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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. GLENN BARRY SPILLMAN, Defendant and Appellant.	H030551 (Monterey County Super. Ct. No. SS031841)

A jury found appellant guilty of second degree murder and found true an enhancement for shooting a firearm from a motor vehicle. (Pen. Code, §§ 187, 190, subd. (d).) The jury did not make findings as to the truth of two personal gun use enhancements. (Pen. Code, §§ 12022.5, 12022.53.) The trial court sentenced appellant to a state prison term of 20 years to life. Appellant contends that the trial court erred in instructing the jury on second degree felony-murder, in instructing on aiding and abetting, and in refusing a defense request concerning instructions. Appellant further contends that the trial court erred in excluding certain gang evidence. We affirm.

Evidence at Trial

In May 2003, Javier Soto was shot and killed as he drove on Highway 101 near White Road in Salinas. Soto was alone in a grey Honda and was headed north when three shots were fired from a pickup truck going in the same direction. Rubi Garcia was driving the pickup truck which belonged to appellant. Appellant was seated next to Rubi

and Antonio Garcia was next to appellant.[1] Because appellant had been drinking, he let Rubi drive the truck. Antonio had been drinking beer and had smoked marijuana. He was "kind of buzzed."

Antonio testified at trial that at the time of the shooting he had known Rubi for three or four years and considered Rubi a close friend "like a cousin." Appellant was "just an acquaintance." Antonio testified that the three traveled along Highway 101 and noticed a car in front of them. When Rubi would change lanes to pass it, the car would also change lanes. Antonio said that the other car, "would mess with us." Antonio testified that appellant said something like "look at this guy." He said that appellant got a gun from the glove compartment in front of Antonio. Antonio testified that appellant pushed Rubi forward up to the steering wheel and, as Rubi passed the car, appellant fired the gun out of the driver's side window. Before the shooting, the three had been laughing. After the shooting, he and Rubi were quiet and scared. Antonio testified, "I thought he was going to shoot my ass too." When the police pulled them over, appellant told Rubi and Antonio, "Shut up. Don't say [any]thing." Antonio testified that he did not touch the gun that day and that he did not know if Rubi did.

Francis and Shirley Jarschke testified at trial that they had witnessed the shooting. Francis Jarschke said that he was driving on Highway 101 when he saw in his rear view mirror that there was a pickup truck tailgating a Honda. After Mr. Jarschke passed a semi-truck, the Honda and the pickup passed him on the right. When the Honda moved to the left turn lane, the pickup moved to the fast lane and matched speed with it. The pickup "moved over close" to the Honda so that it was within two feet of it. Mr. Jarschke testified that he saw an arm and a pistol extend out of the pickup truck's driver's side window. He said that it would have been "hard for the driver to do it." To Mr. Jarschke,

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[1] Because Rubi Garcia and Antonio Garcia have the same last name, we will refer to them by their first names.

the arm and hand looked like that of a Caucasian male but he could not tell whether it was a left or right arm. The pistol fired three times. The Honda continued a short distance and stopped. Mr. Jarschke told his wife to call 911.

Shirley Jarschke testified that it looked as if the pickup was pursuing the Honda. The driver of the pickup was a female with long dark hair. The driver looked "very excited" like she was "just out joyriding." Mrs. Jarschke saw "the pickup getting beside the Honda and veering over." Mrs. Jarschke saw an arm holding a gun come out of the driver's side of the pickup truck. She acknowledged that she told the 911 dispatcher that the shooter was the driver.

Brent Wooldridge testified that he was northbound on Highway 101 when he saw in his mirrors a car and a pickup that seemed to be chasing one another. Wooldridge moved over to the slow lane to let them pass. Wooldridge testified that the truck moved to the side of the car and appeared to drop back to match speeds. Wooldridge then saw an arm coming out of the driver's side window with a gun in the hand. The arm protruded out the window fully extended for "quite a while" by which Woodridge meant "enough time to where he's either trying to scare the person or trying to take aim." Wooldridge said that the arm was "definitely" that of a male and "it was a Caucasian arm, tanned skin, blond hair." Wooldridge followed the truck as it left the freeway at San Miguel Canyon Road and he called 911. He saw the police remove three people from the truck. When he saw the Caucasian man, he thought, "that was the arm I saw" although he did not mention that to the police officer who spoke to him at the time.[2]

An off-duty San Jose police officer who was driving on Highway 101 testified that he saw the pickup truck driving recklessly. It was tailgating other vehicles in the fast lane, apparently to get them to changes lanes. Near San Miguel Canyon Road, the officer

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[2] Wooldridge said that the officer did not specifically ask him who the shooter was but that Wooldridge believed that it was "apparent" or "obvious" because the officer said, "Yeah, his name was engraved on the gun."

honked at the pickup. The officer testified that the driver, a female, "turned towards me and she extended her middle finger of her hand, flipping me off. And seemed to kind of laugh. . . . She then appeared to turn towards the other occupants of the vehicle and appeared to be in discussion . . . with them."

