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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.

LAURO GERARDO HERRERA,

Defendant and Appellant.

G048676

(Super. Ct. No. 10WF0796)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Steven D. Bromberg, Judge. Affirmed.

John Fu for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Charles C. Ragland, Robin Urbanski, and Alastair J. Agcaoili, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Lauro Gerardo Herrera of attempted premeditated murder, conspiracy to commit murder, and street terrorism, and found true allegations Herrera personally used a knife to commit attempted murder and conspiracy to commit murder, and that he committed both crimes at the direction of, for the benefit of, or in association with a criminal street gang. The trial court sentenced Herrera to an indeterminate term of 25 years to life for the conspiracy, stayed sentence on counts 1 and 3, and struck enhancements for sentencing purposes.

Herrera challenges the sufficiency of the evidence to prove he conspired with Rogelio Ortega to murder Mauricio Lima, or that he had the requisite specific intent to commit attempted murder or conspiracy. He also claims the relatively minor injuries sustained by Lima are legally insufficient to support the attempted murder conviction. We reject these contentions and affirm the judgment.

FACTS

During the evening of April 14, 2010, Lima was riding his bicycle near an area within his mobile home park designated for washing cars. He met a friend who was washing his car, Louie Ceron, and was riding his bicycle toward home when he saw a green-colored car with tinted windows drive into the mobile home park.

Lima stopped his bike but continued to watch the car as it stopped and two or three young men got out. One of these men asked Lima if he was from “Palma Vista.” Lima said that he was, which immediately provoked a fist fight between Lima and one of the young men. Lima fell to the ground during the fight, and other young men started to punch and kick him. Lima eventually extricated himself from the fight, but he then realized he was bleeding from several wounds. His stepfather drove him to a nearby fire station, and he was later transported to a hospital.

A police officer interviewed Lima at the hospital the same day. Lima had sustained a total of eight shallow stab wounds to his back, shoulders, and arms.

Emergency room doctors stitched his wounds, and he spent the night in the hospital. Lima said he was frightened by the amount of blood loss his injuries caused.

Lima told the officer that he had been jumped into the Palma Vista (P.V.) criminal street gang when he was 14 years old. He had a gang tattoo, P.V. 714, and the gang moniker of “Darky.” According to Lima, P.V. had about 50 members at the time of the crime, and their rivals were the Playboys, Orphans, Crow Village, Jeffrey Street, and Street Family criminal street gangs. Lima said that the rivalry between the P.V. and Playboys gang members started when some girls began to date members of both gangs. Lima gave general descriptions of his attackers and their clothing, but he could not identify them.

Rogelio Ortega, a charged codefendant in this case, testified at trial in exchange for a favorable plea agreement. According to Ortega, he and Herrera were members of the Playboys gang at the time of the attack. He said the Playboys gang claimed a certain area of Garden Grove as their turf. Ortega’s gang name was “Clown.” He knew Herrera as “Yayo” or “Panda.” Ortega testified P.V. and Playboys were rival gangs at the time. In fact, Ortega testified that if Playboys members saw members of a rival gang, they “would have to jump them or we would get jumped,” and claimed Playboys was a violent gang.

Ortega explained that he, his girlfriend, and his dog rode with Herrera in Herrera’s car to the mobile home park, which was part of P.V.’s claimed territory, on the day in question. They had planned to go to a nearby convenience market to get something to eat, but then decided to go to the mobile home park first. Herrera told Ortega that “Palma Vista kicked it there.” Ortega knew “something was going to happen,” and he felt an adrenaline rush as they entered the mobile home park.

Herrera saw Lima and Ceron and told Ortega, who had poor eyesight, that he recognized two P.V. gang members. Herrera retrieved two knives from the car’s glove compartment, one folding knife with a three-inch blade and one steak knife, while

they circled the car wash station. Then Herrera, armed with the folding knife, stopped his car and got out. Ortega became ensnared in his seatbelt, but he soon joined Herrera, steak knife in hand.

Ortega watched as Herrera slashed the tires on Ceron's car before turning his attention to Lima. At first, Lima froze in place. When Lima tried to run, Herrera tripped him and Lima fell to the ground. Herrera punched and stabbed Lima, and Ortega joined him, kicking Lima "probably like three or four times" while Lima was on the ground. Lima got up and ran toward Ortega. Ortega then punched Lima and cut or stabbed Lima's upper back and shoulders.

