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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CHIA,

Defendant and Appellant.

B186803

(Los Angeles County
Super. Ct. No. A576188)

APPEAL from a judgment of the Superior Court of Los Angeles County, Michelle R. Rosenblatt, Judge. Affirmed as modified, and remanded with directions.

Tracy J. Dressner, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer and Edmund G. Brown, Jr., Attorneys General, Mary Jo Graves, Chief Assistant Attorney General, Pamela C. Hamanaka, Assistant Attorney General, Jaime L. Fuster and Lance E. Winters, Deputy Attorneys General, for Plaintiff and Respondent.

In 1988, Frank Kow, Michael Sun, and William Wang actively participated in a planned robbery and the shooting of three undercover DEA agents who were posing as drug buyers. Two of the agents were killed, the third was wounded, and Kow and Sun were killed by other agents as they attempted to flee. Wang was wounded but survived and was later convicted of two counts of first degree murder, one count of attempted murder, and one count of robbery, and was sentenced to state prison for life without the possibility of parole. We affirmed (*People v. Wang* (June 3, 1992, B049641) [nonpub. opn.]), and the Supreme Court denied review (*People v. Wang* (Aug. 27, 1992, S027668)).

Meanwhile, Michael Chia was tried separately for the same crimes and convicted as an aider and abettor of two counts of first degree murder, one count of attempted murder, one count of robbery, and one count of conspiracy to commit robbery. We affirmed (*People v. Te-Chia* (May 30, 1991, B043360 [nonpub. opn.]), the Supreme Court denied review (*People v. Te-Chia* (Sept. 4, 1991, S021888)), and the United States District Court denied Chia's petition for a writ of habeas corpus -- but the Ninth Circuit Court of Appeals reversed the district court and remanded the cause with instructions to issue a writ of habeas corpus unless Chia was granted a new trial (*Chia v. Cambra* (9th Cir. 2002) 281 F.3d 1032). The United States Supreme Court granted certiorari, vacated the Ninth Circuit's judgment, and remanded the cause to the Ninth Circuit for further consideration (*McGrath v. Chia* (2003) 538 U.S. 902). On remand, the Ninth Circuit again reversed the district court (*Chia v. Cambra* (9th Cir. 2004) 360 F.3d 997), finding that Chia had been denied a fair trial because the trial court had excluded hearsay statements by Wang (who had been

unavailable because he had invoked his Fifth Amendment rights) that allegedly exonerated Chia.

At his retrial in 2005, Chia called Wang as defense witness, and Wang testified that Chia had not been involved in the robbery or murders of the DEA agents. The jury rejected Wang's testimony (and the rest of Chia's defense) and once again convicted him of two counts of first degree murder, one count of attempted murder, one count of robbery, and one count of conspiracy to commit robbery, with true findings on allegations that a principal had been armed with a firearm during the commission of the murders and the robbery. Chia was sentenced to state prison for an aggregate term of 61 years to life. He appeals, challenging various aspects of the trial and his sentence. We vacate a \$200 fine but otherwise affirm the judgment.

FACTS

A.

In July 1987, Group 4 of the DEA's Los Angeles office began an investigation of Frank Kow, a major dealer in heroin imported from Southeast Asia for distribution in the United States. In October, Kow gave a free sample of heroin to a confidential informant. In November, he sold half an ounce of 80 percent pure heroin to an undercover agent, Paul Seema (one of the murder victims). Later, Kow offered two pounds of heroin to Agent Seema for \$80,000; Seema had told Kow he was working as a broker for two buyers, undercover agents George Montoya (the other murder victim) and Jose Martinez (the attempted murder victim). On February 4, 1988, Kow told Agent Seema the heroin was ready, that he would meet him and the buyers the next morning at

the Tiny Naylor's restaurant in Monterey Park, and that the heroin would be delivered at a residence in Pasadena.

