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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE,

Plaintiff and Respondent,

v.

TRAVIS JOHN MILLER,

Defendant and Appellant.

G045837

(Super. Ct. No. 10NF2101)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, M. Marc Kelly, Judge. Affirmed.

David L. Annicchiarico, 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, Scott C. Taylor and Nguyen Tran, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant Travis John Miller was found guilty of assault with a firearm in violation of Penal Code section 245, subdivision (a)(2) as charged in count one of the information. (All further statutory references are to the Penal Code.) But the jury returned a not true finding that defendant personally used a firearm when he committed count one. He was also found guilty of shooting at inhabited dwelling house as charged in count two, and not guilty of attempted murder as charged in count three.

The court sentenced defendant to three years in state prison. He was awarded 440 days of actual custody credits and 220 days for conduct credits.

In his appeal, defendant contends there was insufficient evidence to prove he “did anything to aid and abet the person who fired a shot at the house.” Basically his argument is, since the jury found it not to be true he personally used a firearm, it necessarily decided he was not the perpetrator, and that the guilty verdict means the jury found him guilty on an aiding and abetting theory. He also states he is entitled to additional presentence custody credits pursuant to equal protection principles.

We find sufficient evidence supports the jury’s guilty verdict on counts one and two. We do not reach the decision whether or not there was sufficient evidence to support defendant’s conviction as an aider and abetter since there is sufficient evidence to support his conviction as the perpetrator. We further find he is not entitled to additional presentence custody credits. We affirm.

I

FACTS

Michael Guevara lived on Perdido Street in Anaheim on July 11, 2010. He had a male roommate named Chris Wolf. Guevara and Wolf argued over money. Afterward, Wolf left on a skateboard. Ten minutes later, a car drove by the house. Defendant was sitting in the front passenger seat holding a gun. Also in the car were two other people, “a White guy and, um, Chris.” The White guy was driving, and defendant shot at Guevara after they pulled the car into the driveway of the house.

The 15-year-old brother of Guevara, lived at the same house as Guevara. At the time of the shooting, he was by his computer. He ran outside and saw a PT Cruiser with a White guy driving.

The 14-year-old sister of Guevara, described what happened: “Well, I was sitting down in my mom’s bedroom, and I heard my brother outside. He was like arguing on the phone. So I ignored that. So I turned on the TV. And all of a sudden, I heard like a loud bang. And I just got up in my mom’s bedroom, and I saw Michael on the floor, and I got scared. And when I heard the loud bang, I — oh, My God, I just ran out. And I told Michael, ‘What happened?’”

Deputy Sheriff Doug Claypool was on duty on July 11, 2010, working patrol for the City of Anaheim. At about 7:30 in the evening he was advised of a drive-by shooting. He went to the location and spoke with Guevara who blurted out something to the effect that Travis and Wolf shot at me. Guevara said a silver PT Cruiser drove up the driveway, and “there was a White driver; that Travis was in the front seat; and then Wolf was in the backseat.” Guevara also told the officer “[h]e saw the person in the front, I guess he’s identified as Travis, reach across the driver with a shotgun and fire one shot.” Claypool inspected the area of the shooting. He “saw numerous little holes [which] appeared to come from birdshot around the windowsill area.”

Aaron Brady, another deputy sheriff received a call at 7:50 p.m. advising him there had been a shooting and the suspects were in a gray PT Cruiser with a White male driver and a Black male passenger. Brady observed a gray PT Cruiser with a White male driver and a Black male passenger, who he identified in court as defendant. There was also a male sitting in the backseat.

Claypool took Guevara to a field identification. At first, Guevara did not identify defendant, but Claypool said he moved his vehicle because there was some shadowing and it was too far back. Guevara then said that Travis was the shooter.

Orange County Sheriff Investigator Truong Nguyen met with Guevara the evening of the shooting. Guevara told Nguyen that defendant was the person who shot the gun. Guevara also told the investigator the other two occupants of the car were Forest Hartman and Christopher Wolf, and that Hartman was the driver.

Orange County Sheriff Investigator Chris Wax interviewed defendant on July 11, 2010. Defendant said his girlfriend dropped him off at Hartman's house and that he was pulled over driving away from Hartman's house. He said he had a dispute with Guevara over money, but that he never got over to Guevara's house because the police stopped him before he could get there. Defendant denied being the shooter in the instant shooting.

II

DISCUSSION

Counts One and Two

Defendant contends the evidence was insufficient to prove he did anything to aid and abet the person who fired a shot at the house. He adds the evidence established only that he was a passenger in the car from which the shot was fired and his mere presence was insufficient to prove he aided and abetted the shooter. The Attorney General counters, there was sufficient evidence to support defendant's convictions for assault with a firearm and shooting at an inhabited dwelling, and the not true finding on the personal use of a firearm enhancement does not indicate he was convicted under an aiding and abetting theory.

In addressing challenges to the sufficiency of evidence, "the reviewing court must examine the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—evidence that is reasonable, credible and of solid value—such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] The appellate court presumes in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence.

