

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE OF THE STATE
OF CALIFORNIA,

Plaintiff and Respondent,

v.

CUAUHTEMOC MARTINEZ,

Defendant and Appellant.

B281480

(Los Angeles County
Super. Ct. No. VA137713)

APPEAL from a judgment of the Superior Court of Los Angeles County, Olivia Rosales, Judge. Affirmed.

Cynthia L. Barnes for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Susan Sullivan Pithey and Mary Sanchez, Deputy Attorneys General, for Plaintiff and Respondent.

INTRODUCTION

Defendant Cuauhtemoc Martinez appeals his convictions for two counts of premeditated attempted murder and one count of first degree murder by lying-in-wait. Defendant contends that there was insufficient evidence of premeditation for the attempted murder convictions and of lying in wait for the murder conviction. He also asserts his life without the possibility of parole (LWOP) sentence based on the lying-in-wait special circumstance and the trial court's denial of defendant's request to testify violated his constitutional rights. We affirm on all grounds.

FACTS AND PROCEDURAL BACKGROUND

In accord with the usual rules of appellate review, we state the facts supporting defendant's conviction in a manner most favorable to the judgment. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

1. Stabbing of Juan Carlos Lopez

Late in the afternoon on November 8, 2014, victim Juan Carlos Lopez was working on his car, which was parked on a street in South Gate. As Lopez bent over the car's engine, defendant came from behind and stabbed him in the arm. Lopez turned around and unsuccessfully tried to grab defendant, who ran off. Lopez tried to follow defendant, but stopped after about 15 steps, realizing that he had also been stabbed twice in the back. Lopez returned to his home and a neighbor called 911. During the wordless encounter, Lopez sustained three stab wounds total, one to his arm and two to his back, which required stitches and staples. He survived the attack.

2. Fatal Stabbing of Oscar Perez

Six days later, defendant attacked Oscar Perez from behind while Perez was looking at his cellular phone and walking down a street in the City of Huntington Park. While on his way to the

gas station, defendant noticed Perez walking behind him. Defendant turned down a street and waited for Perez to pass him. Then, defendant quietly crept up behind Perez and grabbed him in a chokehold. The two struggled as defendant stabbed Perez in the neck. Defendant stowed the knife, which was about seven inches long with a straight blade and black handle, in his sweater and fled.

Looking for help, Perez ran towards a bystander who saw the stabbing. The bystander observed that Perez was bleeding from the neck and called 911. An ambulance transported Perez from the scene, but he later died from multiple stab wounds.

3. *Stabbing of Cenobio Gomez Delgadillo*

About a week later, in the late morning hours of November 22, 2014, victim Cenobio Gomez Delgadillo was walking down the street, when defendant hugged him from behind and stabbed him in the neck and ear. Delgadillo never heard or saw defendant prior to the assault. After being stabbed, Delgadillo saw defendant running away from him. A passenger in a car driving through the area at that time witnessed the stabbing, called 911, and rendered assistance to Delgadillo. Delgadillo survived.

4. *Defendant's Apprehension and Confession*

When police arrived at the scene of Delgadillo's stabbing, they set up a perimeter to find the perpetrator. Around 2:00 p.m., a police officer saw and detained defendant after recognizing him from a video that he had seen earlier in the day showing the possible suspect. Police officers took the passenger who witnessed Delgadillo's stabbing to a show-up, where she identified defendant as the person that she saw stab Delgadillo. An officer searched the area where Delgadillo was stabbed and found a six-to-seven inch steak knife with a black handle two blocks from the stabbing location.

Police searched defendant's home in Huntington Park pursuant to a search warrant. Inside the converted garage where defendant slept, police found male clothing and numerous knives, including eight to ten knives from a cutlery set. Four knives were missing from the set. Police also recovered a knife from the trash, which had a black handle.