California Highway Patrol Officer Drake Wilburn assisted in the stop of the truck. About 10 seconds before the truck stopped, Officer Wilburn saw the middle seat passenger reach down and to his left. Officer Wilburn was wearing sunglasses and looking through the tinted back window of the truck from a distance of about 15 feet. When the truck stopped, the officers found Antonio in the right seat of the front bench seat. Appellant was in the middle and Rubi was in the driver's seat.

After removing the occupants from the truck, another officer found a nine-millimeter Smith and Wesson semi-automatic handgun in a nylon holster under and to the right side of the driver's seat. The holster strap was snapped over the gun and the gun would have been accessible to the middle passenger. A photograph introduced into evidence showed the location of the holster and gun in the truck when the police discovered it.

Appellant was the registered owner of the truck. In the pocket on the lower part of the door on the driver's side, the police found a hunting license with appellant's name on it, a gun magazine loaded with eight bullets and another loaded with 14. Inside the pocket on the passenger's side door was a receipt from Radio Shack with Rubi's name on it. On the passenger's side of the transmission hump was a leather pouch with the name "Garcia" on it containing a box cutter and a pen.

The Honda had bullet strikes in the rear passenger window and front passenger door frame. The front and rear passenger side windows were shattered. Soto had been killed by a shot that entered his body below the top of his right shoulder, passed through his chest and lodged under the back of his left armpit. Three shell casings were found by Highway 101 and two slugs in the Honda doors. Two of the casings were found to have

come from the gun that shot Soto. An expert witness who performed a trajectory analysis testified that the sequence of the shots was not certain, but that it was likely to have been that the first shot was from the rear of the Honda, the shot from the side was second, and the shot ahead of the Honda was last. Tests for gunshot residue found none on appellant or Antonio. Some was found on Rubi's left palm, the tops and palms of Soto's hands, and the passenger side of the pickup truck.

A psychologist testified about eyewitness identification. He said that when one is asked a question, one may engage in a "reconstructive process" and that "there may be things that we didn't really see, but we just sort of add them in because it's plausible." He described studies that found that stress reduced the accuracy of one's memory. He also testified about the "weapon focus effect" in which a witness can describe a gun "pretty well" but cannot describe the person holding it.

Appellant was questioned by the police and a videotape of this was shown at trial. The detective noted that appellant had a strong odor of alcohol about him. Appellant told the detective that he had "no idea" why he was being questioned. He said that he picked Rubi up at her mother's house and then picked up Antonio, who lives across the street from Rubi's mother. Rubi was driving because appellant had been drinking. Appellant told the detective that they had not had any problems with anyone on the road. Appellant said that he had the loaded gun in his car because he "just got back from the Sierras with my boys." Appellant told the detective that there might be gunshot residue in his truck from his hunting trip, but he said that there would not be any gunshot residue on his hands and asked the detective why his hands were "the only ones bagged." When asked why witnesses would have pointed out his truck as the one from which the shots were fired, appellant said, "There's a thousand maroon vehicles goin' down the road." Appellant repeatedly told the detective that no one shot out of his truck and that "I didn't shoot no gun."

Second Degree Felony-Murder Instruction

Appellant contends, "The trial court erred prejudicially in instructing on second-degree felony-murder predicated on violation of section 246."

The trial court instructed the jury that it could convict appellant of second degree murder if it found that appellant killed Soto by committing a felony inherently dangerous to human life. The trial court instructed the jury that a violation of Penal Code section 246, discharging a firearm at an occupied motor vehicle, is a felony inherently dangerous to human life.[3] Appellant argues that giving these instructions, considered with the prosecutor's arguments, was error because, "on the facts of this case, violation of section 246 could not legally be the predicate felony for second-degree felony murder." Although appellant makes a well-reasoned, thorough, and thoughtful argument, California Supreme Court precedent compels us to reject it.

First degree felony murder is defined by Penal Code section 189.[4] As for second

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[3] Penal Code section 246 provides, "Any person who shall maliciously and willfully discharge a firearm at an inhabited dwelling house, occupied building, occupied motor vehicle, occupied aircraft, inhabited housecar, as defined in Section 362 of the Vehicle Code, or inhabited camper, as defined in Section 243 of the Vehicle Code, is guilty of a felony, and upon conviction shall be punished by imprisonment in the state prison for three, five, or seven years, or by imprisonment in the county jail for a term of not less than six months and not exceeding one year. [¶] As used in this section, 'inhabited' means currently being used for dwelling purposes, whether occupied or not."

[4] Penal Code section 189 provides, "All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or any act punishable under Section 206, 286, 288, 288a, or 289, or any murder which is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree. All other kinds of murders are of the second degree." Although this statute refers to shooting from a vehicle, first degree drive-by murder under section 189 "is not felony murder because it

degree felony murder, our Supreme Court has said that "the felonies that [can] support a conviction of second degree murder, based upon a felony-murder theory, [have been restricted] to those felonies that are 'inherently dangerous to human life.' We have explained that the justification for the imputation of implied malice under these circumstances is that, 'when society has declared certain inherently dangerous conduct to be felonious, a defendant should not be allowed to excuse himself by saying he was unaware of the danger to life.' " (*People v. Hansen* (1994) 9 Cal.4th 300, 308.)