At 7:30 that evening, Agent Nadine Moorin set up surveillance in a car parked near Kow's apartment, and Agent Leo Ducey set up surveillance from a different vantage point. Shortly after 10:00 p.m., Chia drove up and parked his black Mitsubishi in front of Agent Moorin's car. Chia and Wang got out and opened the trunk; Wang took out a bag containing a box and a .45-caliber handgun which he put in his pants, and Wang then walked to Kow's upstairs apartment. Agents Moorin and Ducey both saw Chia stand next to the Mitsubishi for a few minutes, looking up and down the street, and both agents believed Chia was acting as a "look-out" for Wang. As Agent Moorin watched, Chia then followed Wang into Kow's apartment building, went upstairs to a landing outside Kow's apartment, and walked along the landing, looking back and forth (leading Agent Moorin to believe Chia was continuing his role as look-out for Wang).

Shortly thereafter, Wang came out of Kow's apartment without the box and left with Chia in the Mitsubishi. Agent Moorin broadcast a description of the men and the car, including the license plate number, and Agents Stephen Georges and Ducey followed the Mitsubishi until it stopped on Atlantic Boulevard. The agents drove past the Mitsubishi, then turned around, by which time the Mitsubishi was parked, unoccupied, in front of the 8000 Club (on the other side of the street from where it had stopped a moment earlier). As the agents watched, a gray Honda parked behind the Mitsubishi, and Chia got out of the Honda, then entered the club. After awhile, Chia and Wang came out of the club, got into the Honda, and drove away. Agents Georges and Ducey

stayed to watch the Mitsubishi, but Agent Georges later revised the surveillance plan to include Chia and Wang.

B.

The next morning (February 5), Agent Georges and other DEA agents prepared for the sale by counting out \$80,000 for the "buy money," setting up Agent Martinez with a "Kel" transmitter to record any conversations during the transaction (the transmitter later failed), and setting up Agent Georges's Volvo as the undercover car (because it did not have a police radio). Agents Moorin and Ray Berndt set up surveillance from different vantage points at Kow's apartment, and at about 11:25 a.m. saw Chia walk out of Kow's apartment complex, drive away in the Mitsubishi, and turn onto Atlantic Boulevard, heading in the direction of Tiny Naylor's. Agent Ducey started to follow but lost the Mitsubishi in traffic and went on to Tiny Naylor's.

Meanwhile, at about 11:00 a.m., Agent Ralph Partridge set up surveillance in a parking lot on Atlantic Boulevard, across the street from Tiny Naylor's. Agent Partridge saw Kow standing by the restaurant, then saw Chia's Mitsubishi drive through the Tiny Naylor's parking lot. Agent Ducey arrived, parked near Agent Partridge, and saw the Mitsubishi. Agent Georges arrived, parked near Agents Partridge and Ducey, and saw a red Nissan (with Wang as a passenger) circle through the Tiny Naylor's parking lot (driving in the wrong direction). The Nissan parked in the lot, and Chia's Mitsubishi then entered the lot and parked a few spaces away from the Nissan. Sun and Wang got out of the Nissan and walked to the front of the car. Chia got out of his car and stood talking to Sun and Wang for about three minutes, then walked toward the restaurant while Wang

and Sun got back into the Nissan. Chia walked within three to five feet of Kow, then entered the restaurant. Wang and Sun drove out of the parking lot

Chia came out of the restaurant about 10 minutes later, again walked within a few feet of Kow, got back into his Mitsubishi, then drove through the parking lot against the flow of traffic. The Nissan returned to the lot and parked. At about this time, Agents Martinez, Montoya, and Seema entered the parking lot in the Volvo. Agent Martinez parked the car and all three agents got out. Agent Montoya took the car keys and got into the driver's seat, and Agents Seema and Martinez walked to the restaurant, met Kow, then went into the restaurant and sat in a booth. At about the time the agents entered the restaurant, Chia parked the Mitsubishi near the Nissan.