Apparently, Ceron fled before either Herrera or Ortega could assault him. Eventually, Lima too escaped, and Herrera and Ortega left the mobile home park. Herrera "was asking [Ortega] where . . . should we go, and he said [they] had to get out of the area, like, quick." They were stopped by a police officer almost immediately due to a traffic infraction. The officer became suspicious when he saw Lima's blood on Ortega's hands and in the car, and Herrera and Lima were quickly tied to the stabbing at the mobile home park. After the car was impounded, officers discovered two knives stuffed under the back seat.

Ortega testified he assumed that when Herrera gave him a knife that he and Herrera would stab, and possibly kill, Lima and Ceron, but he denied that he and Herrera had a plan to kill someone. As Ortega put it, he was willing to "back up" Herrera in "whatever [Herrera] needed or wanted to do." He also stated he knew it was going to be something big because "[he and Herrera] had knives, and those were our enemies." And, he testified, "when you're in a gang, or in our gang, if you don't – if somebody does something, and you're there, and you don't jump in or do what you're supposed to do, then you get – we call it taxed. So that means that you get beat up by as many members as there is that day"

The prosecution's gang expert, Garden Grove Police Officer Charles Loeffler, testified criminal street gang members commit crimes to garner respect from their fellow gang members, and he explained criminal street gangs use respect as a status mobility system predicated on their commission of violent crimes. The more violent the crime, the more respect acquired. Gang members also commit crimes to gain respect with their gang's enemies. Respect also facilitates the gang's criminal activities. Crimes committed by gang members benefit the gang in at least two ways, economic gain and fear. Fear keeps members of the gang and people living within the gang's claimed territory from cooperating with police.

If members of one gang do something to disrespect another gang, an act of violence or retaliation is highly likely. In Loeffler's experience, the retaliation is greater than the insult, something like if you "bring a knife, I'll bring a gun" Crimes committed in a rival gang's territory benefit the gang as a whole and the individual. The individual gang member gains respect from fellow gang members and rival gang members.

Loeffler explained that Hispanic criminal street gangs, like Playboys and P.V., tend to claim a specific geographical area as their territory. He also explained the term "backup," and testified that "if you're in a gang you provide backup to . . . a fellow gang member when he's going to get in an altercation." According to Loeffler, if a gang member does not backup his compatriot, he is accused of "ranking out" and will be "taxed," which means he or she is subjected to a beating by fellow gang members.

Hispanic street gangs typically have connections with other gangs in the form of cooperative allies or combative rivals. A rat or a snitch is someone who cooperates with law enforcement, and they are subject to severe sanctions, up to and including murder. A "hit-up" occurs when one gang member asks someone, "Where are you from?" Violent confrontations often happen as a result of hit ups between rival gang members.

Loeffler opined that P.V. and Playboys were criminal street gangs in April 2010. P.V. claims the area where the stabbing occurred. The Playboys gang claims another area close to the mobile home park. The primary activities of Playboys is unlawful possession of firearms and attempted murder. Loeffler also testified about two 2009 attempted murders committed by two different Playboys members, and one 2009 vehicle theft committed by a third. One of the attempted murder victims was a P.V. gang member. Before the stabbing occurred, there had been numerous tit-for-tat acts of retaliation between P.V. and Playboys.

Loeffler also testified that Herrera was an active Playboys member with the monikers Yayo and Panda. In Loeffler's opinion the stabbing was committed for the benefit, in association with, and to promote the Playboys gang. He based his opinion on "the fact that these two individuals went into a rival neighborhood, which is risky . . . to gain respect. And the fact that they did it with two people, they did it so one other gang member is going to witness this actual crime, which is going to bolster both of these members' status within the gang because somebody else could tell the story that it actually occurred rather than just one person." He also testified that a Playboys gang member looking for P.V. members would probably go to the mobile home park where the crime occurred because there are several P.V. gang members living there.

DISCUSSION

Sufficiency of the Evidence

Herrera challenges the sufficiency of the evidence to prove conspiracy to commit murder and attempted murder. Viewing the facts in a light most favorable to the verdict (*People v. Johnson* (1980) 26 Cal.3d 557, 576), we conclude a rational trier of fact could have found beyond a reasonable doubt the essential elements of those crimes.

Criminal liability may be imposed upon all persons concerned in the commission of a crime, including direct perpetrators, aider and abettors, and conspirators. (Pen. Code, § 31.) The prosecution pursued aiding and abetting and conspiracy theories.

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 crime. (*People v. Majors* (1998) 18 Cal.4th 385, 408.) Herrera does not challenge the sufficiency of the evidence to prove aider and abettor liability.

