

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**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 This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.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

GABRIEL CASTILLO,

Defendant and Appellant.

G049406

(Super. Ct. No. 08CF0198)

O P I N I O N

Appeal from a judgment of the Superior Court of Orange County, Sheila F. Hanson, Judge. Affirmed.

Dennis P. O'Connell for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Eric A. Swenson and Ryan H. Peeck, Deputy Attorneys General, for Plaintiff and Respondent.

Gabriel Castillo appeals from the judgment following his conviction for first degree murder and street terrorism. As to the murder count, the jury found true a special circumstances allegation that Castillo was an active participant in a criminal street gang at the time of the murder and he committed the murder to further the gang's activities (Pen. Code, § 190.2, subd. (a)(22)),<sup>1</sup> and it found true other gang and weapons enhancement allegations. Castillo was sentenced to life in prison without the possibility of parole. On appeal, Castillo contends the trial court should have instructed the jury that one of the two eyewitnesses who testified was an accomplice as a matter of law, rather than giving the general instruction that required the jurors to determine whether the witness was an accomplice. Castillo also contends he was not properly advised of his right to testify in his own defense at trial. We reject Castillo's contentions and affirm the judgment.

#### FACTS

The victim, Jesus Segura, was a member of the Locotes street gang. Locotes was a rival of the Delhi street gang. On October 11, 2007, a few minutes after 7:00 p.m., police found Segura shot to death on the sidewalk of South Evergreen Street, in a Santa Ana neighborhood in which both gangs operated. When officers arrived on the scene, food trucks were open and operating on the street. A crowd was gathered around the body but no witnesses would come forward. Soon, a distraught woman ran up to officers and screamed that Segura was the father of her children, and "Delhi killed him. They're going to pay for this." Segura died from multiple gunshot wounds to his chest and abdomen.

Castillo, a Delhi gang member, was arrested in January 2008 for Segura's murder. His trial took place in October 2012.

---

<sup>1</sup> All further statutory references are to the Penal Code.

## *Prosecution Case*

### *Testimony of Juan Calderon*

Juan Calderon testified for the prosecution. In January 2008, Calderon was arrested and taken into custody for the unrelated killing of Juan Orejel. His testimony in this case was secured as a result of a plea agreement in that case.

In October 2007, Calderon was 15 years old. He was a member of the Delhi street gang whose enemies included Locotes. He testified Castillo was also a Delhi member who used the alias “G-Boy,” and they saw each other almost every day. He testified Delhi gang members always had access to firearms—they were distributed throughout the neighborhood and frequently shared with each other.

Calderon testified about gang “hit up[s],” which occur when a gang member approaches someone who appears to be from another gang, or who looks at the gang member in way the gang member does not like, and the gang member either asks, ““Where [are] you from?”” or brandishes a firearm. As a Delhi gang member, Calderon frequently participated in “hit up[s],” and assaults. He testified the Delhi gang members’ objective “most of the time[,] . . . is to kill.”

Calderon testified about prior violent altercations between Delhi and Locotes gang members. Segura was a Locotes gang member. A few months before Segura’s killing, a Delhi gang member called “Balloon” was shot by a Locotes gang member called “Clever,” and Balloon was left paralyzed and in a wheelchair. A few weeks before Segura’s killing, Segura and Clever jumped out of a car and shot at Calderon and his companion, “Sleepy.” The shots missed. On another occasion, Segura “got close to shooting” Calderon and Balloon, who was in his wheelchair. Calderon testified Locotes wanted payback, mostly against Clever for having shot Balloon, but also against Segura for shooting at Calderon and Balloon. Calderon explained ““payback”” meant that “any chance we got at them it was we got to take care of what we had to take care of[,]” meaning “shoot to kill Locotes.”