In the restaurant, Kow told Agents Martinez and Seema that the heroin was ready and that it was being held in a "stash house" in Pasadena. The agents agreed to drive with Kow to the house. Meanwhile, the Nissan circled the parking lot against the flow of traffic, then parked close to the Volvo. Wang got out of the Nissan and walked to a pay phone, dialed a number, hung up, waited a minute or two, then walked back to the Nissan. Inside the restaurant, Kow received a page.

As Wang walked back toward the Nissan, Chia pulled the Mitsubishi out of its parking space, drove through the lot against the flow of traffic, then left the parking lot, heading south on Atlantic. Wang got into the Nissan, and Sun drove the Nissan through the lot against the flow of traffic, then pulled behind a tree in another part of the parking lot. Wang got out of the car and watched as Kow and Agents Seema and Martinez came out of the restaurant and returned to

the Volvo. Agent Montoya got into the back seat on the driver's side, Kow into the back seat on the passenger's side, and Agent Seema sat in the front passenger seat. Kow said he wanted to see the money, and Agent Martinez (who was in the driver's seat) got out of the car, opened the trunk, retrieved a leather bag, and handed it to Agent Montoya. Kow looked into the bag at the money and appeared satisfied.

While the agents were with Kow in the parking lot, Chia drove the Mitsubishi behind Agent Georges's car in the lot across the street from Tiny Naylor's, passed alongside Agent Georges's car, then crossed the street into the Tiny Naylor's lot, drove against the flow of traffic by the Volvo, then made a series of turns and parked nearby, facing the Volvo. In the Volvo, Kow told Agent Martinez to drive north on Atlantic, which he did (with Agent Georges and other DEA agents following). Wang got back into the Nissan and sped through the parking lot to catch up to the Volvo. Agent Partridge followed the Nissan.

Agent Martinez drove north into Pasadena, where Kow told him to turn onto Marengo and to stop in front of a house. As Agent Martinez parked, Agent Ducey pulled his car into the driveway of a nearby residence. Kow said he was going to get the "stuff," got out of the Volvo, stepped onto the parkway, then turned and pointed a .45-caliber semi-automatic handgun at Agents Seema and Martinez. Kow told the three agents to put up their hands, at which point the Nissan pulled up behind the Volvo and Wang got out, walked up next to Kow, and pulled out a .38-special caliber blue-steel Colt revolver. Kow demanded the money. Agent Montoya picked up the leather bag and

handed it to Kow, and Kow told the agents to lock their doors. Kow and Wang looked at each other and then began shooting at the agents.¹

Agent Martinez was able to get out of the driver's door, draw his gun, and run for cover. Wang and Kow ran to the Nissan and Sun began driving away. Meanwhile, Agent Ducey had seen a signal from the Volvo (one of the agent's fingertips stuck through the sunroof) that a robbery was in progress and he had called for backup. When the shooting started, Agent Ducey pulled out of the driveway and intentionally crashed into the Nissan as it started to drive away. Kow shot at Agent Ducey and Agent Martinez shot at Sun. Agent Georges drove head-on into the Nissan. A chase ensued, during which Kow and Sun were shot and killed.

Shortly after noon, Los Angeles County Deputy Sheriff Robert Alcaraz, having heard a radio call to be on the lookout for the Mitsubishi in the area of Tiny Naylor's, saw the car as it was about to turn left onto Atlantic, followed it, and called for backup. When Chia stopped at a red light, Deputy Alcaraz (in uniform and driving a marked patrol car) stopped behind Chia, partially opened his door, and pointed his gun in Chia's direction. Chia got out of his car, looked at the deputy, then raised his hands as though gesturing, "What's up?" Deputy Alcaraz told Chia to stay where he was, but Chia got back into his car. Other officers arrived at the scene and Chia (along with his two passengers, Linda Cheng and Jimmy Sun) were ordered out of the Mitsubishi.

¹ Wang fired the two gunshots that killed Agent Seema, and Kow fired the shot that killed Agent Montoya.

C.

From Chia's Mitsubishi, Pasadena police officers recovered a magazine for a .45-caliber semi-automatic handgun, a 50-round box of .45-caliber hollow-point ammunition (brand name P.M.C.) with seven rounds missing, three sets of handcuffs (two still in their original boxes), and three full-face new ski masks (with price tags still attached). Pasadena Police Department Detective Lionel Salgado interviewed Chia four times after he was taken into custody.

