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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.

GUILLERMO BRAMBILA,

Defendant and Appellant.

G047994

(Super. Ct. No. 10CF3025)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, William R. Froeberg, Judge. Affirmed.

Arthur Martin, 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, Steve Oetting and Andrew Mestman, Deputy Attorneys General, for Plaintiff and Respondent.

Guillermo Brambila appeals from his conviction for murder with the special circumstance the murder was committed for a criminal street gang. He contends there is insufficient evidence to prove he is guilty of murder on either an aider and abettor theory or conspiracy theory. We reject his contentions and affirm his conviction.

FACTS

Prosecution Case

Brambila was a member of the Delhi criminal street gang. On November 27, 2007, Brambila witnessed his friend and fellow Delhi gang member Jonathan Dizon (aka “Risky”) get shot to death near an apartment complex in Delhi territory in Santa Ana. Brambila believed the shooters were members of the rival gang, Alley Boys. Brambila later told police he saw the car in which the shooters were driving through the neighborhood make a U-turn after it drove past Brambila and Dizon. Brambila warned Dizon to “watch out.” Dizon approached the men in the car and “hit up” the men by asking where they were from before they shot Dizon. Brambila told police he thought Dizon might have fired a shot before he was killed. After Dizon was shot, Brambila took a nine-millimeter semiautomatic gun from Dizon’s hand and either threw it away or hid it because he did not want Dizon to get in trouble if he survived the shooting. A nine-millimeter shell casing was found at the scene, along with two .40 caliber casings matching the fatal shots to Dizon’s head and chest.

The day after Dizon’s killing, on the afternoon of November 28, 2007, Jose Jesus Ocampo Quintero was driving in Santa Ana and saw a dark-colored pickup truck stopped in the middle of the street, blocking the road. The truck was stopped next to a blue four-door Nissan that was parked along the curb with its hood up and a door open. Quintero saw someone get out of the front passenger seat of the truck, look at the car, and turn back to the truck where he reached for something handed to him from inside the truck—either from the driver or a passenger. As Quintero glanced in his rear-view mirror he heard what sounded like firecrackers. He looked forward and saw broken glass

and smoke. The person from the truck, who was standing about 10 feet from the parked car, fired a shot at Quintero's vehicle and Quintero felt the impact on the front of the vehicle. The truck drove off, turning two streets away.

Police arrived and found Ruben Cabanas in the blue Nissan dead from a gunshot that grazed his arm and entered his chest causing fatal injuries to his lungs, heart, and liver. The fatal bullet recovered from Cabanas's body was fired by a .38 or .357 magnum revolver. The police found no weapons in or around Cabanas's car. There were numerous bullet holes in the car's windshield and doors. Several bullet cores and casings were recovered from the scene including several nine-millimeter casings, which a firearms examiner opined were fired from the same gun as the nine-millimeter casings found near where Dizon was shot the day before.

Brambila's former girlfriend testified that after Dizon's shooting, Brambila called her and said Risky had been shot by Alley Boys. Brambila was "worked up" and emotional. He told her that when he saw the car drive by, he told Risky to shoot, but Risky got shot first. Brambila said he took the gun Risky had been holding.

When the former girlfriend heard about Cabanas's shooting, which took place the next day, she asked Brambila if he had been involved. At first he said he was not, but when she told Brambila she did not believe him, he told her not to worry and two of his friends "took care of it." He told her they shot Cabanas because he was "one of them," which she understood meant he was one of the guys who shot Risky.

Delhi gang member Juan Calderon, testifying under an agreement with the prosecution, testified about the Cabanas shooting. The day after Dizon was shot, Calderon went to the swap meet in Anaheim with fellow Delhi gang members Augustin Abonce, Eddie Garcia, Henry Cabrera, and Brambila to order t-shirts to memorialize Dizon. Calderon testified Abonce and Cabrera were considered the older, more respected members of Delhi, and he, Garcia, and Brambila were "the main youngsters." They were in Abonce's pickup truck. Calderon testified the men were not

grieving Dizon's death as much as they were "plotting revenge." He testified they were all "talking about who did it. Did anybody know who did it? Since we didn't know, the best option coming from [Abonce] was [to] go to every enemy's neighborhood and let 'em know if they did it, this is our revenge for him."

