Filed 10/14/26 P. v. Barragan CA6
Opinion after recalling remittitur

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE, Plaintiff and Respondent, v. JAVIER ALFONSO BARRAGAN, MARCOS MENDOZA, AND DAVID MARTELL, Defendants and Appellants.	H049114 (Santa Clara County Super. Ct. Nos. C1114503, 212506)

Defendant David Martell was convicted by jury in 2013 of second degree murder. Marcos Mendoza was also convicted of murder by the same jury, and a different jury convicted Javier Alfonso Barragan of murder in 2012 for the same homicide charged against Martell and Mendoza. All three defendants petitioned for resentencing under former Penal Code section 1170.95 (now Pen. Code, § 1172.6) and the trial court denied the petitions after an evidentiary hearing, finding beyond a reasonable doubt that each defendant directly aided and abetted an implied malice murder. On appeal from the denial of the resentencing petitions, we found substantial evidence supporting the trial court's findings but reversed and remanded the matter as to Barragan and Mendoza for the limited purpose of allowing the trial court to consider their youth at the time of the killing as a relevant factor in determining whether they formed the requisite mental state to be convicted of aiding and abetting an implied malice murder. (At the time of the crime, Barragan was 23 years old and Mendoza was 18 years old. Martell, 20 years old

at the time of the crime, had not joined Barragan and Mendoza in arguing that youth must be considered.)

After receiving our previous opinion, Martell moved to recall the remittitur. We granted the motion and invited supplemental briefing from Martell and the Attorney General. Martell filed a supplemental brief requesting the same relief previously granted to Barragan and Mendoza. Now having vacated our previous opinion as to Martell, we issue this new opinion reversing and remanding the matter so that Martell's age can be properly considered.

I. BACKGROUND

A. TRIAL EVIDENCE

We take the following factual summary from the previous unpublished opinion filed in this case, which has been vacated as to Martell only. Because the previous opinion remains in effect as to Barragan and Mendoza, we do not include here a factual summary of the evidence presented at Barragan's trial. As noted in our previous opinion, we have reviewed the transcripts of Martell's trial and conclude they support the factual history set forth here. (*People v. Clements* (2022) 75 Cal.App.5th 276, 293.) We have taken judicial notice of the record in case No. H039705 (the direct appeal from Martell's and Mendoza's convictions) as of November 2021.

1. The Homicide

The jury heard two accounts of Maurillo Garcia's death. Tommy Gonzalez,[1] an accomplice, provided one account. Tommy testified that he was drinking with fellow Norteño gang members in the front yard of his house when a suspected Sureño gang member started spray-painting on the street by the house, leading Tommy and several others to chase down and assault the Sureño. Salvador Rivas, an eyewitness, provided a second account. He testified that he was at a party at his father's house when he saw a

[1] Meaning no disrespect, we refer to members of the Gonzalez family by their first names because multiple members of the Gonzalez family were involved in this case.

group of five to seven men run toward and assault a man who was spray-painting in the street.

a. Co-Perpetrator Tommy Gonzalez's Account

Tommy Gonzalez testified for the prosecution as part of a plea agreement whereby the prosecutor agreed to reduce his murder charge related to Maurillo Garcia's death to voluntary manslaughter in return for his truthful testimony at defendants' trial. Tommy lived at 436 Ezie St. with his mother, his brother Raymond Gonzalez, Jr. (Raymond Jr.), his nephew Raymond Gonzalez III (Raymond III), and others. Tommy had been a Norteño gang member since he was nine years old. His nickname was Beast because he fought frequently when he was incarcerated for a juvenile offense.

Tommy's friend Javier Barragan called him in the afternoon on August 27, 2011 and asked if he could come "kick back" at Tommy's house. Barragan arrived around 6:00 or 7:00 p.m. with defendants Mendoza and Ramirez. Tommy knew Mendoza by the nickname Travieso and Ramirez by the nickname Smiley. Tommy testified that Barragan, Mendoza, and Ramirez were all part of a Norteño subset called San Jose Unidos. They all drank beers in the front yard and were eventually joined around 8:00 p.m. by defendant Martell, known to Tommy as Guerro. At trial, Tommy identified all three defendants as the people who came to his house on August 27.

Around 10:00 p.m., Tommy saw a person (later identified as Maurillo Garcia) who looked like a Sureño gang member walk past the house twice within two minutes. Garcia walked to a stop sign where Richdale Avenue dead-ends into Ezie Street and spray-painted something on the ground while saying "Sur Trece Putos Calle." Tommy perceived Garcia's actions as a challenge. Tommy ran toward Garcia, followed closely by Martell and then more distantly by Mendoza, Ramirez, and Barragan. Tommy swung at Garcia but missed; Garcia cut Tommy's stomach with a screwdriver. Tommy backed up and "everybody jump[ed] on" Garcia. Mendoza and Ramirez were punching Garcia. Tommy did not see Martell or Barragan do any punching or kicking. Tommy and the

others ran back to his mother's Cadillac that was parked in front of 436 Ezie St. and drove away.

b. Witness Salvador Rivas's Account

Salvador Rivas testified that on the night of the homicide he was attending a party at his father's house on Ezie Street, which faces the intersection of Richdale Avenue and Ezie Street. Rivas was in the garage and the garage door facing the street was open. Jose Garcia (Maurillo Garcia's brother, whom we refer to as Jose for clarity) walked by the house and Rivas's father invited Jose to have a beer. Rivas noticed Maurillo Garcia spray-painting on the street near a stop sign. Five to seven men came from the direction of 436 Ezie St. and chased Garcia.[2] Rivas heard someone yell " 'Get him' " and " 'Norte.' "

Rivas testified that Garcia ran but was tripped and fell, at which point all of the men who chased him started beating him. Rivas stated that everyone participated in the assault. Garcia managed to get up for a moment but the men knocked him down again and continued to beat him. Rivas testified that the men mostly kicked Garcia but some punches were also thrown. He could not clearly see any weapons. He saw something shiny but acknowledged it could have been a belt buckle. Rivas also could not see any of the attackers well enough to identify them in court. The attack lasted about 30 seconds. The men went back toward 436 Ezie St. and left in a Cadillac. One of the men might have left separately in a van.

