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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA**

**FOURTH APPELLATE DISTRICT**

**DIVISION TWO**

THE PEOPLE,

Plaintiff and Respondent,

v.

EDWARD CASARES,

Defendant and Appellant.

E034779

(Super.Ct.No. FVA018711)

OPINION

APPEAL from the Superior Court of San Bernardino County. Barry L. Plotkin, Judge. Affirmed.

Neil F. Auwarter, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Gary W. Schons, Senior Assistant Attorney General, Scott C. Taylor, Supervising Deputy Attorney General, and Daniel Rogers, Deputy Attorney General, for Plaintiff and Respondent.

A jury convicted defendant and appellant Edward Casares, Jr. of first degree murder. (Pen. Code § 187, subd. (a).)<sup>1</sup> The jury also found true the allegations that defendant committed the murder during the course of a carjacking (§ 190.2, subd. (a)(17)) and that defendant personally and intentionally discharged a firearm proximately causing great bodily injury and death to the victim, Michael Sirna (the victim). (§ 12022.53, subd. (d).) (It was also alleged that defendant personally and intentionally discharged a firearm (§ 12022.53, subd. (c) and personally used a firearm (§§ 12022.5, subd. (a)(1) and 12022.53, subd. (b).) However, the court dismissed the section 12022.5, subd. (a)(1) and section 12022.53, subd. (b) allegations, pursuant to the prosecution’s motion, and struck the section 12022.53, subd. (c) allegation, pursuant to section 1385.) The court sentenced defendant to a total term of 50 years to life in state prison.

On appeal, defendant contends that: 1) the trial court erred by failing to sua sponte instruct the jury on accomplice testimony; and 2) there was insufficient evidence that defendant intentionally fired the gun. We disagree and affirm the judgment.

### FACTUAL BACKGROUND

“We adopt the version of the facts most favorable to the People as the prevailing party. [Citation.]” (*People v. Kilpatrick* (1980) 105 Cal.App.3d 401, 406, disapproved on other grounds as stated in *People v. Bustamante* (1981) 30 Cal.3d 88, 96.) Thus, this statement of facts is based largely, but not solely, on Donte Lemon’s statements made to

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<sup>1</sup> All further statutory references will be to the Penal Code, unless otherwise indicated.

Detective Robert Ratcliffe during a police interview. Detective Ratcliffe testified at trial concerning Lemon's interview.

On October 7, 2002, between 8:00 p.m. and 9:00 p.m., the victim arrived at the house of Fred Richard Casper. Donte Lemon was already there with Casper. Bruce Cameron and Richard Rubin went to Casper's house later that night. The victim asked Casper if he could get him some drugs, so Casper left the house to talk to a drug supplier across the street. Casper returned a few minutes later and told the victim he had to wait. Shortly thereafter, defendant arrived at Casper's house to tell him that the drugs were ready to be picked up. As Casper was leaving, defendant informed Casper that he wanted to take the victim's car and that he was planning to use a gun to threaten the victim. Casper said he did not care as long as defendant brought the car back. Casper then left to get the drugs.

At some point that night, defendant told Lemon that he was going to "jack" the victim for his car. Lemon went into the living room and lay down on the couch, adjacent to the victim, so that he could see what was going to happen. The victim was seated in a chair. Defendant walked up to the victim and pointed a revolver directly at him. Lemon thought he heard a click from the gun as though the hammer had been drawn back. Defendant demanded the victim's car keys. The victim looked confused and did not say anything. Defendant became angry and asked the victim if he thought he was kidding. Defendant then struck the victim across the face with the gun and shot him in the face at close range. Defendant started to walk out the front door, but then he returned to the

victim, grabbed the victim's keys, and left the house. Defendant drove the victim's car away.

Cameron and Rubin testified that they were in the kitchen when the victim was shot. After hearing the gunshot, they fled out the front door. Casper testified that he heard the gunshot as he was walking to the drug supplier's house, but just kept walking. Soon after the shooting, Lemon found Casper and told him what happened. Casper testified that Lemon told him that he shot the victim, but Casper did not believe him.

Nikki de los Santos, Casper's friend, testified that she arrived at Casper's house after the shooting. After a few minutes, she saw Lemon and Casper returning to the house. Casper looked upset, so she asked him what was wrong. He told her there was a dead body in his living room and that they needed to call 911. De los Santos told him that they should first take all of the drug paraphernalia out of the house since the police would be investigating. So, de los Santos, Casper, and Lemon went into the house and "grabbed a bunch of stuff." De los Santos then drove Casper and Lemon to a nearby McDonald's to use a pay phone to call 911.

Lemon took the victim's wallet and threw it into some bushes. The police later recovered the victim's wallet from the bushes where Lemon disposed of it. The police also recovered the victim's car. The police found the car in an area of San Bernardino that was surrounded on one side by a large vacant lot and on the other side by uninhabited land. The location was about one block from a location where de los Santos had picked defendant up a few days prior to the shooting.