As noted, the prosecution alternatively argued that Herrera could be convicted of attempted premeditated murder under a conspiracy theory. “One who conspires with others to commit a felony is guilty as a principal. ([Pen. Code,] § 31.) “Each member of the conspiracy is liable for the acts of any of the others in carrying out the *common* purpose, i.e., all acts within the reasonable and probable consequences of the common unlawful design.” [Citations.]” (*In re Hardy* (2007) 41 Cal.4th 977, 1025-1026.)

A conviction for attempted murder “requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing. [Citations.]” (*People v. Lee* (2003) 31 Cal.4th 613, 623.) “Intent to unlawfully kill and express malice are, in essence, ‘one and the same.’ [Citation.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739.) Express malice is “‘a deliberate intention unlawfully to take away the life of a fellow creature.’ [Citation.]” (*People v. Lasko* (2000) 23 Cal.4th 101, 107.)

Relying on a paucity of direct evidence, Herrera argues the evidence adduced at trial does not prove he and Ortega “had either an agreement or an understanding to murder Mauricio Lima.” In essence, he relies on the absence of evidence he and Ortega entered into an express verbal agreement to commit murder before they entered the mobile home park. In fact, he claims the evidence supports at most a finding he sought to merely vandalize Ceron’s car while Ortega harbored the intent to hurt Lima. However, more than a reinterpretation of the facts is required to obtain a reversal of a judgment on appeal.

Ortega, an admitted member of Playboys, testified P.V. was a rival gang at the time. Ortega said he, his girlfriend, and his dog rode with Herrera, another admitted member of Playboys to the mobile home park, which they knew was part of P.V.'s claimed territory. In fact, Herrera told Ortega that "Palma Vista kicked it there," which signaled to Ortega that "something was going to happen."

Herrera saw Lima and Ceron and told Ortega he recognized them as P.V. gang members. Circling Ceron, who was washing his car, and Lima, who was sitting on his bicycle, Herrera retrieved two knives from the car's glove compartment. Thus, it was clear, a mere verbal altercation was out of the question. When Herrera, armed with the folding knife, stopped his car and got out, Ortega knew the game was on and something big was going to happen. As Ortega put it, he was willing to "backup" Herrera in "whatever [Herrera] needed or wanted to do." The reason being, as Ortega testified and Loffler confirmed, there are penalties in gang culture for not assisting a fellow gang member commit crimes.

True, Herrera slashed the tires on Ceron's car before turning his attention to Lima. But Herrera's attempt to use this fact as a mitigating circumstance is unavailing. A reasonable juror could have concluded the act of disabling a vehicle that one or both of the P.V. members could have used to escape indicates planning, not lesser culpability. Moreover, when Lima tried to run, Herrera tripped him, thus tipping the odds of a successful attack in his favor. After all, Ortega said Herrera punched and stabbed Lima while Lima was on the ground and helpless. And, together, Ortega and Herrera managed to inflict eight separate wounds in several locations on Lima's upper back, shoulders, and arms.

Furthermore, Ortega testified he assumed when Herrera gave him a knife that he and Herrera would stab, and possibly kill, Lima and Ceron. While not conclusive proof of Herrera's intent, a reasonable inference is that like-minded gang members probably share the same background, knowledge, and thus intent for a crime they intend

to commit together. As Ortega testified, if Playboys members saw members of a rival gang, they “would have to jump them or we would get jumped.”

Furthermore, Loeffler testified extensively regarding common Hispanic gang behavior and practices, and the history of violence between Playboys and P.V. With this background, Herrera and Ortega’s initial decision to drive to the mobile home park with weapons takes on sinister implications. According to Loeffler, specifically traveling to a rival gang’s territory and committing a crime against a rival gang member is a common way to disrespect an enemy. Loeffler testified at length about the importance of respect in the culture of Hispanic criminal street gangs, including his opinion that acts of disrespect often lead to violence up to and including murder.

The bottom line is this: Herrera offers alternative and innocuous explanations of the evidence. However, deciding the credibility of witnesses and what actually happened is the jury’s job. Reversals are not obtained because the circumstances might also reasonably be reconciled with a contrary verdict. We cannot isolate the links of circumstantial evidence in the way Herrera 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.) Here, substantial evidence supports the verdict.

Although Herrera does not specifically challenge the sufficiency of the evidence to support the aiding and abetting theory, to the extent his argument may encompass such a claim, we reject it. 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.) “[K]nowledge of another’s criminal purpose is not sufficient for

aiding and abetting; the defendant must also share that purpose or intent to commit, encourage, or facilitate the commission of the crime.” (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530.) However, 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.)