Appellant does not dispute that Penal Code section 246 describes a felony that is inherently dangerous to human life. Appellant argues that application of the merger doctrine of *People v. Ireland* (1969) 70 Cal.2d 522 (*Ireland*) "bars reliance on the shooting as the underlying felony for a second-degree felony-murder verdict." In *Ireland*, the defendant, a high school teacher, was troubled by his wife's infidelity but hoping to reconcile. She appeared uninterested. After taking some medication and drinking several cups of wine, the defendant shot and killed her. He testified at trial that he had no memory of the actual shooting. The circumstances of the shooting were described to the police by his six-year-old daughter and her statement was admitted into evidence by stipulation at trial. The defense "rested its entire case upon a contention that defendant's mental state at the time of his act -- as affected by cumulative emotional pressure and the ingestion of alcohol and prescribed medications was not that required for murder." (*Ireland*, *supra*, 70 Cal.2d at p. 530.) A jury found the defendant guilty of second degree murder.

Our Supreme Court held that assault with a deadly weapon could not serve as the predicate felony for second-degree felony murder because that felony that was an integral part of the homicide. The court explained that a murder conviction based upon an assault

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requires a mental state [intent to inflict death] that felony murder does not require." (*People v. Chavez* (2004*)* 118 Cal.App.4th 379, 386.)

would amount to "bootstrapping." (*Ireland, supra*, 70 Cal.2d at p. 539.) The court reasoned that "the felony-murder rule would effectively preclude the jury from considering the issue of malice aforethought in all cases wherein homicide has been committed as a result of a felonious assault -- a category which includes the great majority of all homicides." (*Ibid.*) The court observed that a similar limitation on felony murder had been recognized in other states and said, "Although we are not at this time prepared to say that the limitation which we have above articulated, when applied to fact situations not now before us, will come to assume the exact outlines and proportions of the so-called 'merger' doctrine enunciated in these other jurisdictions, we believe that the reasoning underlying that doctrine is basically sound and should be applied to the extent that it is consistent with the laws and policies of this state." (*Id.* at p. 540, fn. omitted.)

Three years later, in *People v. Mattison* (1971) 4 Cal.3d 177, the Supreme Court declined to apply the merger doctrine where a defendant was convicted of second degree felony murder based on the felony of administering poison with intent to cause injury where one prison inmate sold alcohol to another prison inmate who later died. Our Supreme Court rejected the defendant's challenge to the concept of second degree felony murder. The court said, "Although the Penal Code does not expressly set forth any provision for second degree felony murder, it is well-settled that certain felonies inherently dangerous to human life, exclusive of those enumerated in Penal Code section 189, can support application of the felony-murder rule." (*Id*. at p. 184.) Rejecting the defendant's argument that the *Ireland* merger doctrine would apply, the *Mattison* court explained that the merger doctrine does not apply when death results from the defendant's commission of a felony with an independent purpose, that is, when the felony that provides the basis for the felony-murder conviction "was not done with the intent to commit injury which would cause death." (*Id.* at p. 185.) There was no merger because the felony-murder verdict was based upon the defendant's commission of a felony with a " 'collateral and independent felonious design.' " (*Ibid.*)

Since *Ireland* and *Mattison*, our Supreme Court has considered the application of the merger doctrine to various firearm assaults that resulted in deaths. In one case of a violation of Penal Code section 246, the court found that the merger doctrine did not apply and in two cases involving a violation of Penal Code section 246.3, negligent discharge of a firearm, the court held that the merger doctrine did apply in one and did not apply in the other.[5]

In *People v. Hansen* (1994) 9 Cal.4th 300 (*Hansen*), the defendant had given money to a man for drugs, but the man did not deliver them. The defendant fired a gun repeatedly into the apartment where the man lived with his family, killing the man's 13-year-old daughter. (*Id.* at p. 305.) Following his arrest, the defendant told the police that "he was shooting at '[j]ust the house,' and that he would not have engaged in this conduct had he known 'those kids were in there.' " (*Id.* at p. 306.) The defendant testified at trial that he did not intend to harm anyone. He was convicted of second degree felony murder and of discharging a firearm at an inhabited dwelling in violation of section 246.