Lemon testified at trial for both the prosecution and the defense. We note that Lemon was incarcerated for auto theft at the time he testified at defendant's trial. Lemon admitted that it was not good to be in custody and testify in court against somebody, or be known as a "rat." When Lemon testified, he essentially changed his story about what occurred on the night of the incident. He testified that he was talking with defendant in the kitchen when the victim got shot. Thus, he testified that he did not see defendant with a gun, or see defendant shoot the victim in the living room. Lemon said that he had lied to the police when he told them that defendant shot the victim. Lemon testified that he wanted to put the blame on someone because Detective Ratcliffe, the officer who interviewed him, threatened to blame him for the crime.

The jurors heard an audiotape and received a transcript of Detective Ratcliffe's interview with Lemon during which he told the police that defendant shot the victim.

Defendant now appeals.

## ANALYSIS

### I. The Trial Court Had No Sua Sponte Duty to Instruct the Jury on

#### Accomplice Testimony

Defendant contends that his conviction should be reversed because of the trial court's failure to instruct the jury sua sponte on the definition of accomplice and the rules

applying to accomplice testimony.<sup>2</sup> “Where the evidence is sufficient to warrant the conclusion by a jury that a witness implicating the defendant was an accomplice, it is the duty of the trial court to give instructions regarding accomplices and their testimony, whether or not the defendant has requested such instructions. [Citations.]” (*People v. Cooper* (1970) 10 Cal.App.3d 96, 102.) Essentially, the trial court must instruct the jury that “the testimony of an accomplice is to be viewed with distrust and that the defendant may not be convicted on the basis of an accomplice's testimony unless it is corroborated.” (*People v. Hayes* (1999) 21 Cal.4th 1211, 1271 (*Hayes*); *People v. Zapien* (1993) 4 Cal.4th 929, 982 (*Zapien*.) Defendant argues the evidence was sufficient to allow the jury to conclude Lemon was an accomplice.

At trial, Detective Ratcliffe testified concerning his interview with Lemon, during which Lemon told him that defendant shot the victim. (Lemon himself testified that defendant was in the kitchen with him when the victim got shot.) Assuming that Lemon’s out-of-court statements to Detective Ratcliffe constituted the “accomplice testimony” to which accomplice testimony instructions could apply, we find that there was insufficient evidence to show that Lemon was an accomplice.

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<sup>2</sup> The accomplice jury instructions are: CALJIC No. 3.10 (definition of accomplice), CALJIC No. 3.11 (testimony of an accomplice must be corroborated), CALJIC No. 3.12 (what evidence is sufficient to corroborate accomplice testimony), and CALJIC No. 3.18 (accomplice testimony must be viewed with caution). (See *People v. Frye* (1998) 18 Cal.4th 894, 965.)

Pursuant to 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.” “Criminal liability as a principal attaches to those who aid in the commission of a crime only if they also share in the criminal intent [Citations.]” (*People v. Tewksbury* (1976) 15 Cal.3d 953, 960 (*Tewksbury*)). Lemon was thus an accomplice only if he acted with “‘guilty knowledge and intent with regard to the commission of the crime.’ [Citation.]” (*Ibid.*) “The burden is on the defendant to prove by a preponderance of the evidence that a witness is an accomplice. [Citation.]” (*People v. Fauber* (1992) 2 Cal.4th 792, 834 (*Fauber*)).

Defendant first points out that Lemon admitted to Detective Ratcliffe that he (Lemon) knew of defendant’s plan to “jack” the victim’s car, and he accompanied defendant into the living room, where the confrontation occurred. “Mere presence at the scene of a crime which does not itself assist its commission or mere knowledge that a crime is being committed and the failure to prevent it does not amount to aiding and abetting. [Citation.]” (*In re Michael T.* (1978) 84 Cal.App.3d 907, 911.) Thus, simply because Lemon went into the living room knowing that defendant was going to “jack” the victim’s car did not make Lemon an accomplice. Moreover, there was no indication that Lemon acted with the “guilty knowledge” that defendant was going to *murder* the victim. (*Tewksbury, supra*, 15 Cal.3d at p. 960.)

Next, defendant points to evidence that Lemon admitted that he took the victim’s wallet after the shooting. An accomplice is defined as one who is liable to prosecution for the identical offense charged against the defendant. (§ 1111.)

Thus, evidence showing that Lemon took the victim's wallet after he was shot by defendant in no way demonstrates that Lemon was an accomplice to murder.