Rivas described the assailants as Hispanic males between 20 and 30 years old. He acknowledged that it was not very light outside the night of the homicide, that there were no streetlights in the area of Richdale where the homicide took place, and that there were

[2] As relevant to one of Martell's [original] appellate arguments, Rivas's testimony at trial regarding the chase was somewhat inconsistent. On direct examination, Rivas testified that one male led the chase and was followed by the remaining people. On cross-examination, Rivas testified that two men led the chase but that one of them was slightly in front of the second, with the rest farther behind the second man.

some cars and trucks parked in the driveway of his father's house. He estimated his vantage point in the garage was 60 yards from the victim.

2. Defendants Charged with Murder

[Mendoza, Martell, and Juan Ramirez] were each charged in a single felony information with murder (§ 187), with a special allegation that each committed the murder for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(C)).[3] Ramirez, who was 16 on August 27, 2011, was charged as an adult. (Welf. & Inst. Code, § 707, subds. (b), (d)(1).) The information alleged that Martell had a prior juvenile adjudication that qualified as a strike. (§ 667, subds. (b)–(i); Welf. & Inst. Code, § 707, subd. (b).)

3. Trial

Trial commenced in February 2013. Defendants moved for a mistrial after the prosecutor's opening statement, alleging that he argued facts that would not be introduced into evidence, vouched for prosecution witnesses, denigrated defendants, and committed *Griffin* error through improper reference to Ramirez's silence when interrogated after his arrest. (*Griffin v. California* (1965) 380 U.S. 609 (*Griffin*).) The court denied the motion.

a. Additional Testimony About the Homicide

Raymond Gonzalez, Jr. testified that Barragan, Martell, and Ramirez were drinking with Tommy in the front yard of 436 Ezie St. on the evening of the homicide. When the prosecutor pointed to Mendoza in the courtroom and asked if he was also there, Raymond Jr. responded, "I think so." Tommy dropped Raymond Jr. off at a clubhouse in San Jose around 7:00 or 8:00 p.m. on August 27 and Raymond Jr. did not return home until after 2:00 a.m. On cross-examination, Raymond Jr. acknowledged that he was a Norteño when he was younger but said he "grew up out of it." He also acknowledged

[3] Ramirez and Martell were held to answer following a joint preliminary hearing. Mendoza was indicted by a grand jury. Defendants' cases were eventually consolidated.

that the district attorney's office had paid to relocate his family in return for his cooperation and that he had never told the police that Tommy was at the house on the night of the homicide.

Raymond Jr.'s son, Raymond III, also testified. Raymond III testified that he stayed inside the house at 436 Ezie St. the whole night on August 27. Raymond III was on juvenile probation when the homicide occurred. He did not want to testify. He denied that any of the defendants were at 436 Ezie St. the night of the homicide. He claimed that he lied to the police over the course of several interviews, telling them multiple versions of what happened that night and providing fictitious descriptions of suspects. He acknowledged testifying at Martell and Ramirez's preliminary hearing that five men came over to the house the night of the homicide, that he had seen those men before, and that they eventually left in his grandmother's Cadillac. He denied that his uncle Tommy was at the house the night of the homicide, and said his father Raymond Jr. had been there but had left at some point.

San Jose Police Detective Merlin Newton testified about Raymond III's statements to him in the early morning the night of the homicide and during subsequent interviews. The night of the homicide, Raymond III described three suspects to Newton: a man with the nickname Big Tone; a man with "S.J." tattooed on his chest; and a 16-year-old. Newton testified that Raymond III made different statements at different interviews but that at some point he told Newton that he had been in the front yard of the house the night of the homicide and saw five Norteño men run after a person who was spray-painting on Richdale Avenue. Raymond III reportedly told Newton that the men ran out of Raymond III's view and eventually returned to the house before driving away in his grandmother's Cadillac.

Newton testified that, over the course of four interviews, Newton showed Raymond III pictures of individuals (including the defendants) and asked Raymond III if any of them were at the house the night of the homicide. Raymond III was inconsistent

regarding whether Martell had been there the night of the homicide but at some point he identified a picture of Martell as a suspect during one of the interviews. Raymond III identified a picture of Ramirez as the 16-year-old he had described as being present the night of the homicide. He also identified pictures of three people who were never charged. Raymond III never identified pictures of Tommy or Mendoza.

b. Defendants' Flight the Night of the Homicide

i. Tommy's Testimony

Tommy testified that he drove the Cadillac away from 436 Ezie St. with Mendoza, Ramirez, Martell, and Barragan. While they were driving, Mendoza reportedly stated, " 'I got that nigga,' " and also stated that he " 'booked him' " 14 or 15 times. Ramirez said "I was carving that fool's face," and then complained to Mendoza that "you fucking cut me, bitch." Mendoza responded that Ramirez "shouldn't be getting in my way when I'm handling my business." Ramirez had a deep cut on his hand.