On the day Segura was killed, Calderon and Castillo were selling drugs in front of an apartment building in Delhi territory. A boy approached them warning them a Locotes' gang member was near. Calderon saw that it was Segura. Everyone, including Castillo, knew what had happened to Balloon. Calderon testified he asked Castillo for his gun—a 9-millimeter Glock—that was sitting on top of a box under the staircase a few feet away from them. Calderon told Castillo “[he]wanted to handle it because these people are – we never get a chance to get at these people.” Castillo said, “No, I’m going to handle it.” Castillo took the gun and rode off on his bicycle towards Segura.

Calderon did not feel he needed to go with Castillo because he trusted Castillo to “handle it.” Calderon “knew something obviously was going to happen if the chance was there” so he walked towards where Castillo was going to observe. From about 40 feet away, Calderon saw Castillo “already hitting [Segura] up.” He saw Castillo talk to Segura, and when Segura started walking away, Calderon thought “why is he not shooting this guy if he knows that’s the guy.” But then Castillo turned Segura around, pointed the gun into Segura’s stomach, and fired two or three shots. Segura fell to the ground and Castillo stood over Segura and fired several more shots into him—Calderon thought “maybe about seven” rounds were fired.

Later that evening, Calderon saw Castillo at a fellow gang member’s house. Castillo had showered and shaved his head. He told Calderon everything that had happened, saying “I hit that fool up[,]” and he “let the clip on [Segura],” i.e., fired his gun until he ran out of ammunition, after Segura denied being a gang member.

#### *Testimony of Jesus Pulido*

Jesus Pulido was a drug dealer who lived in the neighborhood where Segura was shot. He was not a gang member. He explained that an alley divided the Delhi and Locates sides of the neighborhood. Pulido considered both Segura and Castillo to be his friends. Pulido knew Segura was a member of Locates, and was “pretty sure” Castillo was a Delhi member.

Pulido testified that on the night Segura was killed, Pulido was at one of the food trucks parked on the street. Segura called down to Pulido from an apartment and they talked for a couple minutes. Segura then came walking downstairs from the apartment, near the Delhi side of the neighborhood, walking towards the Locotes side. Pulido saw Castillo and other men riding bicycles in the street, and then saw Castillo jump off of his bicycle. Segura walked towards Pulido—Pulido was looking at him, and Castillo was behind Pulido. As Segura walked past Pulido, he smiled, placed a finger to his mouth and made a “shush” gesture. Pulido turned back around to the food truck. He then he heard someone “hit up” Segura, heard Segura say, ““Oh, shit,”” and then heard shots. He then saw Segura move a short distance and fall to the ground.

At trial, Pulido denied actually seeing who shot Segura, and denied telling police that he saw Castillo shoot Segura. He testified he had only “heard” or had a “feeling” Castillo was the shooter. Pulido testified he remembered the shooter wore a hooded gray sweatshirt and rode a BMX-style bicycle, but he denied telling officers the shooter rode a BMX-style bicycle. He denied telling officers he saw Castillo pull a gun from his waist area. He agreed he had told police he saw Castillo on a bike and at some point Castillo jumped off the bike. He testified Castillo was the only person behind him at the food truck when the hit up happened. Pulido testified he used heroin regularly up to 15 times a day and that on the day Segura was shot, he was under the influence of heroin or cocaine.

*Testimony of Officer David Rondou*

Santa Ana Police Officer David Rondou testified he had interviewed Pulido in January 2008, when Pulido was in custody on a drug offense. Pulido told Rondou he wanted to talk about Segura’s murder and said he “saw everything.” Pulido did not appear to be under the influence of narcotics at the time.

Pulido told Rondou he saw only one person riding a small BMX-style bicycle in the street, Castillo. Pulido said Castillo was wearing a gray hooded sweatshirt

and shorts. Pulido told Rondou that he saw Castillo hit up Segura about his gang affiliation. Pulido said he saw Castillo pull a gun from his front waistband or pocket, and he started shooting Segura. Pulido said he saw Castillo get back on his bicycle and flee the scene. Pulido said Castillo started shooting Segura after he saw Segura reaching for his own waistband.

