Filed 2/26/09 In re D.M. CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

In re D.M., a Person Coming Under the Juvenile Court Law.	
THE PEOPLE, Plaintiff and Respondent, v. D.M., Defendant and Appellant.	A120252 (Alameda County Super. Ct. No. J-189113)

D.M. (defendant) appeals from the orders declaring wardship (Welf. & Inst. Code, § 602) and committing him to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice (DJJ), after a finding that he had committed first degree murder (Pen. Code, § 187). Included in his commitment term of 38 years are consecutive 10-year and 3-year enhancements for personal use of a firearm and infliction of great bodily injury. Defendant contends that (1) there is insufficient evidence to support findings that he was either the actual killer or an aider and abettor, and (2) the findings and calculations with respect to the enhancements are erroneous. We affirm the wardship order and remand to allow the juvenile court to conclude its consideration of the alleged enhancements and recalculate the maximum period of physical confinement.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. The Prosecution

On the night of January 30, 2007, Cheri B. met her cousin Morris McCall at a residence on 35th Avenue, located between Brookdale Avenue and Allendale Avenue in the City of Oakland. At around 9:10 p.m. or 9:15 p.m., Cheri and McCall left the residence to buy some juice at a Quik Stop market located on 35th Avenue, about four blocks north of the residence. After they made their purchase, they walked back towards the residence. It was very dark out and there were no streetlights in the area where they were walking.

As they were proceeding, Cheri saw what she thought was some paper money on the sidewalk on Allendale. Cheri and McCall turned left onto that street and went about five feet forward to investigate. When they saw that the object was not money, they turned around to face 35th Avenue. Cheri looked up and noticed a man standing on the sidewalk on the opposite side of 35th Avenue. He had one hand over his mouth and she could see a light that appeared to be coming from a cell phone that he was holding by his face. She did not observe any other men nearby. Within a second, the man raised a gun with his other hand and fired five or six shots towards her and McCall. She did not hear shots coming from any other weapons. She ran down Allendale, away from the shooter, and hid behind a white car. In court, she described the shooter as an African-American of average height, between 5 feet 5 inches to 6 feet 2 inches tall, with short hair and a caramel-colored complexion.

Cheri came out from behind the car when she heard McCall asking for help. She found him lying on the sidewalk on the southeast corner of 35th Avenue and Allendale, bleeding from his chest. She looked both ways along 35th Avenue but did not see anyone. She called 911 and applied pressure to the chest wound while she waited for the ambulance. McCall died from his gunshot wounds later that night. Eight 9 millimeter shell casings were recovered from the west side of 35th Avenue, near the spot where Cheri said the shooter had been standing. Four slugs were also found at the scene.

Officer Chad Ingebrigtsen arrived at the scene shortly after the shooting and interviewed Cheri. She described the shooter as an African-American male, approximately 19 years of age and about 5 feet 8 inches tall, weighing 140 pounds. At trial eight months after the homicide, Cheri was unable to say that defendant was the shooter.[1] She also stated that defendant's hair did not resemble the shooter's hair.

On February 2, 2007, Officer Robert Rosin was on patrol in East Oakland when he arrested defendant for possession of marijuana for sale. While defendant was sitting in the back of the patrol car, he spontaneously told Rosin he had some information about a murder on Allendale that could possibly help to solve the crime. He offered to provide that information in exchange for being released from custody. Rosin told defendant that if the information he had to give was helpful to the investigation then he would recommend the charges against him be dropped.

A few days later, Sergeants Todd Crutchfield and Derwin Longmire met with defendant at juvenile hall for about 30 minutes. The officers did not read defendant his *Miranda*[2] rights prior to speaking with him about the murder because they did not have a reason to believe he was a suspect. Defendant told the officers that he had been driven to a location near the crime scene by a person he knew as "O'Neal." O'Neal and another man known as "Bin Laden" walked towards the intersection of 35th Avenue and Allendale while defendant stayed in the car. When they returned, O'Neal told defendant that Bin Laden had just shot someone.

The next day, which was February 6, 2007, the officers interviewed defendant again. This time, they read defendant his *Miranda* rights at the outset of the interview. A portion of the interview was taped and the recording was played in court.

On the tape, defendant stated he had information about a murder that had occurred in East Oakland around 35th Avenue and Allendale on Tuesday or Wednesday of the

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[1] Defendant was 15 years old at the time of the shooting. When he was arrested on February 2, 2007, he was 6 feet 3 inches tall and reported that he weighed 177 pounds.