Tommy testified that Barragan told him to drive to Peckerwood's (later identified as John Deleone's) apartment in the Thornbridge Apartments, which were near Ezie Street. Barragan asked for the weapons and Tommy reportedly saw a kitchen knife that had been used by Mendoza as well as a screwdriver.[4] At some point, Martell said that he had dropped his phone somewhere. Tommy parked, they wiped down the car, and he and Barragan went upstairs to Deleone's apartment. Tommy or Barragan handed the weapons to Deleone, Deleone's girlfriend took them into the bathroom, and then "you hear the water running."

Tommy testified that Barragan's brother Junior picked the group up from Deleone's apartment about ten minutes after they arrived and drove them to Barragan's mother's house near the Oakridge Mall. The group stayed at Barragan's mother's house for a short time. Martell left separately before the others. Tommy, Barragan, Mendoza,

[4] Tommy acknowledged on cross-examination that he had told the police during previous interviews that he never saw the weapons.

and Ramirez were picked up by someone with the nickname Creeper and driven to Milpitas. When they arrived in Milpitas, a "cop car pulled in right behind us, and we got off and took off running."

ii. John Deleone's Testimony

John Deleone testified in return for use immunity and an agreement that the prosecutor would resolve pending drug charges against Deleone with drug rehabilitation and a county jail sentence. Deleone testified that in August 2011 he was a heavy methamphetamine user, using up to one-eighth ounce per day. His girlfriend was also a heavy methamphetamine user. He acknowledged at trial that he had a poor memory due to his prior drug use. He knew Barragan and also knew Mendoza, but only by the nickname Travi. He knew Ramirez by the nickname Smiley and claimed to be like a big brother to him. Based on refreshed recollection from Deleone's testimony at Mendoza's grand jury proceedings, Deleone testified that Barragan was a Norteño who was affiliated with San Jose Unidos. Deleone acknowledged that he identified Ramirez at the grand jury hearing as a member of San Jose Unidos but testified at trial that "I might have misspoke when you asked me that question."

Deleone testified that Barragan and Smiley came to his apartment on August 27 around 11:00 p.m. with a third person whose identity Deleone could not remember. The prosecutor purported to refresh Deleone's recollection by reading the following out loud from the grand jury transcript: " 'What happens on this occasion? Who came over on this occasion?' [¶] Your answer was: [¶] 'I remember Javi, Javier, Juan, and somebody else. I don't remember who the other person -- I think it was Travi, but I couldn't be certain.' "[5] Deleone acknowledged at trial that he had also told investigating officers that the third person could have been Beast (Tommy's nickname). Deleone did not see Martell that night.

[5] The court overruled defense objections to the prosecutor's method of refreshing Deleone's recollection.

Deleone testified that the people who came to his apartment that night were agitated. Ramirez reportedly told Deleone that he hit a guy with a Phillips-head screwdriver five to ten times and demonstrated by making stabbing motions on a couch or a pillow. When asked whether the people who came to his house brought weapons, Deleone stated that they brought a knife, a box cutter, and a Phillips-head screwdriver. The court later struck that testimony when Deleone clarified that he never saw weapons that night and instead only saw a black sweatshirt wrapped around certain items that Barragan brought to the apartment. Deleone's girlfriend took the black sweatshirt to a sink and turned on the water, at which point Deleone "could hear all the stuff rattling around in the sink."[6] Deleone testified that it seemed like the others were trying to shift the blame for the stabbing to Ramirez.

c. Tommy Flees, Is Arrested in Texas, and Cooperates with Police

Tommy testified that he moved to Texas after the homicide, where he was arrested in March 2012 for resisting arrest. San Jose police detectives came to Texas and interrogated Tommy regarding the Garcia homicide. Tommy testified that the officers played a short portion of a videotaped interview between Barragan and the police, during which Barragan appeared to be trying to blame everything on Tommy.[7] Faced with that interview, Tommy decided to cooperate with the police and tell them his version of the homicide.

On cross-examination, Tommy acknowledged that he had an extensive criminal history and that he cooperated with the police to avoid a possible life sentence. He also

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[6] After the court struck the testimony about weapons, the prosecutor referred to the items in the sweatshirt as weapons two more times and the trial court sustained defense objections each time. The court later denied a defense mistrial motion based on the prosecutor's conduct.

[7] The court denied a defense motion to admit statements from the Barragan interview.

acknowledged that he might not have positively identified Martell during the initial Texas interview and might have stated more generally that a picture of Martell looked familiar.[8]

d. Cell Phone, DNA, and Fingerprint Evidence

A San Jose police officer testified that police found a cellular phone on Richdale Avenue near the intersection of Richdale and Ezie Street the night of the homicide. The phone was registered to Martell's mother and contained a photograph of Martell that looked like it was taken by Martell "holding out his cell phone and taking a photo of himself." The clip on the phone's case that would secure it to a pocket was loose.

The prosecution introduced information about the general locations of various cellular phones based on call activity on the night of the killing. San Jose Police Detective Juan Vallejo testified that cellular phone calls generally connect through the nearest cellular tower to the phone's location. The San Jose Police Department employee who created a trial exhibit mapping cellular phone activity testified that a phone's location cannot be precisely identified based on its connection with a cellular tower and that if a tower is busy a phone can connect through a different tower.