#### *Other Prosecution Evidence*

Rondou and other officers testified about the search of Castillo's residence in January 2008 in which they found items indicative of Delhi gang membership, including writings and a spiral bound notebook filled with Delhi graffiti, and a black BMX-style bicycle. At the time, Castillo was on a plane headed for Texas, and he was picked up at an airport during a layover.

Forensic analysis of bullet casings found at the shooting scene and an autopsy bullet revealed all the shots were fired by the same firearm. The shots were 9-millimeter rounds with unique rifling marks that could only have been made by four firearm brands, including a Glock. No one came forward to offer up an alibi for Castillo until two to three weeks prior to trial.

#### *Defense Case*

Damien Galarza testified for the defense. He hung out with Delhi gang members but did not consider himself to be a Delhi member. He was Calderon's codefendant in the Orejel murder prosecution and had already been convicted and sentenced to life without the possibility of parole in that case. Galarza testified Calderon was the shooter in the January 2008 Orejel murder, but Calderon told police that Galarza was the shooter. Galarza testified Calderon also told him he had shot and killed someone in Buena Park—a shooting related to the earlier shooting death of a Delhi gang member called "Risky." Galarza had known Segura since grade school and considered him a friend, even though they were affiliated with different gangs. He was also friends with Castillo. Galarza testified Calderon told him he shot Segura.

Vicki Ramirez, who was the mother of Castillo's child, testified that on the day of the shooting, Castillo was with her. Ramirez, who was 15 years old at the time of the shooting, explained she and Castillo were together on the day of the incident starting around 3:00 p.m. Around 6:00 p.m., they left with her entire family to go to a family reunion. They returned to the neighborhood around 8:00 p.m., after the shooting and police were on the scene. She never spoke to police about Castillo being with her—she only discussed it with defense counsel.

Edith Medrano, a friend of Ramirez's and Castillo's, was 14 years old at the time of the shooting. Medrano testified she was with Ramirez and Castillo at the Ramirez family reunion on October 11, 2007. She knew the date because Ramirez told her that was the date.

#### *Charges, Verdict, and Sentence*

An information charged Castillo with murder (§ 187, subd. (a)) (count one), and street terrorism (§ 186.22, subd. (a)) (count two). The information alleged the following enhancements to count 1 (murder) including: (1) Castillo committed the murder for the benefit of, at the direction of, and in association with a criminal street gang, with the specific intent to promote, further, and assist in the criminal conduct of the gang (§ 186.22, subd. (b)(1)); (2) Castillo committed the murder while an active participant in a criminal street gang and the murder was done to further the activities of the gang (§ 190.2, subd. (a)(22)); and (3) Castillo personally discharged a firearm causing death (§§ 12022.53, subd. (d), 1192.7 & 667.5). A jury convicted Castillo of all charges and found all the enhancements to be true. Castillo filed a new trial motion, which the trial court denied. The prosecutor dismissed count 2 (street terrorism). The trial court sentenced Castillo on count 1 (murder) to life in prison without the possibility of parole, plus consecutive terms of 25 years to life in prison on the personal discharge of a firearm enhancement and 10 years on the gang benefit enhancement.

## DISCUSSION

### *1. Accomplice Instruction*

Castillo contends the trial court erred by failing to sua sponte instruct the jury that Calderon was an accomplice as a matter of law. We find no error.

A criminal conviction cannot stand if it rests solely on the testimony of an “accomplice.” (§ 1111.) If substantial evidence indicates a witness is an accomplice, the trial court must instruct the jury to determine whether the witness is an accomplice and, if so, not to return a guilty verdict unless that accomplice’s testimony is corroborated. (*People v. Tobias* (2001) 25 Cal.4th 327, 331.)

Here, in a chambers conference, the trial court advised counsel it intended to instruct the jury in accordance with the general accomplice instruction, CALCRIM No. 334. Defense counsel stated he had no objections to any of the instructions the trial court intended to give and requested no additional instructions.