[2] *Miranda v. Arizona* (1966) 384 U.S. 436.

prior week at around 8:30 or 9:30 p.m.[3] According to the recorded statement, before the murder occurred, O'Neal, Bin Laden, "Mike," and "Raheem" drove to defendant's cousin's house and picked him up to go and shoot "Morris." Defendant did not personally shoot anyone. Prior to the shooting, the men stopped at a house to pick up some guns. Defendant was given a gun that could have been a .38- or a .32-caliber revolver. He was also given a "chirper" (push-to-talk cell phone), and instructed to use it to let O'Neal know if he spotted any police officers.

After arriving at the location, defendant took a position at 35th Avenue near Allendale. Bin Laden went to the opposite corner on 35th Avenue, while the others parked the car further down Allendale. Defendant fired about six shots in the air while in close proximity to Cheri and McCall, with the intention of herding them towards where the other shooters were waiting. When McCall started running, the others fired their weapons and Bin Laden ran towards McCall from across 35th Avenue and shot him. During other interviews with defendant, which were not taped, he mentioned that he had been promised a set of automobile rims in exchange for acting as a lookout.

Subsequently, Crutchfield interviewed three of the people defendant identified as having been involved in the shooting. Crutchfield was not able to locate the person defendant had identified as "O'Neal." The three people all denied participating in the crime and some of them had alibis. After these interviews, Crutchfield concluded that defendant had been truthful about his involvement in the crime, but had lied about the identity of the other perpetrators.

On March 26, 2007, a wardship petition was filed against defendant alleging that he had committed murder (Pen. Code, § 187),[4] with the additional allegations that he had used a firearm and had personally inflicted great bodily injury (§§ 12022.5, subd. (a), 12022.53, subd. (d), and 12022.7).

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[3] The murder occurred on January 30, 2007, which was a Tuesday.

[4] All further statutory references are to the Penal Code except as otherwise indicated.

At the detention hearing, which was held on March 27, 2007, defendant indicated that he had something he wanted to say. After the court acknowledged him, he stated: "Man, I ain't killed nobody. I just was there when it happened, sir." The court responded: "I wouldn't be saying that."

On September 27, 2007, at the conclusion of the prosecution's case, defendant brought a motion to dismiss the petition under Welfare and Institutions Code section 701.1. The motion was denied. In rendering this decision, the court made a finding that defendant was the actual killer.

B. The Defense

Defendant made several attempts to construct a defense based on alibi. Tina Alexander, defendant's mother, initially testified that defendant was at home on the evening of January 30, 2007, participating in the family's birthday party for his younger brother. He did not leave the house until after 11:30 p.m. On cross-examination, however, she admitted that the party had actually occurred on February 1, 2007. She later testified that defendant stayed at home during the entire last week of January 2007 because the family did not have any money to go anywhere.

In contrast to his mother's testimony, defendant testified that on January 30, 2007, he stayed home until about 7:00 p.m. or 9:00 p.m. His friend Phil and Phil's girlfriend picked him up and they drove to Oakland and had some pizza. They spent some time in West Oakland and then drove defendant back to his home at around 10:00 p.m. He denied that he was at 35th Avenue and Allendale that night.

Defendant also denied having volunteered any information about the murder after his arrest on February 2, 2007. He stated that when he was arrested, the officers had asked him if he knew a man named Morris McCall. He also testified that when Longmire and Crutchfield interviewed him at the police station on February 6, 2007, they badgered him into telling them different stories until "they got a story to make it seem like it was good enough to be real." He claimed he had based part of his story on a scene from a movie, and that the officers had "helped" him by telling him where the casings had been

found. He also denied making the incriminating statement at his detention hearing. He claimed that he had actually stated: "All I said was that I was there."

When asked why he had lied about the identities of the other perpetrators, defendant stated that he falsely accused them because they had shot his cousin before. He denied that he had any prior contact with McCall. Regarding his taped statement, he stated that he believed the police had used mental pressure to force him to incriminate himself.

C. The Decision

On December 10, 2007, the juvenile court found beyond a reasonable doubt that defendant was present at the scene of McCall's murder, and that he "at the very least" had acted as an aider and abettor. The court stated it was unable to determine whether he had personally fired the shots that killed McCall. The court found he was not forced or coerced to give information about the murder, but that he voluntarily initiated a dialog with the police in an effort to get out of the marijuana charge. The reporter's transcript reflects the court sustained the murder allegation and, in spite of the fact that it could not conclude defendant was the actual killer, also sustained the section 12022.53, subdivision (d), allegation that he personally discharged a handgun proximately causing great bodily injury to McCall. While the reporter's transcript is silent as to the other two alleged firearm enhancements, the minute order states that all three enhancements were sustained.