Detective Vallejo testified that on August 27, calls from Martell's phone connected through a cellular tower in the San Francisco area before 8:00 p.m. and through towers in San Jose between 8:20 p.m. and 8:23 p.m. No further calls were made from that phone after 8:23 p.m. that night. Data for a phone number associated with Tommy showed that the phone connected with a tower near the crime scene from 6:22 p.m. until 10:02 p.m., through a tower south of the crime scene and closer to Deleone's apartment at 10:41 p.m., through a tower southwest of the crime scene near Barragan's mother's house at 10:58 p.m., and through a tower in Milpitas between 2:51 and 4:03 a.m. on August 28. Data for a phone number associated with Mendoza were

[8] Merlin Newton, one of the San Jose detectives who interviewed Tommy in Texas, testified at trial that Tommy identified Martell during the Texas interrogation as the person who lost his phone the night of the homicide.

generally consistent with Tommy's in both time and location on August 27 and the early morning of August 28. A phone number associated with Ramirez showed phone calls made through a tower in Milpitas around the same time as some of Tommy's calls.

The jury also heard testimony regarding fingerprint and DNA evidence. A fingerprint on a beer can found in the back yard at 436 Ezie St. matched Martell. Martell's DNA was found on a cigarette located in the front yard of 436 Ezie St. A fingerprint on a different beer can found in the back yard of 436 Ezie St. matched Mendoza. One of Mendoza's fingerprints matched a fingerprint found on a beer can in the front driveway of 436 Ezie St. Mendoza's DNA was found on a swab collected from that same beer can. Ramirez's DNA was present in dried blood taken from the exterior rear passenger side door of a gray Cadillac the police found on August 31 at the Thornbridge Apartments.

e. Victim Information and Autopsy Results

A crime scene investigator testified that Garcia had "S.U.R." tattooed in capital letters on his left arm as well as a tattoo of a man's head wearing a bandana with "V.S.T." and "13" written on it. He also had a star to the left of his left eye and three dots to the right of his right eye.

Dr. Joseph O'Hara testified as an expert in pathology and cause of death about the autopsy he performed in the case. Garcia suffered 15 stab wounds to his face, chest, abdomen, thighs, arms, right foot, and lower back. Among the most severe stab wounds were a four- and one-half-inch deep wound to the chest; a four-inch deep wound to the abdomen that perforated his liver; a three-inch deep wound to the chest that collapsed a lung; and a five-inch deep wound to the armpit. Each of those four stab wounds could have been independently fatal without medical treatment. Though he could not be certain, Dr. O'Hara testified that the structure of the stab wounds indicated the possibility that two weapons were used: one with a single-edged blade and another with a double-edged blade. There were no round puncture wounds, as would be expected if a Phillips-

head screwdriver was used as a weapon. Garcia suffered three incised wounds (wounds that are longer than they are deep) and multiple blunt-force injuries, including contusions, abrasions, and lacerations. Dr. O'Hara opined that the cause of death was multiple stab wounds of the head, trunk, and extremities.

f. Statements by Defendants

Detective Vallejo testified about interrogating Martell on August 31 with Detective Newton.[9] Martell was read his *Miranda*[10] rights and asked about the night of the homicide. Martell claimed he had been in San Francisco watching a football game that day and returned to the San Jose area around 7:30 or 8:00 p.m. Martell claimed he was dropped off at a grocery store near Ezie Street, walked to the house of his cousin (who was not home), and then walked to his aunt's house where he stayed the rest of the night. Martell said he lost his phone that day and thought he dropped it while walking from the grocery store to his cousin's house. The prosecutor asked Vallejo whether Martell admitted being a Norteño when he was younger, and Vallejo testified that Martell "said back when he was a juvenile, he was involved with gangs." Martell repeatedly denied being on Ezie Street on August 27 and told the police he did not know anything about the homicide. Detective Vallejo testified that at the time of the interview Martell had scratches and abrasions on his hands and a large "S.J." tattooed on his stomach.

Detective Newton testified about interrogating Ramirez in September 2011 after arresting him and reading him his *Miranda* rights. Ramirez had what Newton described as a healing wound on his right ring finger. Ramirez said he was familiar with Ezie Street and had been there on one afternoon about two months earlier. He identified a picture of Barragan as a friend but claimed not to know his name. Ramirez denied being a Norteño, stating "No, I just hang out with," before trailing off. He steadfastly denied

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[9] The video recording of the interrogation and a transcript were admitted into evidence at trial after certain information was redacted.

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

being on Ezie Street on August 27 and also denied participating in any sort of assault that might have occurred there.

The jury heard statements made by Mendoza from three sources: a non-custodial interview; a booking interview; and text messages from Mendoza's cellular phone. Detective Newton conducted a non-custodial interview with Mendoza at Mendoza's workplace in March 2012.[11] At the non-custodial interview, Mendoza stated that he had heard of Ezie Street but had never been there. He denied being in a gang. When asked if he "claimed Northern," Mendoza responded "[j]ust Northern, yeah." Newton showed Mendoza pictures of Martell, Barragan, and possibly other suspects; Mendoza denied knowing any of them. Mendoza had a large "U" tattoo that extended from the top of his chest down to his belly button. He also had "Unidos" tattooed across his stomach. Newton testified that Mendoza told him those tattoos were in support of a college team he liked, the Utah Utes.

When Mendoza was booked into the county jail after his arrest, correctional officer Gilbert Rios conducted a classification interview with Mendoza. Rios testified that all inmates are asked if they associate with a gang when they are booked into the county jail. Inmates were told that the gang association question was for their safety and that their response would remain confidential. Rios testified that if an individual indicated they would rather be housed with members of a certain gang, that would be treated as an admission. Rios's notes indicated that Mendoza "admitted Northerner."