Castillo now contends the trial court should have instead instructed the jury in accordance with CALCRIM No. 335. The two instructions deal with the issue of accomplice testimony and the need for corroboration. One is given when the witness is an accomplice as a matter of law. (CALCRIM No. 335.) The other is given when there is a dispute as to whether the witness was an accomplice. (CALCRIM No. 334.) Both inform the jury it cannot convict the defendant based upon the testimony of an accomplice absent other evidence independent of the witness’s testimony that tends to connect defendant to the crime. Both also instruct that the corroborating evidence may be slight and an accomplice’s testimony should be viewed with caution. (CALCRIM Nos. 334 & 335.) The difference is that CALCRIM No. 335 instructs the jury the witness *is* an accomplice, while CALCRIM No. 334 defines an accomplice and places on the defendant the burden of proving the witness was an accomplice. The Attorney General does not defend giving CALCRIM No. 334 instead of

CALCRIM No. 335, but rather argues any error was harmless because Calderon's testimony was corroborated.

Preliminarily, we do not believe the trial court erred in giving the general accomplice instruction. Whether a person is an accomplice is generally a question of fact for the jury. A trial court may take the issue away from the jury and instruct the jury that a witness is an accomplice as a matter of law only if the ““clear and undisputed facts”” and the inferences that may be drawn therefrom compel that conclusion. (*People v. Williams* (2008) 43 Cal.4th 584, 636; *People v. Avila* (2006) 38 Cal.4th 491, 565; *People v. Stankewitz* (1990) 51 Cal.3d 72, 90.)

“For purposes of [section 1111], an ‘accomplice’ is ‘one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.’ [Citation.] ‘This definition encompasses all principals to the crime [citation], including aiders and abettors and coconspirators. [Citation.]’ [Citation.] [L]iability as an aider and abettor requires proof that the person in question ‘aid[ed] or promote[d] the perpetrator’s crime with knowledge of the perpetrator’s unlawful purpose and an intent to assist in the commission of the target crime.’ [Citation.]” (*People v. Manibusan* (2013) 58 Cal.4th 40, 93 (*Manibusan*)). An aider and abettor must (1) do something to aid, promote, or encourage the charged crime, (2) while knowing of the perpetrator’s unlawful purpose, and (3) while intending to encourage the crime. (*People v. Beeman* (1984) 35 Cal.3d 547, 561.)

We agree the evidence could support finding Calderon was an accomplice. Calderon testified he and the Delhi gang wanted payback for the Locotes shooting of Balloon (and for shooting at Calderon, Sleepy, and Balloon on other occasions); payback meant shoot to kill; when he and Castillo heard Segura was nearby, Calderon asked Castillo for his gun saying he wanted to “take care of it,” but Castillo said he would “take care of it” and rode away; Calderon knew something was about to happen so he followed to watch, and he could not understand at first why Castillo was not shooting Segura when

Segura started walking away. But although the evidence is strong, we cannot say it compelled a finding Calderon was an accomplice *as a matter of law*. It is not enough that Calderon was present when Segura was shot. (See *People v. Nguyen* (1993) 21 Cal.App.4th 518, 529-530 [“[m]ere presence at the scene of a crime is not sufficient to constitute aiding and abetting”]; *People v. Johnson* (1973) 33 Cal.App.3d 9, 22 [overhearing others plotting a crime does not render one an accomplice as a matter of law].) Nor is it enough that Calderon knew a crime was about to occur and shared Castillo’s criminal intent. An aider and abettor must “actually know[] and share[] the full extent of the perpetrator’s specific criminal intent, *and* actively promote[], encourage[], or assist[] the perpetrator with the intent and purpose of advancing the perpetrator’s successful commission of the target offense. [Citation.]” (*People v. Snyder* (2003) 112 Cal.App.4th 1200, 1220, second italics added, fn. omitted.) Whether Calderon’s actions constituted active promotion, encouragement, or assistance to Castillo was a question of fact for the jury, and thus the trial court did not err by instructing with CALCRIM No. 334.