DISCUSSION

A. The Court did not Err in Denying Defendant's Motion to Dismiss

Defendant first claims that the juvenile court erred in denying his Welfare and Institutions Code section 701.1 dismissal motion brought at the close of the prosecution's case.[5] He contends the evidence is insufficient to support the finding that he was the

[5] Welfare and Institutions Code section 701.1 provides: "At the hearing, the court, on motion of the minor or on its own motion, shall order that the petition be dismissed and that the minor be discharged from any detention or restriction therefore ordered, after the presentation of evidence on behalf of the petitioner has been closed, if the court, upon weighing the evidence then before it, finds that the minor is not a person described by Section 601 or 602. If such a motion at the

"actual killer." He focuses his argument on Cheri's eyewitness testimony, arguing that her description of the shooter was "markedly at odds" with his actual physical appearance. He also contends that the court did not critically examine the "major discrepancies" between his tape-recorded statement and Cheri's testimony. He claims the recorded statement is also inconsistent with the physical evidence taken from the scene.[6] Finally, he asserts the evidence is insufficient to support a finding that he acted as an aider and abettor.

A motion under Welfare and Institutions Code section 701.1 challenges the sufficiency of the prosecution's evidence at the close of its case-in-chief. In ruling on such a motion, a juvenile court weighs the evidence, evaluates witness credibility and decides if the prosecution's case against the defendant has been proved beyond a reasonable doubt. (*In re Andre G.* (1989) 210 Cal.App.3d 62, 66.) We review the court's ruling under the substantial evidence standard. (*Id.* at p. 65.)[7] That is, we examine the record in the light most favorable to the judgment to determine whether there is substantial evidence such that " 'any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.' " (*People v. Marshall* (1997) 15 Cal.4th 1, 34, italics omitted, quoting *Jackson v. Virginia* (1979) 443 U.S. 307, 319.) In doing so, we assume all facts in support of the ruling that may reasonably be deduced from the evidence (*In re Man J.* (1983) 149 Cal.App.3d 475, 482), and we accept the court's credibility determinations (see *People v. Ochoa* (1993) 6 Cal.4th 1199, 1206). We do not reassess the evidence in order to substitute our opinion for that of the juvenile court. (*In re George T.* (2004) 33 Cal.4th 620, 630–631.) We may not set aside a denial

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close of evidence offered by the petitioner is not granted, the minor may offer evidence without first having reserved that right."

[6] On appeal, defendant does not challenge the voluntariness of the statements he made to the police.

[7] Our review of the evidence is limited to that which was before the juvenile court at the time it ruled on the motion under Welfare and Institutions Code section 701.1. (See *People v. Cole* (2004) 33 Cal.4th 1158, 1212–1213 [reviewing an analogous motion for acquittal under Pen. Code, § 1118.1, made at the close of the prosecution's case-in-chief].)

of the motion on the ground of insufficiency of the evidence unless " 'it clearly appears that upon no hypothesis whatsoever is there sufficient substantial evidence to support the conclusion reached by the court below.' [Citations.]" (*In re Man J., supra,* at p. 482.)

Murder is defined as an unlawful killing committed with malice aforethought. (§ 187, subd. (a).) Malice may be express or implied. Malice is express "when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature." (§ 188.) It is implied "when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart." (*Ibid*.) Defendant does not dispute that McCall was murdered. Rather, he denies that he is a responsible party.

Setting aside the question of whether defendant fired the fatal shot, we conclude substantial evidence supports the finding that he acted as an aider and abettor. "[A] person aids and abets the commission of a crime when he or she, acting with (1) knowledge of the unlawful purpose of the perpetrator; and (2) the intent or purpose of committing, encouraging, or facilitating the commission of the offense, (3) by act or advice aids, promotes, encourages or instigates, the commission of the crime." (*People v. Beeman* (1984) 35 Cal.3d 547, 561.) "The doctrine [of] *Beeman* . . . 'snares all who intentionally contribute to the accomplishment of a crime in the net of criminal liability defined by the crime, even though the actor does not personally engage in all of the elements of the crime.' [Citation.]" (*People v. Montoya* (1994) 7 Cal.4th 1027, 1039.) An example of aiding and abetting includes acting as a lookout while others commit the offense. (*Id.* at pp. 1043–1044.)