Our Supreme Court considered whether a violation of Penal Code section 246 for discharging a firearm at an inhabited dwelling house could support a second-degree felony-murder verdict, and held that the collateral and independent purpose test articulated in *Mattison* was not dispositive of the application of the *Ireland* merger doctrine. (*Hansen, supra*, 9 Cal.4th at p. 315.) The *Hansen* court stated that declining to apply the merger doctrine to these facts would further the deterrence principles behind the felony-murder doctrine. The court said that firearm deaths have become "an alarmingly common occurrence in our society," and that "[b]y providing notice to

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[5] Recently, our Supreme Court granted review in *People v. Chun*, S157601, which presents the issue, "Does the offense of discharging a firearm at an occupied vehicle in violation of Penal Code section 246 merge with a resulting homicide under *People v. Ireland*[, *supra*,] 70 Cal.2d 522, if there is no admissible evidence of an independent and collateral criminal purpose other than to commit an assault?"

persons inclined to willfully discharge a firearm at an inhabited dwelling-even to those individuals who would do so merely to frighten or intimidate the occupants, or to 'leave their calling card'-that such persons will be guilty of murder should their conduct result in the all-too-likely fatal injury of another, the felony-murder rule may serve to deter this type of reprehensible conduct, which has created a climate of fear for significant numbers of Californians . . . ." (*Id*. at p. 311.)

In *People v. Robertson* (2004) 34 Cal.4th 156, the court considered whether a violation of Penal Code section 246.3, grossly negligent discharge of a firearm, could support a second degree felony-murder verdict. In *Robertson*, the defendant heard men stealing the hubcaps from his car and went outside with a gun and fired shots, killing one and wounding another. The defendant said that he had fired to scare the men away. A divided court held that the merger doctrine did not bar the second degree murder conviction. The court returned to the collateral and independent felonious design reasoning of the *Mattison* case. The court found that evidence of the defendant's collateral purpose to scare the men made instruction on second degree felony murder permissible. The court observed that although someone who decides to assault another would not be deterred by the felony-murder rule, a defendant with a collateral purpose may be deterred. Acknowledging that the collateral purpose rationale may have its "drawbacks in some situations" the court said, "we believe it provides the most appropriate framework to determine whether, under the facts of the present case, the trial court properly instructed the jury. The defendant's asserted underlying purpose was to frighten away the young men who were burglarizing his automobile**.** According to defendant's own statements, the discharge of the firearm was undertaken with a purpose collateral to the resulting homicide, rendering the challenged instruction permissible." (*Id.* p. 171.)

Justice Moreno concurred in *Robertson* but expressed concern about the continuing viability of the felony-murder doctrine, noting that it "has been roundly

criticized both by commentators and this court." (*Robertson, supra,* 34 Cal.4th at p. 174.) Justice Moreno noted that although first degree felony murder was expressly codified, "[s]econd degree felony murder does not have the same statutory basis, and may be abrogated by this court." (*Id.* at p. 175.) Justice Moreno called up the court to "reassess[] the rule in an appropriate case." (*Id.* at p. 176.) Dissenting Justices Brown and Werdeger also called upon the court to reconsider the second degree felony-murder doctrine. Justice Werdegar took the view that the *Ireland* merger doctrine "must be understood to preclude the offense of grossly negligent discharge of a firearm (Pen. Code, § 246.3) from serving as a predicate felony under the circumstances of this case." (*Id*. at p. 185.) Dissenting Justice Kennard expressed the view that, "The majority is wrong in treating defendant's alleged intent to scare the victim as a felonious intent independent of the killing. An intent to scare is neither independent nor felonious." (*Id.* at p. 183.)

The following year, in *People v. Randle* (2005) 35 Cal.4th 987, the Supreme Court found that, under the facts presented, a violation of Penal Code section 246.3 would not support second degree felony-murder instructions because of the merger doctrine. In *Randle* the defendant and his cousin were caught in the act of burglarizing a car. They fled and were pursued. The defendant shot and killed one of the pursuers as the man beat his cousin. The defendant admitted firing at the victim. The defendant was charged with murder. Among other theories, the jury was instructed the defendant could be convicted of second degree felony murder with a violation of Penal Code section 246.3 as the predicate crime. The Supreme Court concluded that that instruction was improper. The court distinguished *Robertson* by noting that in that case the defendant had stated that he had fired into the air to frighten the victim, while in *Randle* the defendant had admitted firing at the victim. The court stated: "The fact that defendant admitted shooting at [the victim] distinguishes *Robertson* and supports application of the merger rule here. Defendant's claim that he shot [the victim] in order to rescue [his cousin] simply provided

a *motive* for the shooting; it was not a purpose independent of the shooting." (*Id*. at p. 1005.)

Recently, *People v. Bejarano* (2007) 149 Cal.App.4th 975 examined the second degree felony-murder doctrine with a violation of Penal Code section 246 as the predicate felony. In *Bejarano*, the defendant shot at the occupants of an Oldsmobile who were rival gang members and hit a third person in another car. The defendant admitted that he intentionally shot at the occupants. The court found that because the defendant had admitted that he had intentionally shot at the occupants of the Oldsmobile, there was no collateral purpose, and applied the *Ireland* merger doctrine. The *Bejarano* court said that this admission of an intent to assault distinguished the case from *Robertson* and made *Randle* controlling. (*Id*. at p. 990.) The court said that "[t]he felony-murder rule can hardly be much of a deterrent to a defendant who has decided to discharge a firearm at an occupied motor vehicle solely with an intent to thereby assault the occupants." (*Ibid.*) The *Bejarano* court held that under the circumstances of that case, the violation of Penal Code section 246 could not form the basis of second degree felony murder, and that the trial court erred in instructing the jury on second degree felony murder based on the predicate felony of discharging a firearm at an occupied motor vehicle.