1.

At about 7:40 p.m. on February 5, Det. Salgado and another detective interviewed Chia at the police department jail. Chia told them he was staying at a residence on Curtis Avenue, that he had driven down Atlantic that morning to go to a county agency, and that he had stopped to eat but could not remember the name of the restaurant. He then drove back to Curtis Avenue, talked to Jimmy Sun and Linda Cheng, and agreed to take Cheng to the Pasadena courthouse so she could take care of a traffic ticket. Chia also gave Jimmy's brother a ride to work on Atlantic and had just dropped him off when he was stopped by the police. Chia did not mention Tiny Naylor's, Wang or Kow, but when Det. Salgado told Chia he had been seen at Tiny Naylor's, Chia remembered he had stopped there to call Jimmy Sun.

2.

At 3:20 a.m. on February 6, Det. Salgado and another detective again interviewed Chia, this time asking whether he knew Wang. Chia said Wang was his friend, and that on February 3, Wang had told him he planned to "rip off" some drug dealers (the DEA agents) for a "couple thousand dollars." On February 4, according to Chia, Wang had asked Chia to drive him to an

apartment building on Atlantic, which he did; when they arrived, Wang got out of the car with a .45-caliber handgun and took a box of .45-caliber bullets from the trunk. Chia said he had waited in the car, and that Wang had returned 15 minutes later, at which time they again discussed Wang's plan to rob the drug dealers the next day (February 5). Chia was worried about Wang, and the two devised a plan for Chia to help Wang by following him; Wang would stick his hand out of the car window if he got into any trouble with the drug dealers, and Chia would then drive up and get him.

According to Chia, on February 5, he dropped Wang at the apartment complex on Atlantic at about 11:00 a.m., then parked nearby and waited. Chia knew Wang was meeting the drug dealers at Tiny Naylor's, and knew that a red Nissan was to be used in Wang's plan. Chia drove to Tiny Naylor's after he dropped off Wang but did not see Wang or the Nissan and for this reason went into the restaurant, called Jimmy Sun, then took Jimmy's brother to work. When Det. Salgado asked Chia about the handcuffs, ski masks, and gun magazine found in his car, Chia said the ski masks were used for "playing jokes on people." Chia had nothing to say about the handcuffs but said the gun magazine belonged to Wang.

3.

At around 2:00 p.m. on February 7, Det. Salgado and an FBI agent interviewed Chia, and Det. Salgado told Chia for the first time that two DEA agents had been killed.

Chia then told the officers that he had known Wang since December 1987, and that Wang had introduced him to Michael Sun about two weeks

before February 5. On February 3, Wang had said he planned to rip off some drug dealers with Sun and another friend on February 5, and that he was going to earn \$20,000 from the robbery. It was then that Chia agreed to help Wang. Chia said he did not trust Sun and was worried about Wang, and that he had told Wang that the others might try to rob him.

Chia said that at about 10:00 p.m. on February 4, he drove Wang to the apartment complex on Atlantic so that Wang could talk to Sun and a friend about the robbery. He described how Wang got out of the car with a .45-caliber gun, got the bullets from the trunk, and went into the apartment complex, then returned to the car without the gun or bullets. Wang and Chia then went to the 8000 Club, then drove home, at which time Wang told Chia that he had to be back on Atlantic the next morning to meet Sun and the friend because they were going to meet the drug dealers at 11:00 a.m. Chia said he and Wang spent the night at the Curtis Avenue residence where Chia had been staying.

At 9:50 a.m. on February 5, according to this statement, Chia dropped Wang at the apartment complex on Atlantic, then drove around and arrived at Tiny Naylor's at about 11:00 a.m. to find Wang and Sun standing in front of the restaurant. Wang asked, "What are you doing here?" and said, "You're not supposed to be here." Chia tried to act as though he was not there to meet Wang, went into Tiny Naylor's, made his phone call, and then went to see Jimmy Sun and Linda Cheng.