The trial court also admitted text messages from Mendoza's phone relating to drug sales.

g. Gang Expert

San Jose Police Detective Chris Gridley testified as an expert regarding gang crimes. Detective Chris Gridley was a gang detective with more than 100 hours of

[11] After minor redactions, the audio recording of Mendoza's non-custodial interview was admitted into evidence over his relevance objection.

training about gangs, including training specifically about Hispanic gangs in San Jose. This was his first homicide investigation as a gang expert. He testified that indicia of gang membership he looks for when determining whether an individual is a gang member include: use of gang symbols, hand signs, and clothing; admission of gang affiliation; association with known gang members; tattoos; and prior gang-related criminal conduct.

Gridley testified that he was "familiar with a gang called the Nortenos." He stated that the gang has approximately 2,000 members in San Jose and that their "territory would be considered Bakersfield north to Northern California." The primary activities of the Norteño gang include assault with a deadly weapon, homicide, drive-by shootings, car theft, robbery, and burglary. Norteño gang members commonly carry weapons for protection and for use in attacks. Violence is common and is used to gain respect from other gang members and to intimidate non-gang members. It is common for gang members to support themselves by selling drugs. Common names, signs, and symbols for the Norteño gang include: Norte, Norteño, Northerner, the color red, the number 14, the Huelga bird symbol, the San Jose Sharks symbol, and "compass-bearing points for San Jose, such as East Side San Jo, E.S.S.J."

Gridley stated that the Norteño gang is an informal gang. The Norteño gang is affiliated with the Nuestra Familia prison gang, which Gridley described as "the pinnacle of Norteño prison gangs." At the local level, gang members sometimes create formal subsets that claim specific territory. While street gangs "derive a history" from the Nuestra Familia, "not all Northerner gang members are affiliated" with the Nuestra Familia. The Nuestra Familia influences Norteño street gangs to "a certain extent" through sending out kites[12] that "may be disseminated down to the street level." But Gridley testified that in his experience, "some of our subsets in San Jose don't align themselves with the N.F." Further, some Norteño gang members are what Gridley

[12] Detective Gridley explained that a kite is a method of communicating in jail by sending messages written on a small strip of paper.

termed "solo Northerners," who do not follow orders from the Nuestra Familia or any formal subset.

The Norteño gang's main rival is the Sureño gang. Gridley stated that if a Sureño gang member walks into a Norteño neighborhood, it is likely he will be challenged, and possibly attacked, by Norteño gang members. Based on pictures taken of graffiti in the neighborhood surrounding 436 Ezie St., Gridley opined that it was a Norteño neighborhood that was specifically claimed by a Norteño subset called Seven Trees. There was no evidence that any of the defendants were part of the Seven Trees subset.

Gridley opined that the Norteño gang has engaged in a pattern of criminal gang activity, based on seven predicate offenses. In 2001, Tommy Gonzalez admitted committing assault with a deadly weapon with a gang enhancement as a juvenile in Gilroy. Gridley testified that Tommy or another suspect called the victims " 'scraps' " and Tommy hit a victim's car multiple times with a bat. In 2004, Barragan admitted committing attempted murder with a gang enhancement in Stanislaus County. Gridley testified that Barragan was visiting "two other Northerners" when a Sureño drove by and that Barragan eventually shot the car the victim was driving multiple times. In 2007, Mendoza admitted robbing someone as a juvenile in San Jose. Despite the lack of a gang enhancement allegation in Mendoza's robbery adjudication, Gridley opined that the offense was related to Norteño gang activity because Mendoza asked the victim if he "bangs," which Gridley described as a "street check" that gang members sometimes ask perceived rivals.[13] In 2008, Martell admitted committing assault with a deadly weapon with a gang enhancement in San Jose as a juvenile. Gridley testified that Martell was in a group of "Northerners" that challenged another group to a fight "by calling them 'Scraps'

[13] Though all of the predicate offenses involved a suspect or were for crimes committed in Santa Clara County, Detective Gridley agreed on cross-examination with Ramirez's attorney's statement that based on Gridley's theory about the breadth of the Norteño gang's territory, "you could just as well have brought in a criminal act by somebody in Fresno that was a Norteño, or Crescent City, or Sacramento."

and yelling out 'Norte.' " A fight ensued, an individual in the group referred to as Scraps was stabbed, and Martell pleaded guilty to that stabbing.

In addition to predicate offenses involving defendants or accomplices to Garcia's homicide, the prosecution offered additional predicate offenses committed by other individuals. In 2010, Jose Sotelo pleaded no contest to felony vandalism with a gang enhancement in San Jose. Gridley testified that Sotelo was "a Northerner gang member." In 2010, Orlando Heredia and Miguel Hurtado pleaded no contest to assault with a deadly weapon with gang enhancements in San Jose. Gridley testified that in that case the victim was walking through "a known Norteño hood claimed by Triple L., Los Latinos Locos" and a suspect (presumably Heredia or Hurtado) cut the victim's chin while the other suspect "yells 'Norte' and also pulls out a knife." In 2010, Andy Martinez pleaded guilty to assault with a deadly weapon with a gang enhancement in San Jose. Gridley testified that a group of what the victim apparently identified as "Northerners" challenged the victim to fight while yelling " 'Puro Norte,' " and that Martinez eventually threw a brick through the victim's car window.

Regarding the gang membership of the defendants and other suspected perpetrators, Gridley opined that Barragan and Tommy were active Norteño gang members, based on each of them self-identifying as Norteños and on their previous convictions for Norteño-related offenses. Gridley thought Martell was an active solo Norteño gang member who was not affiliated with any subsets. That opinion was based on Martell's tattoos; the presence of his name on a jail kite found after the homicide; his criminal history; his mode of dress; and Martell's admission during a 2011 field interview that he had been a Norteño since he was 12 years old. Gridley believed Mendoza was an active Norteño gang member based on his admission during booking; his tattoos (Gridley opined the "U" and "Unidos" were gang-related rather than being related to a Utah college); his juvenile adjudication where he asked the victim if he "banged"; and the facts of the present case.