The *Bejarano* court did not expressly explain why *Randle*, and not *Hansen*, controlled on the issue of whether shooting at an occupied motor vehicle in violation of section 246 may be used as the predicate felony for a conviction of second degree felony-murder. Both *Robertson* and *Randle* dealt with section 246.3, negligent discharge of a firearm. *Hansen,* however, considers section 246, shooting at an inhibited dwelling or occupied vehicle, the same crime present here. That *Hansen* involved shooting at an inhabited dwelling (which the defendant claimed he did not know was occupied) and this case involves shooting at an occupied motor vehicle, is a distinction without difference. Both means of violating section 246 involve a high probability that death will result and therefore constitute inherently dangerous felonies; if anything, shooting at an *occupied*

motor vehicle poses a greater risk of death than shooting at an inhabited dwelling which may be unoccupied at the time of the shooting.

In *Bejarano, Hansen, Randle, Robertson,* and even *Ireland,* the defendant essentially conceded having shot the firearm and sought to explain his mental state. At trial, appellant's defense was that the evidence supported the conclusion that Rubi was the shooter. Here, appellant argues, "Whoever fired the three shots from the pickup into Mr. Soto's Honda – as established by the trajectory analysis – was shooting not at tires but at Mr. Soto. Whether analyzed in terms of an act indivisible from the homicide, or as an act lacking an independent felonious purpose, the merger doctrine bars reliance on the shooting as the underlying felony for a second-degree felony-murder verdict, regardless of how the assault was 'packaged' in terms of the predicate felony." We do not consider the trajectory analysis evidence to establish either an independent purpose or act indivisible from the homicide. Only one bullet struck Soto. The shooter may have been shooting at Soto but missed twice, or may have been shooting at Soto's car but, unintentionally, hit Soto once. However, we must reject appellant's argument here because the Supreme Court has rejected it. In *Hansen,* the Supreme Court said, "In rendering our decision in the present case, we disapprove of the holding in *People v. Wesley* [(1970)] 10 Cal.App.3d 902, in which the Court of Appeal, in construing *Ireland,* concluded that the felony proscribed by section 246 merged with a resulting homicide because the felony was in fact 'an integral part' and a necessary element of the homicide. . . . [We] conclude that the offense of discharging a firearm at an inhabited dwelling house does not 'merge' with a resulting homicide within the meaning of the *Ireland* doctrine and therefore that this offense will support a conviction of second degree felony-murder. Accordingly, the trial court did not err in instructing the jury on a second degree felony-murder theory based upon the underlying felony of discharging a firearm at an inhabited dwelling house." (*Hansen, supra*, 9 Cal.4th at p. 316.) We must therefore, likewise conclude that the offense of discharging a firearm at an occupied vehicle does

not merge with a resulting homicide within the meaning of the *Ireland* doctrine, and therefore a violation of Penal Code section 246 will support a conviction of second degree felony murder and the trial court did not err in so instructing the jury. (*Auto Equity Sales v. Superior Court* (1962) 57 Cal.2d 450, 453.)

The Aiding and Abetting Instructions

Appellant contends, "There was insufficient evidence to justify instructions on aiding and abetting, as the record did not support such a conclusion without resorting to conjecture and speculation."

" 'The test for determining whether instructions on a particular theory of guilt are appropriate is whether there is substantial evidence which would support conviction on that theory. [Citation.] To determine whether there is substantial evidence to support a conviction we must view the record in a light most favorable to conviction, resolving all conflicts in the evidence and drawing all reasonable inferences in support of conviction. We may conclude that there is no substantial evidence in support of conviction only if it can be said that on the evidence presented no reasonable fact finder could find the defendant guilty on the theory presented. [Citation.]' (*People v. Nguyen* (1993) 21 Cal.App.4th 518, 528-529. . . . see *People v. Johnson* (1980) 26 Cal.3d 557, 576 . . . , *Jackson v. Virginia* (1979) 443 U.S. 307, 318 [. . . 99 S.Ct. 2781].) Substantial evidence is evidence ' "of ponderable legal significance . . . . reasonable in nature, credible, and of solid value." [Citations.]' (*People v. Johnson, supra,* 26 Cal.3d at p. 576.)" (*People v. Campbell* (1994) 25 Cal.App.4th 402, 408.) "Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense." (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

Appellant argues that although "[t]here may have been substantial evidence that Mr. Spillman personally fired the gun, based on the testimony of Mr. Garcia that Mr. Spillman had done so, and the testimony of Mr. Wooldridge that the arm holding the gun

had belonged to a man . . . there was no equivalently substantial evidence that Mr. Spillman – if he did not personally fire the gun – aided and abetted Ms. Garcia in having done so, with the aiding and abetting theory being based on conjecture, speculation, and guesswork." Respondent argues, "Ignoring Antonio's testimony that appellant got the gun from the glove compartment, appellant fails to explain why the jury could not reasonably have adopted a hybrid theory of the case (i.e., derived partly from the prosecution's theory and partly from the defense's) that appellant initially had the gun but that Rubi fired it after he gave it to her."