4.

At around 11:50 a.m. on February 9, Det. Salgado and the FBI agent again interviewed Chia. This time, Chia said that at about noon on February 4, he and Wang left a Hacienda Heights residence, at which time Wang had the .45-caliber gun, the ski masks, and the bullets. When the FBI agent asked Chia about the handcuffs, Chia did not have any explanation. When asked about the ski masks, Chia again said they were used to play jokes on friends.

When Det. Salgado told Chia the DEA had been watching Kow's apartment, Chia repeated his statement about delivering the handgun the night before the murders, but this time mentioned that he had stepped out of the car. When Det. Salgado again asked about the day of the shooting, Chia said he had waited awhile for Wang to bring him \$20 for gas, then gone into the apartment complex looking for Wang but did not find him, then walked back to his car and got in. He said Wang came out a few minutes later and gave him the money. Chia got something to eat, then returned to Tiny Naylor's at 11:00 a.m., ran into Wang and Sun, and went into the restaurant to make a phone call. At some point when he was inside the restaurant, he heard a car horn, looked outside, and saw Sun driving a red car with Wang as a passenger. Chia said he then walked out of the restaurant, went back to his car, and noticed Wang and Sun in a red car parked in the lot.

D.

As noted at the outset, Chia was charged with two counts of first degree murder, one count of attempted murder, one count of robbery, and one count of conspiracy to commit robbery, with allegations that a principal had been armed with a firearm during the robbery, murders, and attempted murder. At

his second trial, the People presented the eyewitness testimony of DEA agents Moorin, Georges, Partridge, Ducey, Berndt, and Martinez, Los Angeles Sheriffs Deputies Verdugo and Alcaraz, and Pasadena Police Officers Thomas and Salgado, which established the facts summarized above. In addition, Agents Georges, Partridge, and Ducey testified about their training and expertise in surveillance and counter-surveillance techniques and drug deals, and they opined that Chia's activities at Tiny Naylor's -- driving through the parking lot, parking, leaving, returning, parking -- were consistent with counter-surveillance techniques.

A gun shop owner placed Chia (in the company of other people "of Asian descent") in his shop two or three times during December 1987 and January 1988, and testified that one of Chia's companions had purchased at least one box of Hornady .45-caliber hollow point ammunition. A firearms expert testified that the bullet recovered from Agent Montoya's body was a .45-caliber Hornady hollow-point.

The jury rejected Chia's defense (he had not intended to be involved in the planned robbery and murders) and convicted him as charged.

DISCUSSION

I.

Chia contends the evidence is insufficient to support the jury's finding that he aided and abetted the robbery, murders, and attempted murder because, he claims, the evidence does not show that he acted with the intent to encourage or facilitate the crimes as required by *People v. Beeman* (1984) 35

Cal.3d 547, 560. The rules of appellate review compel rejection of this argument.

We review the record in the light most favorable to the judgment and will not substitute our conclusions or credibility calls for those of the jury. (*People v. Ceja* (1993) 4 Cal.4th 1134, 1138-1139; *People v. Bloom* (1989) 48 Cal.3d 1194, 1208.) Intent -- which is rarely admitted or otherwise readily susceptible of direct proof -- may be inferred from the facts and circumstances surrounding the charged offense, and reasonable inferences drawn by the jury are sufficient to constitute substantial evidence of intent. (*People v. Pre* (2004) 117 Cal.App.4th 413, 420; *People v. Bloom, supra*, 48 Cal.3d at p. 1208; *People v. Ceja, supra*, 4 Cal.4th at pp. 1138-1139; *People v. Rodriguez* (1999) 20 Cal.4th 1, 11.)