Calderon testified they left the swap meet to go home—Cabrera drove and Abonce was in the front passenger seat. Brambila was sitting in the middle of the back seat between Calderon (on the driver's side) and Garcia (on the passenger side). Calderon fell asleep, but as he woke up they were driving in a neighborhood where both Delhi and Alley Boys members lived. Cabrera stopped the truck next to where a man was working under the hood of his parked car. Abonce leaned out the passenger side window, pointed a nine-millimeter handgun at the man's head, and said, "'Where the fuck you from?'" The man ran to the open driver's side door of the car and jumped inside. Garcia pulled out a .38 revolver and started shooting, and then Abonce started shooting too. Calderon testified that as the shooting was going on, he was "acting as backup." He said it was "[j]ust instinct. Just you see something about to happen, you just play your role in whatever position you're in." Calderon testified Brambila was "looking" on as well as the shooting occurred. After the shooting, Cabrera drove to his house, which was a few blocks away.

Trung Ly was a member of the Asian Boys criminal street gang, a gang that was friendly with the Delhi gang. Ly was friends with Brambila and Dizon, and he lived in the apartment building near where Dizon was killed. Ly testified he was receiving leniency on other charges he was facing in exchange for his testimony. Ly testified he saw Brambila at a street memorial for Dizon the night after Dizon was killed. Brambila had a nine-millimeter gun, a gun which Ly had seen in Brambila's possession multiple times in the week and a half before Dizon was shot. Brambila told Ly the nine-millimeter gun was "loaded and ready to go if someone gang related pulled up" at the memorial. Brambila told Ly that before Dizon was shot, he loaded the

nine-millimeter gun's clip with 15 rounds, and handed the gun to Dizon telling him to "[l]ight 'em up." Dizon only got one shot off before he was killed. Ly asked Brambila about the Cabanas shooting, but Brambila would not tell him who was involved. Brambila later told Ly that he sold the nine-millimeter gun "because it was hot."

Following Cabanas's shooting, police searched Brambila's residence and found five rounds of .38 caliber ammunition and a memorial t-shirt with a picture of Dizon and the words "Gone But Not Forgotten, Johnny Dizon, 7-22-1987 to 11-27-2007" Brambila had a tattoo reading, "'Rest in peace, Risky.'"

The parties stipulated the Delhi gang qualified as a criminal street gang. The prosecution's gang expert, Santa Ana Police Officer David Rondou, testified Delhi was one of the oldest and most violent gangs in Santa Ana. Alley Boys was Delhi's main rival and there had been "dozens and dozens of murders on both sides going back and forth for the last 25 years." Brambila was a self-admitted Delhi gang member.

Rondou testified about gang retaliation. He explained that "if a gang is shot at, beat up, whatever it is, to save face, to show strength, to show we're not weak, you're going to see some sort of payback or retaliation to the gang that did it. It may not necessarily [be] and very rare[ly] is it the same guy. [¶] . . . You're shooting at the gang. So typically you're going to see at least some sort of retaliation that's at the level of whatever you did to us, at least that, if not more." Cabanas was associated with Los Primos, a gang from a different area. Investigators found Cabanas had no connection with Dizon's shooting.

Rondou testified about the gang subculture in which "respect equates to fear" and respect is often gained "through violent crime. The more violent the member is, the more violent the gang is, the more respect they earn within their own gang and in the subculture as a whole." Rondou testified "guns are how [gangs] get things done." They need guns to commit crimes and defend their territory, and when gang members go to do something they know who among them has guns.

Rondou testified about the role of fellow gang members as “backup” when a crime is committed. They are expected to be on the lookout and prepared to step in to help or fill other roles if the need arises—“He’s there to help facilitate whatever we’re trying to get done” and “backup” is “an active role that could change at any moment.” Rondou testified gang members are expected to act as backups during the commission of a crime. It was a “Three Musketeers kind of thing, all for one and one for all,” and if you “rank out” and fail to act for the gang, “it’s going to be a problem for you.”

Based upon a hypothetical mirroring the facts of the current offense, Rondou opined the crime benefited the Delhi gang. Everybody in the vehicle would have a role—whether it was as a backup, a shooter, or the driver. The people in the back seat would play an active role as back-ups to look out for people with guns, the police, and if a shooter “goes down,” would be expected to grab the gun and finish the shooting.

Defense Case

Brambila called alibi witnesses who testified Brambila was at the street-side memorial for Dizon for most of the day on November 28, 2007. The witnesses included Dizon’s sister. They also included Brambila’s current girlfriend and two people with whom she lived.

Charges & Verdict

Brambila was charged with murder with a special circumstances allegation that Brambila was a criminal street gang member and the murder was committed to further the gang’s activities (Pen. Code, §§ 187, subd. (a); 190.2, subd, (a)(22))¹ (count 1); and street terrorism (§ 186.22, subd. (a)) (count 2). As to count 1, the information also contained gang benefit and vicarious discharge of a firearm causing death allegations (§§ 186.22, subd. (b)(1), 12022.53, subds. (d) & (e)(1)).