In any event, even were we to agree with Castillo that Calderon was an accomplice as a matter of law, the Attorney General is correct that any error is harmless “where, in fact, the witness’s testimony was sufficiently corroborated.” (*People v. Boyer* (2006) 38 Cal.4th 412, 467 (*Boyer*), superseded on other grounds by § 29.4; see *Manibusan, supra*, 58 Cal.4th at p. 95.) ““Such [corroborative] evidence ‘may be slight and entitled to little consideration when standing alone. [Citations.]’” [Citation.] “Corroborating evidence ‘must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that [such] evidence be sufficient in itself to establish every element of the offense charged.’ [Citation.]” [Citation.]’ [Citation.]” (*Boyer, supra*, 38 Cal.4th at p. 467.)

Calderon’s testimony was sufficiently corroborated. Calderon’s testimony that Castillo was a Delhi gang member and Segura was a Locotes gang member was

corroborated by Pulido who knew Segura to be a Locotes gang member and believed Castillo to be a Delhi gang member. The gang membership was also corroborated by police officers who testified to finding items connecting Castillo to Delhi in his residence. Calderon testified Castillo was at the scene of the shooting and he was the shooter. That testimony was corroborated by Pulido's trial testimony and his statements to police. Rondou testified Pulido told him that he saw Castillo riding a BMX-style bike, pull a gun from his waistband area and shoot Segura, and get back on his bike and flee. Pulido testified he saw Segura walking from the Delhi side of the neighborhood towards the Locotes side; and after Segura passed him, he heard someone "hit up" Segura and then heard shots. And although Pulido denied telling police officers he saw Castillo shoot Segura—he only heard the shooting which took place behind him—he confirmed Castillo's presence at the scene. He testified he saw Castillo riding a BMX-style bike, and he then jumped off the bike, and Castillo was the only person behind him at the food truck when the "hit up" happened. Castillo argues Pulido's testimony "was questionable" because of his chronic drug use. But corroborating evidence "'may be slight and entitled to little consideration when standing alone.'" (*People v. Tewksbury* (1976) 15 Cal.3d 953, 968-969.) Pulido's testimony and statements to police were sufficient to connect Castillo with the commission of the shooting and thus any error in the accomplice instruction was harmless.

## 2. *Denial of Right to Testify*

Castillo contends he was denied the opportunity to testify in his own defense because his trial counsel failed to inform him that he had the right to testify even though counsel advised against doing so. We reject his contentions.

### a. *Background*

We begin with the proceedings below. At the conclusion of the defense case, the trial court questioned Castillo about his understanding of his right to testify and his decision to not do so in this case. The court began by advising Castillo that he had

two “absolute right[s]”—to testify in his own defense and to remain silent—and he was “the only person who could choose which of those rights . . . to elect.” The court asked Castillo if he understood those rights; Castillo replied he did. The court asked Castillo if he had discussed with his attorney whether or not he should testify in his own defense; Castillo said he had. The court asked Castillo if he had decided if he wanted to testify; Castillo said he had made a decision and the decision was, “No.”

After his conviction, Castillo filed a motion for new trial brought in part on the grounds he was denied the right to testify in his own defense. The trial court held an evidentiary hearing on the motion, at which Castillo and his former trial counsel, Glenn Osajima, testified. Castillo testified that during trial he told his attorney he wanted to testify, but the attorney said “it wasn’t a good idea.” Castillo felt his attorney was “ordering [him] not to testify. . . . [¶] . . . [¶] [H]e pretty much said that I can’t take the stand.” Castillo said his attorney told him the trial judge would question him about his right to testify, and ask if he wanted to testify, and he should “just say no.” Castillo did not feel he had any choice in the matter. On cross-examination, Castillo agreed he followed his attorney’s advice to not testify because he trusted him, and it was not until after trial and his conviction that he decided he should have testified.