The evidence supports the trial court's determination that aiding and abetting instructions should be given. Appellant and Rubi were friends and co-workers. Rubi was driving appellant's truck with his permission. Appellant was present at the scene of the crime, sitting right next Rubi, who the defense argued was, based on the evidence, the shooter. Appellant took the gun, engraved with his name, from the glove compartment before the shooting and placed it in a holster after the shooting. He told Rubi and Antonio not to say anything when they were stopped by the police. This evidence of presence at the scene, companionship, and conduct before and after the offense was sufficient to support the giving of the aiding and abetting instructions.

Defense Requested Instruction

The court instructed the jury with CALJIC No. 3.01 which states in part: "A person aids and abets the commission or attempted commission of a crime, when that person, one, with knowledge of the unlawful purpose of the perpetrator, and two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and three, by act [or] advice, aids, promotes, encourages, or instigates the commission of a crime." Appellant requested an instruction to explain the difference between an aider and abettor and an accessory after the fact. The proposed instruction read: "A person may not be found guilty as an aider and abettor unless the act, knowledge and intent required for aiding and abetting all occurred before or during the

alleged crime. [¶] Any assistance offered by the defendant to the perpetrator of the crime after the crime has been committed is insufficient to establish that [he] [she] aided and abetted the perpetrator in the commission of the offense. [¶] If you have a reasonable doubt that the required act, knowledge and intent occurred before or during the alleged crime, you must give the defendant the benefit of that doubt and find [him] [her] not guilty."

The defense requested instruction is grounded in Penal Code sections 31 and 32. Section 31 attaches criminal liability as a principal to all persons "concerned in the commission of a crime" whether that person directly commits the crime or aids and abets in its commission. Section 32 attaches criminal liability as an accessory to a person who "after a felony has been committed" aids a principal in the felony with the intent that the principal may avoid or escape. Appellant contends, "The trial court erred in refusing on defense request to explain to the jury that liability as an aider and abettor attached only for acts which 'aided' or 'abetted' before or during the crime, and that aid after the crime, although criminal, did not constitute aiding and abetting." Appellant asserts, "The critical concern here is the 'line' between aid rendered while 'concerned in the commission of a crime,' and aid rendered 'after' a crime." Appellant argues, "Neither 3.01, nor any other instruction given, identified that temporal 'bright line' between 'before or during' and 'after' the crime, within the meaning of the law governing aiding and abetting."

Defense counsel argued that the instruction should be given because, "It clarifies sort of what I think the law deems a dividing line. And I don't think that the instruction itself really addresses that separation from the before and during, as opposed to after." The prosecutor said that the proposed instruction was "misleading and inaccurate" and "confusing" because one's conduct before and after an offense is committed can be used in determining whether one is an aider and abettor.

At appellant's first trial, the prosecutor had presented evidence and argument to support the theory that appellant fired the gun and that Rubi was an aider and abettor.

Although the jury was unable to reach a unanimous verdict as to appellant, Rubi was convicted. Before appellant's second trial began, the defense brought a motion "to exclude evidence of liability as aider and abettor as barred by judicial estoppel." The defense also sought to prohibit the prosecutor from "present[ing] for the jury's consideration an alternate theory of liability of an aider and abettor." Citing *People v. Sakarias* (2005) 35 Cal.4th 140, appellant contended, "Given the conviction of the aider and abettor and the prosecution's theory that defendant Spillman was the shooter, the prosecution cannot argue in this second trial that defendant Spillman was merely an aider and abettor."

The trial court said that although it believed that it was obligated by the state of the record to give the jury the instructions on aiding and abetting, "This is an area that the Court feels the prosecution needs to be very, very cautious and prudent in how it's presented to the jury, and whether or not it is presented in a way that actually appears to be a theory by the prosecution, that it's being argued to the jury, or whether or not it is left to the jury to utilize as a theory." Defense counsel took full advantage of this restriction on the prosecution's argument, telling the jury that the prosecutor was "not going to tell you that there's any evidence that supports my client's aiding in any way. Her theory is that he's the shooter." He said that there was only "pure speculation" to support the idea that appellant aided and abetted Rubi. Defense counsel reviewed the aiding and abetting instructions and argued, "Now, the act, knowledge, and intent must all occur before or during the crime. Okay. So assuming that you agree that Rubi Garcia might be the shooter, and assuming that you are even considering something that the prosecutor doesn't even want you to consider, which is that my client aided, it's not a theory she presented to you, the fact that Mr. Spillman hid the gun under the seat is after the crime. It's after the shooting. Okay. It's not in any way evidence of aiding because it's not during or before the crime. It's important that you make that break in your head, okay. It's a significant legal point that conduct after the crime itself is not aiding and abetting.