Regarding Ramirez, the prosecutor asked Gridley "whether Mr. Ramirez is a member of the Norteño gang," and Gridley stated he "found him to be an associate," or someone who was working to become a gang member. That opinion was based on Ramirez's "East Side" tattoo, Tommy's statement that Ramirez was "putting in work" to benefit the gang, and Ramirez's close association with Barragan. Gridley acknowledged that Ramirez had no criminal record, no arrests, and no gang-related field identifications before this case. Finally, Gridley opined that Maurillo Garcia was a Sureño gang member (and therefore a rival to defendants) based on his tattoos and on the graffiti he spray-painted being Sureño-related.

In addition to being Norteño gang members, Gridley testified that Barragan, Mendoza, and Ramirez were part of a Norteño subset called San Jose Unidos. Gridley had never heard of that subset before working on this case and said he learned about it from Tommy, Deleone, and another gang detective. Deleone had apparently told police during an interview that Barragan "and others" were members of San Jose Unidos. Gridley testified that Deleone referred to San Jose Unidos as " 'the U' " and Gridley believed Mendoza's "U" and "Unidos" tattoos demonstrated his affiliation with the subset. Gridley was not aware of any affiliation or relationship between San Jose Unidos and the subset who claimed the neighborhood where the homicide occurred (Seven Trees). On cross-examination, counsel for Mendoza asked Gridley: "And the reason that you are using Norteño as the sort of umbrella street gang is because I think you said that there are no crimes that have been committed by the subset S.J.U. if it exists, right?" Gridley responded: "I did not find any predicates by them, no," and also acknowledged that he found no evidence of any criminal activity by the San Jose Unidos subset before the homicide in this case.

Gridley opined that the homicide was gang related. He believed defendants committed the homicide for the benefit of, and in association with, the Norteño gang based on the way the defendants worked together to carry out the assault. The homicide

benefited the Norteño gang by increasing the gang's respect and intimidating others in the neighborhood.

h. Evidence of Intimidation

Evidence suggesting intimidation of witnesses was admitted over defendants' objections. Deleone testified that he was punched in the mouth by an inmate while in custody in the Santa Clara County Jail in May 2012. Deleone was told that the attack had been ordered by "the Nortenos" because Deleone had made statements to the police related to defendants' case.[14] He was "[s]omewhat" fearful for his life afterward and was moved into protective custody. Deleone asked the district attorney's office to relocate him and also asked for an escort to and from testifying at defendants' trial because he feared for his life.

Tommy testified that at some point between the homicide and his arrest in Texas, Barragan's brother Junior told Tommy that his nephew and his brother (presumably meaning Raymond Jr. and Raymond III) "are snitching on me and on everybody" and asked Tommy if he knew where they were.[15] Tommy withheld the information because he feared for both his and his family's safety.

Salvador Rivas testified that his home was vandalized in October 2011 when someone spray-painted graffiti on his garage and his car. Among the graffiti was "XIV." Rivas feared for his family's safety and believed the graffiti was related to him talking to the police because the graffiti occurred within two hours after he received a subpoena to testify in defendants' case. He remained fearful at trial.

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[14] The hearsay statement was admitted for the limited purpose of showing Deleone's state of mind.

[15] The hearsay statement was admitted for the limited purpose of showing the effect on the listener (Tommy).

i. Defense Case

Though technically called by the prosecution, Martell's attorney sought favorable testimony from Randy Carrasco, whose grandmother was Martell's grandmother's partner. Carrasco worked with Martell as a furniture mover and testified that it was common for employees to get scratches while at work.

Defense investigator James O'Keefe testified based on a site visit that the approximate distance between where Garcia was stabbed and the garage at 452 Ezie Street was 198 feet, or 66 yards. He also testified, based on an Internet search, that there would have been almost no light from the moon on the night of the homicide.

B. Resentencing Petition and Trial Court's Decision

Martell was sentenced to 15 years to life in prison. He later petitioned for resentencing, as did Barragan and Mendoza. The trial court found they presented prima facie cases for relief, and the parties filed extensive briefing. The parties did not present additional evidence at the hearing.

The trial court denied all three defendants' resentencing petitions by written order, finding beyond a reasonable doubt that each defendant directly aided and abetted an implied malice murder. The trial court did not identify which of the participants was the actual killer, but rather considered liability on an aiding and abetting theory. Specifically, the court found "all [defendants], along with several others, ran after and chased the victim after seeing the victim engage in conduct that suggested he was part of the Sureño gang." The court found that the "victim was tripped-up, prevented from escaping and then killed with 15+ stab wounds and multiple contusions and abrasions and blunt force injuries." The assault lasted approximately 30 seconds. All three defendants were identified by the gang expert in their respective trials as Norteño gang members, as were other suspected perpetrators in the group. The "murder was committed in a Norteño neighborhood, where a Sureño would likely be challenged and attacked, by Norteño gang

members." The court also noted the "gang expert's opinion that the homicide was gang-related in that it was committed for the benefit of the Norteño gang."

The court found each defendant's "knowledge of the unlawful purpose of the perpetrator can be inferred from the evidence that they ran towards or chased the victim, and then immediately joined in beating him, after seeing the victim engage in behavior that suggested he was part of the rival Sureño gang." Defendants' knowledge of the perpetrator's unlawful purpose could also be "inferred from the evidence that someone in their group yelled 'Norte' and 'get him' during the incident." The court found that defendants "participated in the physical assault and continued to do so even as they presumably witnessed the victim right in front of them get stabbed multiple times." And the court found defendants' conduct aided and promoted the commission of the crime because "as a group they overwhelmed the victim and then kept the victim incapacitated while he was being repeatedly stabbed."

