned or possessed by the gang as a whole, and used to commit criminal acts and to defend against rivals. If a gang member possessed a gun in a vehicle, everyone else in the vehicle would know about it. If a gang member goes to commit a crime with several other people, each would have a specific role in committing the crime.

Defendant is correct in arguing that his mere presence at the scene and his failure to take any action to prevent the crime are not sufficient to constitute aiding and abetting. (*People v. Richardson* (2008) 43 Cal.4th 959, 1024.) Defendant is incorrect, however, when he asserts that there was no evidence of aiding and abetting other than his presence in the minivan. To the contrary, as discussed *ante*, there was ample evidence of defendant’s association with the Walnut Street gang, the workings and culture of gangs, and the application of this evidence to the circumstances of the shooting in this case; this evidence was sufficient to support the jury’s determination that defendant aided and abetted the shooter in a gang-related shooting.

II.

PAROLE REVOCATION RESTITUTION FINE

At sentencing, the trial court imposed a \$10,000 parole revocation restitution fine under Penal Code section 1202.45, and suspended the fine pending revocation of parole. Defendant argues the sentencing minutes and the abstract of

judgment must be corrected to remove the references to the parole revocation restitution fine.

It is error for the trial court to impose and suspend a parole revocation restitution fine when a defendant is sentenced only to life in prison without the possibility of parole. (*People v. Oganesyany* (1999) 70 Cal.App.4th 1178, 1183.) When a determinate sentence is imposed in addition to a sentence of death or life without the possibility of parole, imposition of a parole revocation restitution fine is required, despite the fact there is little if any chance parole will ever be granted. (*People v. Brasure* (2008) 42 Cal.4th 1037, 1075.)

In *People v. Ybarra* (2008) 166 Cal.App.4th 1069, 1074-1075, in addition to indeterminate terms of life without the possibility of parole and life with the possibility of parole, each of the two defendants was sentenced to a determinate term of three years on a count of active participation in a criminal street gang. Execution of those determinate sentences was stayed pursuant to Penal Code section 654, and the trial court imposed a parole revocation restitution fine in connection with the determinate sentences. (*People v. Ybarra, supra*, at p. 1075.) The Court of Appeal remanded to the trial court to strike the parole revocation restitution fines from the defendants' judgments because "neither [defendant] has a sentence that includes a period of parole." (*Id.* at p. 1097.)

As in *People v. Ybarra*, defendant is not subject to a sentence that includes a period of parole. The parole revocation restitution fine was imposed in connection with the three-year sentence on the active gang participation count, but execution of sentence on that count was stayed pursuant to Penal Code section 654. Therefore, the trial court erred in imposing a parole revocation restitution fine.

DISPOSITION

We direct the trial court to amend the sentencing minutes and the abstract of judgment to strike the parole revocation restitution fine, and to forward a certified

copy of the amended abstract of judgment to the Department of Corrections and Rehabilitation. In all other respects, the judgment is affirmed.

FYBEL, J.

WE CONCUR:

O'LEARY, P. J.

RYLAARSDAM, J.