¹ All further statutory references are to the Penal Code.

In closing, the prosecution argued the jury could find Brambila guilty of first degree murder as an aider and abettor or as part of an uncharged conspiracy. The trial court instructed on both theories. A jury found Brambila guilty of both counts and found the special circumstance and enhancement allegations to be true. The court sentenced Brambila to life in prison without the possibility of parole on count 1, plus a consecutive term of 25 years to life for the firearm enhancement. The trial court stayed the sentence on count 2 pursuant to section 654.

DISCUSSION

Brambila contends the evidence was insufficient to convict him of Cabanas's murder on either an aider or abettor theory or an uncharged conspiracy theory. We reject his contentions.

“In reviewing a criminal conviction challenged as lacking evidentiary support, “the court must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence—that is, evidence which 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 same standard of review applies to cases in which the prosecution relies mainly on circumstantial evidence [citation], and to special circumstance allegations [citation]. An appellate court must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]” (*People v. Maury* (2003) 30 Cal.4th 342, 396.)

Criminal liability may be imposed upon all persons concerned in the commission of a crime, including direct perpetrators, aider and abettors, and conspirators. (§ 31.) Brambila was prosecuted on aiding and abetting and uncharged conspiracy theories. Substantial evidence supports his conviction based on both.²

² Where two separate theories of liability apply to the same acts, the jury need not decide unanimously under which theory the defendant is guilty so long as each juror is convinced beyond a reasonable doubt the defendant is guilty of the charged

Aiding and Abetting

A person aids and abets the crimes of another, and is liable as a principal, when that person (1) acts with knowledge of the unlawful purpose of the perpetrator, (2) with the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates the commission of the crime. (*People v. McCoy* (2001) 25 Cal.4th 1111, 1118, 1120; *People v. Beeman* (1984) 35 Cal.3d 547, 561; *People v. Miranda* (2011) 192 Cal.App.4th 398, 407.) Likewise, any person who is “present for the purpose of diverting suspicion, or to serve as a lookout, or to give warning of anyone seeking to interfere, or to take charge of an automobile and to keep the engine running, or to drive the “getaway” car and to give direct aid to others in making their escape from the scene of the crime, is a principal in the crime committed. [Citation.]’ [Citations.]” (*People v. Swanson-Birabent* (2003) 114 Cal.App.4th 733, 743-744.)

“Mere presence at the scene of a crime is not sufficient to constitute aiding and abetting, nor is the failure to take action to prevent a crime, although these are factors the jury may consider in assessing a defendant’s criminal responsibility. [Citation.] Likewise, knowledge of another’s criminal purpose is not sufficient for aiding and abetting; the defendant must also share that purpose or intend to commit, encourage, or facilitate the commission of the crime.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.) Companionship and conduct before and after the offense are relevant considerations in the liability analysis. (*People v. Haynes* (1998) 61 Cal.App.4th 1282, 1294.)

Substantial evidence supports Brambila’s murder conviction on an aider and abettor theory. Brambila ineffectively attempts to minimize the evidence against him. He asserts the only real evidence was he just happened to be in the truck when

crime. (*People v. Majors* (1998) 18 Cal.4th 385, 408.)

Abonce and Garcia opened fire on Cabanas, and one of the guns used just happened to be one Brambila had personally possessed before and after the shooting. Brambila argues those facts were not sufficient to demonstrate he had knowledge the shooting was going to take place or intended to encourage or facilitate it. Moreover, he argues the prosecution's expert testimony regarding gang culture for retaliation or payback, the role of violence and guns, and the role of fellow gang members as "backup" during the commission of a crime, could not fill the gap. He argues the expert testimony about "cultural norms" of gangs could not be used to speculate that on any given occasion a gang member acted in accordance with those norms.

We cannot isolate the links of circumstantial evidence in the way Brambila would like because we "must review the *whole record* in the light most favorable to the judgment below to determine whether it discloses substantial evidence" of guilt. (*People v. Brown* (1995) 35 Cal.App.4th 1585, 1598, italics added, citation omitted.) In this case, the evidence and reasonable inferences that can be drawn from the evidence support the conclusion Brambila aided and abetted Cabanas's murder.