As to the required mental state, the court concluded each defendant harbored the necessary mental state based on their "participat[ion] in a brutal group (comprised of at least five people) attack against the single victim, continued to assault the victim as he was repeatedly stabbed, and then fled without doing anything to help mitigate the danger to the victim's life they had just caused." The court concluded defendants were guilty of second degree murder because "each knew their conduct endangered the life of another and each acted with conscious disregard for life when they aided and abetted the group attack of the rival gang member victim." The trial court also discussed the five-factor test summarized in *People v. Clark* (2016) 63 Cal.4th 522 (*Clark*), describing it as "instructive" in the conscious disregard for life analysis, and correctly noting that *Clark* applies to the distinct question of whether a person acts with reckless indifference to human life. The trial court relied on *People v. Johnson* (2016) 243 Cal.App.4th 1247, 1285 in reasoning that " 'conscious disregard for human life[]' is a *lower* standard

requiring *less* subjective awareness of the risk of death for the victim than does the similar 'reckless indifference to life' mental state required for capital murder cases."

II. DISCUSSION

The trial court found Martell directly aided and abetted an implied malice murder. To satisfy the actus reus for that theory of liability, the aider and abettor must, " 'by words or conduct, aid the commission of the life-endangering *act*, not the result of that act.' " (*People v. Reyes* (2023) 14 Cal.5th 981, 991.) " 'The relevant act is the act that proximately causes death.' " (*Ibid.*) The required mens rea is " 'knowledge that the perpetrator intended to commit *the act*, intent to aid the perpetrator in the commission of *the act*, knowledge that *the act* is dangerous to human life, and acting in conscious disregard for human life.' " (*Ibid*.) The denial of a Penal Code section 1172.6 petition is reviewed for substantial evidence unless there is a question about the trial court's understanding of the elements of the applicable offense. (*Reyes*, at p. 988.)

Based on our review of the trial court's written order denying resentencing, we conclude the trial court understood and applied the elements of directly aiding and abetting an implied malice murder. We therefore review its decision for substantial evidence. "In assessing the sufficiency of the evidence, we review the entire record in the light most favorable to the judgment to determine whether it discloses evidence that is reasonable, credible, and of solid value such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt." (*People v. Bolin* (1998) 18 Cal.4th 297, 331.) We do not reweigh evidence or second-guess credibility determinations. (*People v. Ramirez* (2022) 13 Cal.5th 997, 1118 (*Ramirez*).) We presume the existence of every fact the trier of fact could reasonably deduce from the evidence to support the judgment. (*Ibid.*) To overturn a conviction based on insufficient evidence, "it must clearly appear that upon no hypothesis whatever is there sufficient substantial evidence to support it." (*People v. Redmond* (1969) 71 Cal.2d 745, 755.)

A. SUBSTANTIAL EVIDENCE SUPPORTS THE FINDINGS AS TO MARTELL

Martell initially argued the evidence was insufficient to support the trial court's conclusion that he directly aided and abetted an implied malice murder. The previous opinion filed in this case rejected that contention, and Martell presents no new argument or authority on the issue in his supplemental brief. Our analysis thus remains unchanged, and we reproduce it in relevant part here.

The life-endangering act that proximately caused the victim's death was being stabbed 15 times during a group assault; the medical examiner testified the cause of death was multiple stab wounds to the head, trunk, and extremities. Substantial evidence supports the finding that Martell aided the commission of the stabbing: Tommy testified that Martell ran with him when he chased down the victim, and that "everybody" jumped on the victim; eyewitness Rivas testified that all of the men who chased the victim took part in the assault. (The trial court was entitled to credit Rivas's testimony over Tommy's testimony that he did not see Martell do any punching or kicking.) Martell's personal participation in the beating aided the actual killer's stabbing of the victim by incapacitating the victim.

Substantial evidence supports the finding that Martell knew the perpetrator intended to stab the victim. According to the gang expert's testimony, Martell, Mendoza, Tommy, and Barragan were all Norteño gang members, and Ramirez was a Norteño associate. The primary activities of the gang include assault with a deadly weapon. Members of the gang commonly use weapons and are expected to be armed. The expert testified that a Norteño gang member would "want to be armed in case, for an example, if you are a Northerner and you are patrolling your hood, and a Southerner comes into your neighborhood, you want to be ready for that, because the Southerner might be armed." The expert stated the majority of Norteño gang members he had "come across have had knives on them." He further testified that he would expect a violent reaction in response to disrespect, and that he "would expect [Norteño gang members] to be armed during it."

The expert testified that he had seen violent reactions from Norteño gang members to a rival wandering into their neighborhood range from a beating to "all the way up to homicide." In addition to that circumstantial evidence, the autopsy indicated the victim received 15 stab wounds all over his body, including his face, chest, abdomen, thighs, arms, right foot, and lower back. Four of those wounds would have been independently fatal without medical attention. The number, severity, and distribution of stab wounds support the finding that Martell perceived that the victim was being stabbed as he participated in the assault. From the foregoing, a rational trier of fact could conclude that Martell knew the actual stabber intended to stab the victim, and that Martell perceived the stabbing as it occurred.