Osajima testified he had practiced criminal law for 41 years, and had tried 25 to 30 murder cases. From the beginning of the case, Osajima had several conversations with Castillo about his right to testify; Castillo consistently said he did not want to testify; and as a result, Osajima extensively voir dired the jury to ferret out jurors who might be prejudiced against Castillo if he did not take the stand. Osajima testified it was his practice to always discuss with criminal defendants that they have an absolute right to testify. He explained to Castillo the trial judge would question him and take a waiver of his right to testify. Osajima explained why in his professional judgment it would have been a bad idea for Castillo to take the stand. Nonetheless, Osajima had explained to Castillo that he could disregard counsel’s advice and take the stand anyway.

The trial court denied Castillo's new trial motion. It found Osajima's testimony credible and found that although it was Osajima's professional opinion Castillo should not take the stand, Osajima had explained to Castillo that he had a right to testify regardless of counsel's advice. Additionally, the court referenced its own inquiry of Castillo at trial. The court had explained to Castillo his absolute rights to testify and to remain silent and he was the only person who could choose which right to invoke. Castillo told the court he understood his rights and had decided to not testify. Accordingly, the court stated it did "not believe [Castillo] was deprived of his right to testify in his own defense."

*b. Analysis*

Castillo argues he was not adequately informed of his right to testify at trial. He does not discuss the issue in the context of denial of his new trial motion. On appeal, we construe the argument to be that the trial court erred by denying Castillo's motion for new trial because he was not adequately advised of his right to testify. We reject the argument.

The determination of a motion for new trial rests within the trial court's discretion and its ruling will not be disturbed on appeal absent a manifest and unmistakable abuse of discretion. (*People v. Delgado* (1993) 5 Cal.4th 312, 328.) The trial court did not abuse its discretion by denying Castillo's new trial motion.

A defendant has a constitutional right to testify on his own behalf. (*Rock v. Arkansas* (1987) 483 U.S. 44, 51-52), and the ultimate decision whether to testify belongs to the defendant, not counsel (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332). At the hearing on the new trial motion, the trial court resolved the factual dispute over whether Castillo knowingly waived his right to testify at trial against him. We must uphold to this factual finding as there is substantial evidence to support it. (*People v. Nesler* (1997) 16 Cal.4th 561, 582.) During trial, the court confirmed with Castillo that he understood he had an "absolute right" to testify and only he could decide whether to do so. Osajima

testified he had several conversations with Castillo about his right to testify. Osajima told Castillo he had an absolute right to testify. And although in Osajima's professional judgment Castillo should not take the stand, Osajima explained to Castillo he could disregard that advice and take the stand anyway. Castillo consistently told Osajima that he did not want to testify. Castillo himself agreed it was not until after he was convicted that he decided he should have testified. The trial court stated it found Osajima to be the more credible witness and concluded Castillo was not deprived of his right to testify in his own defense. We must defer to its credibility determinations.<sup>2</sup> (*People v. Jefferson* (1956) 47 Cal.2d 438, 446, superseded by statute on another ground as stated in *People v. St. Martin* (1970) 1 Cal.3d 524, 535.)

#### DISPOSITION

The judgment is affirmed.

O'LEARY, P. J.

WE CONCUR:

BEDSWORTH, J.

MOORE, J.

---

<sup>2</sup> As the Attorney General points out, neither Castillo's new trial motion, nor his argument on appeal, couched this argument in terms of incompetence of trial counsel. However, to the extent the argument on appeal can be construed as an ineffective assistance of counsel claim, i.e., trial counsel's failure to adequately inform Castillo of his right to testify constituted ineffective assistance of counsel, the trial court's resolution of the factual dispute resolves this claim. (*People v. Taylor* (1984) 162 Cal.App.3d 720, 724.)