So viewed, the record contains substantial evidence to support the jury's finding that Chia intended to encourage and facilitate the charged offenses. It is undisputed (and conceded by Chia) that he knew his cohorts were going to rob and murder the "drug dealers" (that is, the DEA agents). With that knowledge, Chia went with Kow to purchase the ammunition used to murder Agent Montoya; drove Wang to Kow's apartment where, with Chia's knowledge, Wang delivered one of the guns used in the murders; drove Wang to Kow's apartment on the day of the crimes, knowing Wang and Kow were on their way to commit the robbery and murders; and acted as the lookout at Tiny Naylor's. Moreover, at the time of his arrest, Chia had in his possession items that could have been used in the robbery (a magazine for a .45-caliber weapon, ammunition, handcuffs and ski masks).

No more was required.

II.

Chia contends the trial court should not have permitted the prosecutor to use a PowerPoint presentation at trial. We disagree.

The Power Point presentation is a diagram of the area around Tiny Naylor's. Moving colored lines show the routes taken by the cars and the placement of the various participants (Chia and his cohorts as well as the DEA agents). We have viewed the presentation (it is recorded on a compact disc and was admitted into evidence) and find nothing objectionable about it -- because all it does is illustrate the testimony of the DEA agents who were present at the scene. The relevance of the diagram as an aid to understanding the agents' testimony was great, whereas its prejudice, if any, was minimal at most, and its admission was certainly not an abuse of discretion. (Evid. Code, § 352; *People v. Ayala* (2000) 24 Cal.4th 243, 282; *People v. Lewis* (2001) 26 Cal.4th 334, 374.)

We reject Chia's contention that the presentation should have been excluded on the ground that it was cumulative; it was the only exhibit that fully illustrated the testimony.

III.

Chia contends he was deprived of a fair trial because several DEA agents were present in the courtroom at various times during trial. We disagree.

A.

When the jury returned to the courtroom for the afternoon session on the first day of trial, it appears that everyone in the audience stood. Defense

counsel objected, the audience sat, and the prosecutor made his opening statement. When he finished, the court excused the jury but asked the audience to remain and told those present that it would be inappropriate for them to stand when the jury entered and left the courtroom.

About a week later, defense counsel complained to the court that there were 15 to 20 DEA agents in the hallway standing around when the jurors left the courtroom, and asked for an order telling them to stay away from all the jurors during breaks. The prosecutor explained that different agents attended the trial on different days, and agreed when the court suggested his investigator could take charge and make sure the agents were kept in another part of the hallways when the jurors were on break.

Other than the one reference to 15 or 20 agents in the hallways, which in context might have been hyperbole, there is nothing in the record to establish how many agents were in or around the courtroom on any particular day or to suggest they were in uniform or otherwise distinguishable from other members of the public, and there was no request by the defense to exclude the agents.

Following the verdicts, Chia filed a motion for a new trial but did not mention the presence of the agents in his written motion. At the hearing on that motion, defense counsel nevertheless raised the point, noting the presence of the agents throughout the trial, conceding that the prosecutor had cooperated with the court, but suggesting that despite all this the “jury was pressured, they felt this pressure. And the scales of justice weren’t equal. It was unfair.” The trial court denied the new trial motion with these comments about the agents:

“With respect to the number of DEA agents who were in court, on many days there were -- the courtroom was full; and on many days it was not, and there were -- now and again -- just a few people in court. But there is, number one, no reason to believe that the jury was pressured in any way. [¶] The parties do have a right to have a public trial, and the public has the right to be present. There were no comments made. This court made sure, and orders were made in open court, and directed to the People and the investigator . . . to be sure that the agents were never near, close to, near the jury outside the courtroom, that there were no comments or actions done in any way that would influence the jury. In fact, the court requested that, rather than stand, as they [are] accustomed to doing in federal court, as the jury entered the courtroom, the court asked that all members of the audience, just remain seated each day, so as not to call attention to who might be here on behalf of the DEA as opposed to on behalf of Mr. Chia or other members of the public. [¶] There is nothing that this court observed in any way to show that the jury was pressured.”

B.