Neither presence at the scene of a crime nor knowledge of but failure to prevent it is sufficient to establish aider and abettor liability. (See *People v. Durham* (1969) 70 Cal.2d 171, 181; *In re Jose T.* (1991) 230 Cal.App.3d 1455, 1460.) However, mere presence at the scene of a crime may be considered with other meaningful evidence, such as companionship and conduct before and after the offense, in assessing aider and abettor liability. (*In re Lynette G.* (1976) 54 Cal.App.3d 1087, 1094.)

The evidence presented during the prosecution's case-in-chief was sufficient to establish defendant was present when Morris McCall was murdered and that he was an active participant in the crime. Defendant's own statements placed him at the scene, with a gun in his hand, firing shots into the air in an effort to herd the victim towards others who were waiting to kill the victim. He admitted he knew in advance of the plot to kill McCall and that he willingly armed himself and acted as a lookout. Defendant disclosed that as motivation for his participation, he was promised a set of wheel rims. His description of the time, location, and manner in which the crime was committed was consistent with the physical evidence as well as with the eyewitness's testimony. While Cheri's testimony suggests that the shooter may have acted alone, the evidence supplied by defendant's own report of his involvement and his recitation of details which would be known only to one present at the incident constitutes sufficient evidence to support a finding that he participated in the killing whatever his precise role.

Even if defendant did not fire any shots that night, his admission that he acted as a lookout constitutes sufficient grounds to find liability as an aider and abettor. He himself admits that "it may have been reasonable for the juvenile court to have inferred that [defendant] was present on the scene in some capacity." He also acknowledges that "If the version of events [defendant] recounted in his recorded statement were accepted as true, then [defendant] concedes he would be liable as an aider and abettor based on his activities as a lookout and his firing of a gun with the intent of driving the victims into the actual killer's gunfire." He claims, however, that the court erred in relying on his statement because "no credible evidence actually corroborates the falsehood-ridden story [he] told the homicide investigators."

Defendant cites to no authority for the proposition that corroborating evidence is required under these circumstances. While it is true that Cheri's testimony is inconsistent with a finding that more than one person was involved in the shooting, as a reviewing court we are not bound to reweigh the evidence presented to the juvenile court. And while portions of his taped statement were clearly false, defendant's admissions were credible insofar as they were consistent with respect to the time, place, and manner of

McCall's murder. Further, as defendant acknowledges, his admissions were corroborated by his spontaneous statement at the detention hearing that he "just was there when it happened." We conclude substantial evidence supports the court's denial of the motion to dismiss.

B. Firearm Enhancements

Defendant argues that the true finding on the section 12022.53, subdivision (d), enhancement must be set aside. We agree.

At the dispositional hearing held on December 24, 2007, the court set the degree of murder as first degree. The court set the maximum term of confinement for the murder charge at 25 years. The court then added consecutive terms for the alleged enhancements under section 12022.5, subdivision (a),[8] and section 12022.7,[9] of 10 years and 3 years, respectively. Defendant was committed to the Division of Juvenile Justice. The total maximum term of confinement was set at 38 years.

While at the conclusion of the jurisdictional hearing on December 10, 2007, the juvenile court indicated that it was sustaining the section 12022.53, subdivision (d),[10] allegation, it did not at that hearing make findings disposing of the other two enhancements. It did not reference this finding at the dispositional hearing. The minute orders for both the December 10th and December 24th hearings, however, reflect positive

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[8] Section 12022.5, subdivision (a), provides: "Except as provided in subdivision (b) [pertaining to assault weapons], any person who personally uses a firearm in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for 3, 4, or 10 years, unless use of a firearm is an element of that offense."

[9] Section 12022.7, subdivision (a), states: "Any person who personally inflicts great bodily injury on any person other than an accomplice in the commission of a felony or attempted felony shall be punished by an additional and consecutive term of imprisonment in the state prison for three years."

[10] Section 12022.53, subdivision (d), provides, in part: " Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), [including murder], . . . personally and intentionally discharges a firearm and proximately causes great bodily injury, as defined in Section 12022.7, or death, to any person other than an accomplice, shall be punished by an additional and consecutive term of imprisonment in the state prison for 25 years to life."

findings on all three enhancements. As defendant notes, it is well settled that when there is a conflict between the reporter's and clerk's transcripts, the oral pronouncement of judgment or order control. (*People v. Mesa* (1975) 14 Cal.3d 466, 471; *People v. Hartsell* (1973) 34 Cal.App.3d 8, 14.) Relying on the reporter's transcript, it appears that the court never made any factual findings with respect to the section 12022.7 and 12022.5, subdivision (a), allegations, even though it imposed consecutive terms under those provisions. In yet another inconsistency, the commitment order does not reflect a finding of either a section 12022.53, subdivision (d), enhancement or a section 12022.5 enhancement. Rather, it reflects two enhancements, one for section 12022.53, subdivision (a),[11] and another for section 12022.7.