Any assistance offered after the crime is committed is insufficient to establish it. Hiding of a weapon is such conduct after the crime."

In CALJIC No. 3.01, the jury was instructed that there had to be proof that the aider and abettor, "with knowledge of the unlawful purpose of the perpetrator; and, two, with the intent or purpose of committing or encouraging or facilitating the commission of the crime, and, three, by act [or] advice aids, promotes, encourages, or instigates the commission of a crime." The jury was instructed that "[m]ere presence at the scene of the crime, which does not [in] itself assist the commission of the crime, does not amount to aiding and abetting. Mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting." By this language, the jury received the information that the act and the intent of the defendant had to precede, or coincide with the perpetrator's act and intent. Furthermore, even if we were to accept the argument that the aiding and abetting instructions were, in the abstract, susceptible to the misinterpretation appellant suggests, there was no reasonable likelihood that this jury would have adopted such a misinterpretation, given the fact that defense counsel expressly warned the jury against such an interpretation and neither the prosecutor nor the court suggested otherwise.

The Exclusion of Gang Evidence

Appellant contends, "The trial court erred in excluding evidence that Rubi Garcia and Antonio Garcia were Nortenos, where gang affiliation gave Antonio Garcia a motive falsely to accuse Mr. Spillman of a shooting committed by Rubi Garcia, and gave Rubi Garcia a motive to shoot Mr. Soto, who had been wearing blue."

Background

Before appellant's first trial on these charges, he sought to introduce evidence to support a defense theory of third party culpability.[6] Appellant's theory was that Soto's

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[6] This court has taken judicial notice of the record in People v. Garcia, H028474.

death was a gang motivated shooting, that Rubi Garcia and Antonio Garcia were Norteno gang members, that Rubi perceived Soto to be a Sureno gang member because he was wearing blue, and that Rubi was the shooter. The theory included the element that Antonio Garcia's testimony that appellant was the shooter was false because of his bias in favor of Rubi because of their gang ties. Both counsel for Rubi and the prosecutor argued against the introduction of any gang evidence, including the testimony of a gang expert witness, but their objections were overruled and the evidence was admitted. The trial court based its decision to admit the evidence concerning gang membership on proposed defense evidence that one Michelle Johnson, who had been a fellow inmate with Rubi and had recently been interviewed by an investigator with the District Attorney's Office, would testify that Rubi had admitted to her that she shot Soto because she had thought that he was a Sureno. Appellant's trial counsel had argued that because Michelle Johnson would testify about Rubi's admission, evidence of gang membership of Rubi and Antonio and gang expert testimony was required in order to make the admission understandable to the jury. The trial court agreed.

As it turned out, Michelle Johnson did not testify. Nevertheless, the other gang evidence, including the expert testimony, was admitted at appellant's first trial. After the receipt of this evidence, the trial court reflected on its ruling regarding the admissibility of the gang evidence and stated, "the Court made certain rulings in this case concerning gang evidence. The rulings that the Court made at the time were predicated upon the information the Court had before it at the time, which included a belief of the attorneys, that a statement by Michelle Johnson that had been ruled admissible by the Court would in fact be utilized in this case. [¶] And the Court, based a number of its rulings as to admissibility of gang evidence on the statements that were attributed to Rubi Garcia in that particular statement . . . . Had the Court known at that time that the Michelle Johnson statement or testimony would not be offered, the Court's review of that particular gang evidence and its admissibility may very well have been different and even somewhat

more limited or excluded in its entirety. [¶] And the Court felt compelled to put that on the record should a reviewing court at some point in time need to review the admissibility of that evidence and the court's rationale or thought process as to why that evidence was admitted." (*People v. Garcia*, H028474, p. 14.)

The first trial ended with a mistrial being declared as to appellant and a first degree murder conviction as to Rubi. Following the first trial, Rubi Garcia appealed her conviction to this court, arguing that the trial court had erred by admitting the gang membership evidence and by permitting appellant's gang expert to testify. This court reviewed the strength of the gang evidence and concluded, "Given the exceedingly low probative value of this evidence, and its powerful prejudicial impact, and with due consideration of the deferential standard of review, we find that its admission was an abuse of discretion." (*People v. Garcia*, H028474, p. 19.) This court reversed Rubi Garcia's conviction.

Before appellant's second trial, in which he was the sole defendant, appellant once again sought admission of the gang evidence. He brought a motion "to present evidence of third party culpability, gang evidence, and gang expert testimony." The motion repeatedly referred to, and attached as an exhibit, the interview with Michelle Johnson conducted by the investigator in August 2004. Defense counsel argued that evidence of gang membership of Rubi and Antonio was relevant to show bias and relevant on the issue of "motive, identity, or intent." Defense counsel said that the gang evidence was "highly probative of what Rubi Garcia's intent and motive would have been to go from what is road rage, at least as the thing that might have drawn their attention to this person to rise to the next level of actually going so far as to shoot and kill." Neither Rubi Garcia nor Michelle Johnson testified.