We reject Chia’s contention that the presence of the agents deprived him of a fair trial. There is nothing in the record to show that the agents were identifiable (other than to the court and the lawyers) as DEA agents. As noted, there is nothing to suggest they were wearing uniforms, and there is certainly nothing to suggest they wore badges or buttons or any kind of identifying marks. Although Chia contends in his brief that the agents could be recognized as DEA agents because they had the “typical clean-cut, dark-suited, spit-polished look” of DEA agents, there is nothing in the record to support this assertion or to show whether they were even wearing suits rather than casual clothing.

Under these circumstances, the presence of the officers could not possibly have affected the fairness of the trial or its outcome. (*People v. Cummings* (1993) 4 Cal.4th 1233; and see *Carey v. Musladin* (Dec. 11, 2006) ___ U.S. ___; 127 S.Ct. 649 [reversing the 9th Circuit and upholding the California appellate court's determination that the defendant was not prejudiced when spectators wore buttons depicting the murder victim].)

IV.

Chia contends, the Attorney General concedes, and we agree that the trial court should not have imposed a \$200 parole revocation fine -- because the statute creating that fine was not enacted until years after these crimes occurred. (Pen. Code, § 1202.45, added by Stats. 1995, ch. 313, § 6, p. 1758; and see *People v. Callejas* (2000) 85 Cal.App.4th 667, 676-678.)

But unless the Supreme Court directs otherwise in *People v. Alford* (2006) 137 Cal.App.4th 612, review granted May 10, 2006 (\$142508), we disagree with Chia's claim that, for the same reasons, the trial court should not have imposed a \$20 court security fee. (Pen. Code, § 1465.8, added by Stats. 2003, ch. 159, § 25.) Unlike the parole revocation *fine*, the court security *fee* does not punish a defendant; it is simply an administrative fee imposed for funding purposes. (*People v. Wallace* (2004) 120 Cal.App.4th 867.)

V.

Chia's sentence of 61 years to life includes a nine-year upper term sentence for the attempted murder count, which Chia claims must be vacated in light of *Blakely v. Washington* (2004) 542 U.S. 296. Although the Supreme Court's recent decision in *Cunningham v. California* (2007) __ U.S. __ (2007 WL

135687) establishes that Chia is correct insofar as he claims that the facts relied on by the trial court should have been submitted to the jury, the Attorney General asks us to find either (1) that the issue was forfeited by reason of Chia's failure to raise it at his sentencing hearing, or (2) that the error was harmless. We reject the Attorney General's forfeiture argument (*People v. Vera* (1997) 15 Cal.4th 269, 276-278; *People v. Saunders* (1993) 5 Cal.4th 580, 589, fn. 5) but agree that, on these facts, the error was harmless beyond a reasonable doubt.

A.

As Chia necessarily concedes, *Blakely* error is subject to a harmless error analysis. (*Washington v. Recuenco* (2006) __ U.S. __, 126 S.Ct. 2546, 2553 ["[f]ailure to submit a sentencing factor to the jury . . . is not structural error" and is subject to the harmless error rule]; *People v. Sengpadychith* (2001) 26 Cal.4th 316, 327.) On this record, we have no doubt that Chia's jury (applying the reasonable doubt standard) would have reached the same conclusion as the trial court.

B.

After hearing from Chia's lawyer, Chia himself, and others who spoke on his behalf, the trial court found that Chia "knowingly participated in a plot not only to rob drug dealers, but to murder them as well; and at the time that he aided William Wang, the evidence shows that he knew multiple lives would be taken. [¶] Further, the manner in which the crime was carried out demonstrated criminal sophistication . . . and planning on the part of Mr. Chia, one example of that being the counter surveillance driving engaged in by Mr. Chia; and therefore, the court finds him unsuitable for probation." After imposing consecutive sentences of 25 years to life for the murders of

Agents Seema and Montoya plus 2 years for the armed allegations ancillary to those counts, the court selected the 9-year upper term for the attempted murder count for these reasons:

“The factors in aggravation that the court considered included that the crime involved great violence disclosing a high degree of cruelty, viciousness and callousness. [¶] It was committed for the money, yet Mr. Chia aided and abetted in the crime knowing that more than a robbery of \$80,000 was involved, that the needless loss of human life was also found. [¶] Secondly, the manner in which the crime was carried out involved planning and sophistication. [¶] Several individuals involved with Mr. Chia, bringing Mr. Wang to [a] location where he could deliver a gun to Mr. Kow; he was acting as a lookout; his conducting of counter surveillance; his supplies.