In spite of the fact that the juvenile court did not reference the section 12022.53, subdivision (d), finding at the dispositional hearing, the Attorney General argues that the finding should be sustained because it is supported by substantial evidence. However, the record is ambiguous as to whether the court actually intended to sustain this finding at the conclusion of the jurisdictional hearing. Specifically, while the court made a finding that defendant was the actual shooter when it denied his Welfare and Institutions Code section 701.1 motion to dismiss at the conclusion of the prosecution's case, by the end of the proceeding the court was much more ambivalent: "From my review and consideration of all of the evidence presented, I find that while at this time *I am unable to say whether the minor personally pulled the trigger* and fired the shots that totally [*sic*] wounded and killed a human being, the victim, Morris McCall, from the totality of the evidence, including the minor's confessions and admissions, I am convinced beyond a reasonable doubt that at the very least he was an aider and abettor, and therefore a principal in the murder of Morris McCall." (Italics added.) Despite having equivocated on whether defendant was the actual killer, the court nevertheless went on to make a positive finding on the section 12022.53, subdivision (d), enhancement, stating: "I sustain the 12022.53(d)

[11] The reference to section 12022.53, subdivision (a), appears to be in error as this subdivision sets forth the list of felonies to which the enhancements apply. Subdivision (a) does not itself set forth any enhancement terms.

allegation and find that the minor personally used a firearm, to wit, a handgun, and that he caused great bodily injury to Morris McCall." Simply put, the two findings are inconsistent. It is also noteworthy that the court did not reference this enhancement at the subsequent dispositional hearing, nor did it impose an additional 25-year-to-life term when it calculated the maximum term of confinement.

The Attorney General argues that if defendant is not found to have been the actual shooter, "the appropriate remedy would be to reduce the enhancement to section 12022.53, subdivision (c)."[12] Application of this subdivision would add a consecutive 20-year term. Defendant, on the other hand, offers to concede that the commitment order should reflect the 10-year term that the court imposed under section 12022.5, subdivision (a). Because of the inconsistencies among the minute orders, the reporter's transcripts, and the commitment order, we decline to follow either party's recommendation.

In sum, the commitment order must be modified to reflect the correct statutory basis for the enhancements. Rather than attempting to divine what the juvenile court actually intended to impose by way of firearm enhancements, we will remand this matter. As guidance to the court, we again note that at the conclusion of the jurisdictional hearing it was not able to conclude that defendant was the actual killer. In the absence of such a finding, it would appear that the imposition of an enhancement under section 12022.53, subdivision (d), would be inappropriate. Additionally, we note that section 12022.7, subdivision (g), specifies: "This section *shall not apply to murder* or manslaughter or a violation of Section 451 or 452." (Italics added.) Thus, the 3-year enhancement as set forth in section 12022.7, subdivision (a), would also appear to have no application to this case.

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[12] Section 12022.53, subdivision (c), provides: "Notwithstanding any other provision of law, any person who, in the commission of a felony specified in subdivision (a), [including murder], personally and intentionally discharges a firearm, shall be punished by an additional and consecutive term of imprisonment in the state prison for 20 years." This enhancement was alleged in the petition filed against defendant and was never disposed in the court's findings on the record or in minute orders.

DISPOSITION

The wardship order is affirmed. The order committing defendant to the DJJ is affirmed. The order sustaining the enhancement allegations and calculating the maximum period of physical confinement is reversed. Upon remittitur issuance, the juvenile court is to reconsider the enhancement allegations and recalculate defendant's maximum period of physical confinement in a manner consistent with the views set forth in the body of this opinion. The jurisdictional and dispositional minute orders are affirmed in all other respects. The court shall complete an amended commitment to the California Department of Corrections and Rehabilitation, Division of Juvenile Justice form (JV-732) and is then to forward a copy of the amended commitment to the DJJ.

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Graham, J.*

We concur:

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Marchiano, P. J.

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Margulies, J.

* Retired judge of the Superior Court of Marin County, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.