[Citations.] The same standard applies when the conviction rests primarily on circumstantial evidence. [Citation.] Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.] "If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also reasonably be reconciled with a contrary finding does not warrant a reversal of the judgment. [Citation.]" [Citation.] (*People v. Kraft* (2000) 23 Cal.4th 978, 1053-1054.)

"An Acquittal of one or more counts shall not be deemed an acquittal of any other count." (§ 954.) It is well settled that, as a general rule, inherently inconsistent verdicts are allowed to stand. (*People v. Palmer* (2001) 24 Cal.4th 856, 860-861.) "An inconsistency may show no more than jury lenity, compromise, or mistake, none of which undermines the validity of a verdict. [Citations.]" (*People v. Lewis* (2001) 25 Cal.4th 610, 656.) The United States Supreme Court has explained: "[A] criminal defendant . . . is afforded protection against jury irrationality or error by the independent review of the sufficiency of the evidence undertaken by the trial and appellate courts. This review should not be confused with the problems caused by inconsistent verdicts. Sufficiency-of-the evidence review involves assessment by the courts of whether the evidence adduced at trial could support any rational determination of guilty beyond a reasonable doubt. [Citations.] This review should be independent of the jury's determination that evidence on another count was insufficient." (*United States v. Powell* (1984) 469 U.S. 57, 67.)

"Defendant contends the evidence was insufficient to support the convictions of attempted murder, robbery, assault with a firearm and felon in possession of a firearm. The linchpin of each argument is that, because the jury found 'not true' all of the personal gun-use enhancement allegations, it necessarily found defendant guilty of

the attempted murder, robbery and assault with a firearm charges only as an aider and abettor, and must have found that defendant only constructively possessed the firearm for the felon in possession charge. Stated in the converse, the jury must have found defendant was not the direct perpetrator of any of the crimes. He then argues the evidence was insufficient that he acted as an aider and abettor or that he constructively possessed the firearm.” (*People v. Miranda* (2011) 192 Cal.App.4th 398, 405.) The *Miranda* court was not persuaded, finding that, under the inconsistent verdict doctrine, the “not true” finding on the personal use enhancements does not inexorably lead to a finding that defendant was not the direct perpetrator of the substantive offenses. (*Ibid.*)

We do not know why the jury found defendant did not personally use a firearm in committing counts one and two, but we conclude there is sufficient evidence to support the jury’s guilty verdicts on both counts. Because there is sufficient evidence to support defendant’s guilt as the perpetrator, we need not decide whether there is also sufficient evidence to find he could have been guilty as an aider and abetter as well.

Presentence Custody Credits

Defendant also contends he is entitled to additional presentence custody credits pursuant to settled equal protection principles, and that the October 1, 2011 amendment to § 4019 must be retroactively applied to him. The Attorney General states that equal protection does not compel retroactive application of the October 1, 2011 amendment to § 4019.

“The concept of equal protection recognizes that persons who are similarly situated with respect to a law’s legitimate purposes must be treated equally. [Citation.] Accordingly, “[t]he first prerequisite to a meritorious claim under the equal protection clause is a showing that the state has adopted a classification that affects two or more *similarly situated* groups in an unequal manner.” [Citation.] ‘This initial inquiry is not whether persons are similarly situated for all purposes, but “whether they are similarly

situated for purposes of the law challenged.” [Citation.]” (*People v. Brown* (2012) 54 Cal.4th 314, 328.) “[T]he important correctional purposes of a statute authorizing incentives for good behavior [citation] are not served by rewarding prisoners who served time before the incentives took effect and thus could not have modified their behavior in response.” (*Id.* at pp. 328-329.)

Because defendant committed his offenses on July 11, 2010, the Attorney General argues he is not similarly situated to persons who committed their offenses on or after October 1, 2011. The amended statute states in relevant part: “The changes to this section enacted by the act that added this subdivision shall apply prospectively and shall apply to prisoners who are confined to a county jail, city jail, industrial farm, or road camp for a crime committed on or after October 1, 2011. Any days earned by a prisoner prior to October 1, 2011, shall be calculated at the rate required by prior law.” (§ 4019, subd. (h); Stats 2011, ch. 15 § 482, operative October 1, 2011.)

“Defendant has not cited a single case, in this state or any other, that recognizes an equal protection violation arising from the timing of the effective date of a statute lessening the punishment for a particular offense. Numerous courts, however, have rejected such a claim—including this court.” (*People v. Floyd* (2003) 31 Cal.4th 179, 188.)

People v. Brown, supra, 54 Cal.4th 314, considered an iteration of § 4019 that was in effect for eight months during 2010. (*Id.* at pp. 317-318.) In that case, the California Supreme Court held “that equal protection does not require former section 4019 to be applied retroactively.” (*Id.* at p. 330.)

Except for the specific statutory direction not to apply the October 1, 2011 amendment to crimes committed prior to that date, the circumstances here are essentially that same as they were in *Brown*. That is, the defendant had been sentenced prior to the passage of an amendment to § 4019. (*People v. Brown, supra*, 54 Cal.4th at p. 318.) We find no equal protection violation here.

III
DISPOSITION

The judgment is affirmed.

MOORE, J.

WE CONCUR:

O'LEARY, P. J.

THOMPSON, J.