The multiple stab wounds Lima suffered were not, as Herrera asserts, the “spontaneous” result of a fight. Ceron and Lima were minding their own business. They were not in a rival gang’s territory. No evidence suggests they had weapons of any kind. In fact, no evidence suggests they took any notice of Herrera and Ortega until it was too late to defend themselves. Based on this evidence, the jury reasonably concluded Herrera and Ortega either entered the mobile home park with the intent to kill, or formed the intent to kill when they saw Lima and Ceron in a relatively vulnerable state. And, with the specific intent to do so, they committed direct but ineffectual acts toward accomplishing the intended killing.

Herrera also challenges the evidence does not prove he had the specific intent to enter into a conspiracy to commit murder and attempted murder. Both crimes require specific intent. “‘Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.’ [Citations.]” (*People v. Smith* (2005) 37 Cal.4th 733, 739.) A conviction for conspiracy to commit murder “requires proof of: (1) an agreement; (2) the specific intent to conspire; (3) the specific intent to commit the offense; and (4) an overt act towards achievement of that goal. [Citation.]” (*People v. Herrera* (1999) 70 Cal.App.4th 1456, 1464, overruled on other grounds in *People v. Mesa* (2012) 54 Cal.4th 191, 198.) However, “[t]hese elements are sufficiently met by circumstantial evidence, particularly when those circumstances are the defendant’s carrying out the agreed-upon crime. [Citation.]” (*Herrera*, at p. 1464)

Without belaboring what has been stated above, circumstantial evidence demonstrates Herrera went with a fellow gang member into a rival gang's territory specifically to look for rival gang members with the intent to add another act of violence, in this case repeatedly stabbing an unarmed and helpless rival, to a long line of violent acts between rival gangs. Once in their rival's territory, Herrera and Ortega acted in concert to carry out their planned attack on Lima. Herrera disabled a potential getaway car before disabling Lima, and then repeatedly kicked, punched, and stabbed him. One wonders what Herrera would find sufficient, short of evidence of an express oral agreement to kill. In any event, substantial evidence supports the jury's verdict.

Herrera also claims the prosecution failed to prove Lima's injuries were significant or near fatal, and that a conviction of attempted murder may not rest upon evidence of minor injuries. Relying on *People v. Grubb* (1914) 24 Cal.App. 604, he argues the prosecution failed to prove the wounds he inflicted would likely have resulted in Lima's death. Thus, he characterizes the eight stab wounds Lima suffered as "minor cuts," too minor to support the jury's verdict. We reject this assertion for three reasons.

First, to characterize the incident as one producing only minor injuries is misleading. Lima was stabbed eight times. He bled from the wounds and they undoubtedly caused severe pain. Moreover, the pain of mending his wounds was not minor, and the fact he was kept overnight at the hospital is an indication the treating doctors were not initially sure he was free of an injury to a vital organ, vein, or artery. In short, Herrera does not get a pass just because Lima lucked out.

Second, the argument some type of severe injury is required to uphold an attempted murder conviction has been rejected by the California Supreme Court. (*People v. Avila* (2009) 46 Cal.4th 680.) *Avila* held "the degree of the resulting injury is not dispositive of defendant's intent. Indeed, a defendant may properly be convicted of attempted murder when no injury results. [Citation.]" (*Id.* at p. 702.) Herrera cites no case holding otherwise.

Third, the severity of Lima’s wounds is irrelevant to intent. “The fact that [defendant] missed [the victim’s] heart and lungs was fortuitous rather than indicative of the absence of an intent to kill.” (*People v. Gonzalez* (2005) 126 Cal.App.4th 1539, 1552; *People v. Lashley* (1991) 1 Cal.App.4th 938, 945 [fact shooter fired only once and then abandoned efforts out of necessity or fear, and victim’s escape from death due to “poor marksmanship,” did not establish lack of intent to kill].) To the contrary, the jury reasonably could infer Lima avoided further injury solely because he assumed a position to protect his vital organs from immediate injury. (*Gonzalez*, at p. 1552.)

Finally, in connection with Herrera’s discussion of properly identified issues in his reply brief, he also makes an oblique reference to the Eighth Amendment to the United States Constitution and cruel and unusual punishment. To the extent Herrera thereby seeks to challenge the severity of his punishment, he waived the issue by first raising it in his reply brief (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453), and by failing to set forth the issue under a separate heading supported by argument and citation to authority (Cal. Rules of Court, rule 8.204(1)(B)).

DISPOSITION

The judgment is affirmed.

THOMPSON, J.

WE CONCUR:

ARONSON, ACTING P. J.

IKOLA, J.