Defendant also cites evidence that the police found bullets in the car "in which Lemon had been transported from the crime scene." However, there is no evidence which connects the bullets to the crime. Furthermore, Lemon was driven away from the crime scene by de los Santos, and there is no evidence showing how the bullets got into her car. Thus, evidence that bullets were found in de los Santos's car does not indicate that Lemon had the criminal intent to kill the victim or that he aided defendant in any way.

The only evidence that defendant cites that could possibly support his contention that Lemon was an accomplice is Casper's testimony that Lemon told him that he (Lemon) shot the victim. Assuming *arguendo* that this evidence was sufficient for the jury to find that Lemon was an accomplice, and that accomplice instructions should have been given, we nonetheless conclude that the trial court's omission was harmless error. (*Zapien, supra*, 4 Cal.4th at p. 981.)

The "[f]ailure to instruct pursuant to section 1111 is harmless if there is sufficient corroborating evidence. Corroborating evidence may be *slight*, may be *entirely circumstantial*, and *need not be sufficient to establish every element of the charged offense*. [Citations.]" (*Hayes, supra*, 21 Cal.4th at p. 1271, italics added.)

Here, there was ample corroborating evidence. Lemon's account to the police was corroborated by the coroner's examination of the victim's injuries. At trial, the chief medical examiner from the coroner's office testified that the victim was struck across the



face with a blunt object two to three times. The coroner also testified that the gun was shot about one foot away from the victim's face. Furthermore, de los Santos testified that both Lemon and Casper told her that defendant was going to use a gun to threaten the victim to get his car. They also told her that defendant "pistol whipped" the victim with the gun and shot him in the head. In sum, the evidence of defendant's guilt was sufficient to corroborate Lemon's statements that defendant killed the victim. Therefore, any error committed by the trial court in failing to instruct the jury regarding accomplice testimony was harmless. (*Zapien, supra*, 4 Cal.4th at pp. 982-983.)

We note defendant's contention that, although corroborative evidence renders harmless the omission of CALJIC No. 3.11 (the testimony of an accomplice must be corroborated) and CALJIC No. 3.12 (what evidence is sufficient to corroborate accomplice testimony), it does not render harmless the omission of CALJIC No. 3.18 (accomplice testimony must be viewed with caution). He claims that "instead," this particular error is subject to the *People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*) test. Defendant fails to cite any valid authority. He cites *People v. Williams* (1988) 45 Cal.3d 1268, 1314, and *People v. Gordon* (1973) 10 Cal.3d 460, 470. These cases do not support defendant's proposition. On the contrary, it is settled that the omission of instructions on the law of accomplices, including CALJIC No. 3.18, "even if erroneous, is deemed harmless where there was ample evidence corroborating the witness's testimony." (*People v. Arias* (1996) 13 Cal.4th 92, 143; see also, *People v. Sully* (1991) 53 Cal.3d 1195, 1228.) The cases do not distinguish CALJIC No. 3.18 from the other

standard instructions on accomplice testimony. (See *People v. Frye, supra*, 18 Cal.4th 894, 965-966; *People v. Miranda* (1987) 44 Cal.3d 57, 100.)

## II. There Was Substantial Evidence To Support the Firearm Enhancement

Defendant contends that the evidence did not support the jury's true finding, pursuant to section 12022.53, subdivision (d), that defendant intentionally fired the fatal shot. We disagree.

### A. Standard of Review

When faced with a challenge to the sufficiency of the evidence, we "must review the whole record in the light most favorable to the judgment below to determine whether it discloses substantial evidence . . . such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Johnson* (1980) 26 Cal. 3d 557, 578.)

### B. Substantial Evidence Support's the Jury's Finding That Defendant Intentionally Fired the Gun

Viewed in the light most favorable to the judgment, substantial evidence supports the jury's finding that defendant intentionally discharged the firearm. Lemon was apparently the only witness to the shooting. Lemon told the police that when defendant was standing next to the victim, he (Lemon) thought he heard a distinctive click coming from the gun, as though defendant pulled the hammer back on the gun. Lemon also stated that defendant pointed the gun directly at the victim when he demanded the victim's car keys from him. Lemon explained that when the victim failed to comply, defendant angrily asked the victim if he thought he (defendant) was kidding. Defendant

then hit the victim across the face with the gun. Although defendant claims that the gun accidentally fired when he hit the victim across the face, the evidence showed otherwise. The chief medical examiner from the coroner's office testified that, judging from the powder burn, or stippling, around the gunshot wound on the victim's face, the gun was shot about one foot away from the victim's face. He further testified that if the gun had accidentally discharged while defendant was striking the victim's face, the bullet would have traveled in a different direction altogether. Instead, the bullet went directly into the victim's right cheek.

In view of the evidence, the jury could reasonably conclude that defendant intentionally fired the gun at the victim.

DISPOSITION

The judgment is affirmed.

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/s/ Ward  
J.

We concur:

/s/ Hollenhorst  
Acting P. J.

/s/ McKinster  
J.