The evidence demonstrated that on numerous occasions in the weeks before Cabanas's murder, Delhi gang member Brambila was seen with the nine-millimeter handgun that was used in the Cabanas' shooting. The day before Cabanas's killing, Brambila was present when his companion and fellow Delhi gang member Dizon was shot and killed by rival gang members. There was evidence that during the Dizon shooting, Brambila had first loaded a clip into the nine-millimeter handgun and gave it to Dizon telling him to shoot. After Dizon was shot, Brambila retrieved the handgun and took it away from the scene. The next day, after Cabanas's shooting, Brambila was in possession of the same gun. Sometime later, Brambila told Ly he had sold the gun because it was "hot." A jury could reasonably infer that because Brambila possessed the same gun before and after both shootings, it belonged to him.

There was evidence Brambila believed Alley Boys gang members killed Dizon. He called his former girlfriend after Dizon's killing and was worked up and emotional. The next day, Brambila and four other Delhi gang members went to the swap meet. There was evidence all five men were discussing revenge for Dizon's killing. Calderon testified they *all* talked about not knowing who committed the shooting and the best option they came up with, at Abonce's suggestion, "was go to every enemy's neighborhood and let 'em know if they did it, this is our revenge for him."

The men drove past Cabanas, who was working on his car on the street in a neighborhood where Alley Boys members were known to live. Calderon testified Abonce pointed the nine-millimeter gun out of the truck's window and demanded of Cabanas, "Where the fuck you from?" When Cabanas ran to the door of his car, Garcia pulled out a .38 revolver and both men started shooting. Quintero testified the man in the front passenger seat of the truck (i.e., Abonce) got out of the truck, then reached back inside and took something from the driver or a passenger, and then the shooting started. There was evidence that while they were shooting, Brambila and Calderon were looking around and Calderon testified they were acting as backups. Calderon's testimony was supported by the prosecution's expert who testified, based on a hypothetical mirroring the facts of this case, that gang members in the back seat would be playing an active role as backups to look out for people with guns and the police, and if for some reason the shooter "goes down," they would be expected to grab the gun and finish the shooting. After the shooting, although Brambila at first denied being involved, but then admitted to his former girlfriend two of his friends "took care of it" and had shot Cabanas because he was one of the men who shot Dizon. Brambila later disposed of the nine-millimeter gun because it was "hot."

A reasonable inference can be drawn from the evidence that after Dizon's killing, the five men wanted revenge. They drove to a neighborhood where Alley Boys were known to live. Brambila provided his gun to Abonce, who along with Garcia

opened fire on Cabanas killing him. A jury could reasonably infer Brambila knew of his fellow gang members' unlawful purpose to shoot perceived rival gang members in retaliation for Dizon's killing and Brambila intended to and did aid and abet that crime by providing a weapon, and acting as a backup during the crime, and later disposing of the weapon.

Uncharged Conspiracy Theory

Brambila's conviction for first degree murder is also supported on the uncharged conspiracy theory. "Conspiracy is a concept closely allied with aiding and abetting. A conspiracy generally requires agreement plus an overt act causing damage. [Citation.] Aiding and abetting requires not agreement, but simply assistance." (*Janken v. GM Hughes Electronics* (1996) 46 Cal.App.4th 55, 78.) A criminal conspiracy exists where two or more persons agree to commit a crime, intend to commit the crime, and one of the persons performs an overt act in furtherance of the agreement. (*People v. Liu* (1996) 46 Cal.App.4th 1119, 1128.) The existence of an agreement may be proven through circumstantial evidence, and a conspiracy may be formed even if the conspirators do not fully comprehend its scope. (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1134.)

The same evidence that supports Brambila's conviction of first degree murder on an aiding and abetting theory supports his conviction on a conspiracy theory. (See *People v. Lopez* (2013) 56 Cal.4th 1028, 1071.) The jury was instructed with CALCRIM No. 416 the prosecution must prove Brambila agreed with his companions to commit murder and committed at least one overt act towards that purpose including that they drove together in the vehicle to the area where the murder was committed; two loaded guns were carried in the vehicle by one or more of the occupants; the vehicle stopped in the roadway where the murder was committed; and/or the guns were fired at Cabanas, killing him. The evidence showed Brambila and his cohorts believed their fellow Delhi gang member Dizon was killed by Alley Boys gang members. They plotted how to avenge his death and decided to go into rival gang territory and "let 'em know if

they did this, this is our revenge for [Dizon].” They drove to a neighborhood where Alley Boys members lived and had at least two loaded firearms in the car. They stopped the car where Cabanas was working on his car and opened fire on him. Substantial evidence supports Brambila’s conviction on a conspiracy theory.

DISPOSITION

The judgment is affirmed.

O’LEARY, P. J.

WE CONCUR:

ARONSON, J.

THOMPSON, J.