“In mitigation, Mr. Chia has no record. Mr. Chia was not present at the scene, and the court did consider the very fine recommendations and statements by those who spoke on his behalf. [¶] Now I do disagree with the representation . . . that [the] inducement by others to participate was a factor in mitigation. The court finds that not to be a factor in mitigation in this case. And in balancing the factors in aggravation against the factors in mitigation the court finds that the factors in aggravation do greatly outweigh the factors in mitigation.

“And two other comments: I agree, that in terms of factors in mitigation and aggravation, that the fact that the victims were members of D.E.A. was not an aggravating factor [for] sentencing. The court did not find that to be an aggravating factor. And I disagree with the characterization. While I

appreciate it, I understand it, I disagree with the characterization that the court has been pressured to sentence Mr. Chia more harshly because those killed [were] D.E.A. agents. This court acts independently and not based upon community-centered [*sic*]. This is an independent sentence. It's not merely following what the judge did before. Although a determination was made not to sentence more harshly than was previously done, and the court does take into consideration all of the evidence regarding Mr. Chia's character that has been presented."

C.

To find harmless error in this context, we need only find that at least one of the aggravating circumstances would have been found true by the jury beyond a reasonable doubt. (*People v. Osband* (1996) 13 Cal.4th 622, 728-729 [a single aggravating factor is sufficient to support an upper term sentence].) As the Attorney General points out, the *Cunningham* error in this case is that the *facts* on which the trial court relied -- that the crimes involved great violence, viciousness and callousness and so on -- were not submitted to the jury, and it is only for that reason that the sentence is flawed. Put another way, if we are satisfied beyond a reasonable doubt that the jury would have found any one of these facts beyond a reasonable doubt, then the trial court's error in failing to have the jury decide that fact is harmless -- because nothing in *Cunningham* places the actual sentencing decision in the hands of the jury. (*Cunningham v. California, supra*, 2007 WL 135687 at *4 [it is the "sentence-elevating fact-finding" inherent in DSL that violates the defendant's right to a jury trial].)

The jury that convicted Chia would certainly have agreed with the trial court that the attempted murder involved great violence disclosing a high

degree of cruelty, viciousness and callousness. (Cal. Rules of Court, rule 4.421(a)(1).)² These were not simple murders (assuming that any murder could be so described) but well-planned executions and an attempted execution committed in furtherance of a robbery, and it is inconceivable that the jury would have found otherwise.

Chia's suggestion that he was not involved in the planning but merely "helped out Wang, thereby making it more likely that Wang would go through with the plan" is simply not borne out by the record. Chia's participation in the purchase of ammunition for one of the guns and his counter surveillance efforts enabled Wang and Kow to do what they did. More to the point, the extent of Chia's participation is relevant to the trial court's finding that the manner in which the attempted murder was carried out involved planning and sophistication (rule 4.421(a)(8)), not to the vicious and callous manner in which the attempted murder was carried out.

In sum, we are satisfied beyond a reasonable doubt that, had the jury been asked, it would have found beyond a reasonable doubt that the attempted murder involved great violence disclosing a high degree of cruelty, viciousness and callousness. For this reason, the *Cunningham* error was harmless beyond a reasonable doubt.

² All rule references are to the California Rules of Court.

DISPOSITION

The judgment is modified by striking the \$200 parole revocation fine and, as modified, affirmed and remanded to the trial court with directions to issue a corrected abstract of judgment and forward it to the Department of Corrections.

NOT TO BE PUBLISHED.

VOGEL, J.

We concur:

MALLANO, Acting P.J.

JACKSON, J.*

*Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.