The trial court denied the defense motion. The trial court said that "absent the statement of Michelle Johnson, there really just is a category of evidence in which it could be said, could be interpreted that they are gang members. The driving down the

road, next thing that happens is Mr. Soto gets shot. There isn't anything in the two of those, absent her statement, that creates what the Court calls a nexus." The court also said that it was excluding the evidence under Evidence Code section 352 because the probative value of the proposed evidence was outweighed by the "undue consumption of time" and "substantial danger [of] confusing [the] issues or misleading the jury."

Discussion

Appellant contends that it was error to exclude the gang evidence. He argues that it was admissible as third party culpability evidence and to demonstrate bias and motive to fabricate by Antonio. He contends that it was an abuse of discretion to exclude this evidence because Evidence Code section 352 should be used only sparingly against a criminal defendant and that he had a constitutional right to present relevant exculpatory evidence.[7]

In *People v. Hall* (1986) 41 Cal.3d 826, the Supreme Court addressed the issue of the standard for admitting evidence tending to show that someone else, rather than the defendant, may have committed the charged offense. The *Hall* court stated that the analysis of whether defense evidence of third-party culpability is admissible is the same as that for any other evidence: "[C]ourts should simply treat third-party culpability evidence like any other evidence: if relevant it is admissible ([Evid. Code] § 350) unless its probative value is substantially outweighed by the risk of undue delay, prejudice, or confusion ([Evid. Code] § 352)." (*Id.* at p. 834.)

"To withstand a challenge under Evidence Code section 352, evidence of a third party's culpability 'need only be capable of raising a reasonable doubt of [the] defendant's

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[7] Appellant states, "Mr. Spillman submits that this Court can resolve the issue by asking itself a simple question: If Mr. Spillmand had also been a Norteno, would the prosecution have been allowed to introduce evidence that he, Rubi Garcia and Antonio Garcia had all been Nortenos, to establish that the reason Mr. Soto was shot was because he was wearing blue? The answer to this question is undoubtedly yes."

guilt.' " (*People v. Cudjo* (1993) 6 Cal.4th 585, 609, quoting from *Hall, supra,* 41 Cal.3d at p. 833.) Although a trial court's discretionary power to exclude evidence under Evidence Code section 352 "must yield to a defendant's due process right to a fair trial and to the right to present all relevant evidence of significant probative value to his or her defense" (*People v. Cunningham* (2001) 25 Cal.4th 926, 999), a trial court's discretionary ruling under Evidence Code section 352 will not be disturbed unless the court acted in an "arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice[.]" (*People v. Rodriguez* (1999) 20 Cal.4th 1, 9-10.)

Here, the trial court did not exclude all evidence to support appellant's third party culpability theory. Defense counsel explicitly argued that Rubi, not appellant, was the shooter and developed evidence at trial to support this argument. Thus, the defense was not limited in presenting third party culpability evidence as to identity and opportunity to commit the crime. Nor was the defense precluded by the court's ruling from arguing that Rubi could have been motivated by road rage to shoot Soto. The court's ruling prevented appellant from developing the theory that the shooting was motivated by gang rivalries, that is, that Rubi shot Soto because she was a Norteno who perceived Soto as a Sureno. Without Michelle Johnson's testimony, that theory had no support.[8] There was then no evidence that Rubi thought that Soto was a Sureno, and any basis for one perceiving him as such was simply that he was wearing a blue jumpsuit for work.[9]

Appellant was not precluded from developing evidence that Antonio was biased in favor of Rubi because of their close relationship, which was thoroughly explored and argued by defense counsel at trial. Furthermore, the evidence of Rubi's Norteno gang

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[8] We did observe in People v. Garcia, H028474 , that "there were numerous, glaring contradictions between undisputed evidence presented at trial and what Johnson had told the investigator that she had heard about the shooting." (P. 17.)

[9] There seems to have been an unstated presumption throughout these proceedings that the additional factors of Soto being young, Hispanic, and male also would support that perception.

affiliation was weak. As we noted in *People v. Garcia*, H028474, "An assessment of the strength of the underlying data on which [the gang expert] based his opinion about the gang motive must take into account that there was evidence that if [Rubi] had any gang affiliation it was arguably Sureno, rather than Norteno, in that she had had a long term relationship, and a child, with an admitted Sureno. In [the gang expert's] pre-trial testimony, he said that it would be 'extremely unusual' for an active Norteno gang member to be living with, and have a child with, a Sureno gang member." (P. 18.) Whether or not Antonio was an active Norteno gang member, given the weakness of the evidence of Rubi's gang affiliation, the court could properly limit the defense presentation of this aspect of the bias evidence.

The excluded evidence would have taken a fair amount of time to present and presented a danger of confusing the jury. More importantly, it did not have any significant probative value. Thus, we cannot say that the trial court, in excluding this evidence, acted in an arbitrary, capricious, or patently absurd manner that resulted in a manifest miscarriage of justice.

Disposition

The judgment is affirmed.

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ELIA, J.

WE CONCUR:

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RUSHING, P. J.

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PREMO, J.