Substantial evidence supports the finding that Martell intended to aid the perpetrator in the stabbing. Eyewitness Rivas testified that everyone who ran from the house participated in the beating. He also testified that the victim managed to get up for a moment but was knocked down again by his assailants. A rational trier of fact could conclude that Martell intended to aid the perpetrator of the stabbing by beating the victim while he was being stabbed.

Substantial evidence supports the findings that Martell knew that repeated stabbing would be dangerous to human life and that he acted in conscious disregard for human life. Martell participated in a group attack of a rival gang member. At least five males (four Norteño gang members and one gang associate) attacked a lone victim. The evidence we have earlier summarized supports the finding that Martell participated in the attack aware that the victim was being stabbed by one of the assailants. No evidence suggests that any of the assailants stopped attacking the victim before they all fled together, nor was there evidence that any assailant attempted to aid the victim.

Martell initially argued that the gang expert's testimony could not support the required mens rea, noting that the expert estimated hundreds of Norteño-Sureño conflicts occur annually, but only a "very small percentage" result in death. But the expert's

testimony must be read in the context of the questions posed. During cross-examination at trial, a defense attorney asked the expert to estimate the number of Norteno-Sureno "skirmishes, fist fights, physical confrontations" in San Jose each year; the expert acknowledged hundreds and possibly one thousand per year. The expert then estimated that about half of the approximately 40 homicides in the city the previous year resulted from "that kind of fist-fighting skirmishing," acknowledging the number would represent only a very small percentage of all such confrontations. The expert was responding to questions about the incidence of death from all skirmishes, fist fights, and physical altercations between the two gangs; he was not asked about the likelihood of death when a group of five men attacks a rival gang member. The expert's statements do not contradict the trial court's findings.

Martell initially joined Mendoza in arguing the trial court improperly applied the five-factor test from *Clark*. (In brief, the five *Clark* factors are: (1) whether a defendant used a weapon or knew a weapon would be used; (2) whether a defendant was present at the crime and had opportunity to constrain the crime or aid the victim; (3) the duration of the crime; (4) a defendant's knowledge of the likelihood of killing; and (5) a defendant's efforts to minimize the risk of violence. (*Clark*, *supra*, 63 Cal.4th at pp. 618–623.)) But the trial court's findings under *Clark* are irrelevant, because any findings about reckless indifference under Clark do not negate the findings and evidence necessary to the trial court's conclusion that Martell directly aided and abetted an implied malice murder.

Martell pointed to facts which he argued foreclose the trial court's findings, including that the assault took place on a dark night on a dark street, the eyewitness was 60 yards away, and the assault lasted only around 30 seconds. He also suggested that because Tommy testified he was unaware the victim had been stabbed until after the group fled, the evidence did not support the finding that any assailant perceived the stabbing as it occurred. But here again, we do not reweigh the evidence (*Ramirez*, *supra*, 13 Cal.5th at p. 1118), and we have summarized the substantial evidence supporting the

trial court's decision. Martell also pointed to absent circumstances which could have strengthened the court's conscious disregard finding, such as evidence of being armed or using a weapon during the assault. But as we have stated, the *absence* of particular evidence does not render insufficient the evidence that *was* presented to and considered by the trial court.

Martell initially argued the trial court's conclusion that he perceived the stabbing was unfounded, pointing to the trial court's finding that each defendant "participated in the physical assault and continued to do so even as they *presumably* witnessed the victim right in front of them get stabbed multiple times." (Italics added.) But the trial court also found that the defendants "continued to assault the victim as he was repeatedly stabbed," which we interpret as a finding that each defendant perceived the stabbing as it occurred. We have earlier summarized the substantial evidence to support that finding.

B. MARTELL'S YOUTH MUST BE CONSIDERED

Martell argues in his supplemental brief that the trial court failed to consider his youth when deciding the resentencing petition. He did not raise the issue in the trial court, arguably forfeiting the issue. But we agree that considering the issue on the merits is appropriate where this emerging area of the law was only developing at the time the trial court denied the petition. In *People v. Pittman* (2023) 96 Cal.App.5th 400, 416 (*Pittman*) for example, the defendant argued for the first time on appeal after the denial of resentencing that his youth (21 years old at the time of the offense) was "relevant to whether he acted with implied malice and therefore could be found guilty of second degree murder." (*Ibid.*) The appellate court observed that the "policy interests underlying the felony-murder cases—that youth is relevant to a criminal defendant's ability to perceive risk and consequences, and therefore to the level of culpability—apply equally in the context of implied malice murder." (*Id.* at p. 417.) The court further concluded that failure to consider Pittman's youth was not harmless, given trial evidence of "Pittman and his peers act[ing] impulsively and under the influence of 'transient

rashness.' " (*Id.* at p. 418 ["cases discussing the role of youth in relation to criminal culpability 'stress two areas': youthful offenders' 'relative impulsivity' and 'their vulnerability to peer pressure.' "].)

Martell was 20 years old at the time of the crime. Impulsivity and vulnerability to peer pressure may have contributed to his participation in the unplanned group attack of a rival gang member. We find it is reasonably probable a more favorable result would have been reached on Martell's petition had the trial court considered his youth. (*Pittman*, *supra*, 96 Cal.App.5th at p. 417 [applying prejudice standard from *People v. Watson* (1956) 46 Cal.2d 818].) We express no opinion on how the trial court should decide the issue on remand; we merely conclude it is appropriate to give the trial court a meaningful opportunity to consider Martell's youth.

III. DISPOSITION

The order denying Martell's resentencing petition is reversed and the matter remanded for the limited purpose of allowing the trial court to consider Martell's youth in determining whether he acted with implied malice.

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Grover, J.

WE CONCUR:

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Greenwood, P. J.

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Lie, J.