When interviewed after being Mirandized, defendant initially denied any knowledge of or involvement in Delgadillo's stabbing. After police told defendant that they had found the victim's blood on defendant's shoe and the weapon, defendant confessed to stabbing Delgadillo in the neck with a kitchen knife. Defendant asserted that Delgadillo was a member of the Florence gang, which was out to get him, and that he stabbed Delgadillo in self-defense while fighting him.

Police then asked defendant about the two earlier stabbings of Perez and Lopez. Defendant stated that he got in a fight with Perez, who was also a Florence gang member. Defendant admitted to stabbing Perez in the neck with a kitchen knife and running away.

Regarding Lopez's stabbing, defendant admitted he stabbed Lopez in the stomach. Defendant asserted that he had to stab Lopez before Lopez attacked him, and that he ran away after stabbing Lopez. Defendant stated he kept the knife following the Lopez stabbing, and that it was the same knife police had recovered from the Delgadillo stabbing.

5. *Subsequent Interview*

The next day, the same police officer interviewed defendant again. Defendant began the interview stating that he had not given the right answers in the first interview. Defendant told police that his victims wanted to kill him because of racism and because he was Guatemalan. Defendant explained that he was jumped by Florence gang members six years ago. Defendant told

police that he “always” has a knife with him, in case “somebody tries to hit [him] again.”

In this interview, defendant stated that while he was on his way to the gas station, he recognized victim Perez as a member of the Florence gang. Defendant admitted to hiding and waiting for Perez to pass him before he crept up behind and stabbed Perez. Defendant also confessed that he had stabbed three victims, one of whom was working on his car. Defendant hoped both Perez and Delgadillo had died.

6. *Charges*

The People charged defendant with two counts of attempted willful, deliberate, and premeditated murder for his attacks on Lopez and Delgadillo. Defendant was also charged with one count of murder with the special allegation that defendant intentionally killed Perez by lying in wait. The People alleged that defendant personally used a dangerous or deadly weapon on all counts and caused great bodily injury on the attempted murder counts.

7. *Court Trial*

At the bench trial, the People entered into evidence the recordings and transcripts of defendant’s two interviews. The People also elicited testimony from the bystander who witnessed Perez’s fatal stabbing, the car passenger who saw Delgadillo’s stabbing, and victims Lopez and Delgadillo. All four identified defendant as the perpetrator of the respective stabbings they witnessed or experienced. The People also elicited testimony from the police officer who interviewed defendant, the officer who searched defendant’s home and found knives, the officer who found the knife near the scene of Delgadillo’s stabbing, and the officer who recognized and detained defendant following the third stabbing.

Prior to the close of evidence, the court advised defendant of his right to remain silent and his right to testify on his own behalf. After consultation with defense counsel, defendant told the court that he decided not to testify at trial. The defense did not introduce any evidence. Counsel argued the case.

The trial court convicted defendant of two counts of willful, deliberate, and premeditated attempted murder, and one count of first degree murder. The court found true the special circumstance that the murder was committed by means of lying in wait. The court also found true the special enhancement allegations about the deadly weapon and great bodily injury. The court explained its findings, stating that “it’s clear that defendant went up by surprise and stabbed these men with no provocation at all. There’s no evidence that these men were gang members. They did not appear to be gang members. And one . . . appeared to be [an] elderly man. One of them was working under the hood. One was talking on the phone. And one was I think just walking to the bank. They are not with other people. They are stabbed in places where-- two of them in the neck, one was in the torso, the third person was in the torso and in the arm where it can inflict fatal wounds. [¶] So there’s no evidence that objectively there was an issue of self-defense or any evidence for the defendant to claim self-defense. The only issue is in his mind because . . . he was beaten up years earlier. . . . It started when he was 19 and he was beat up by what he believes are Florencia. [¶] But when I went through the whole listening to his statement and the transcript, there’s no evidence that he is under the influence of any drugs, of any psychiatric medications, that he suffers from any psychiatric illness. And he actually shows a lot of cunning.”

When the court announced its findings of guilt, defendant stated he wanted to testify to explain his fear for his safety during the incidents involved in this case and his need to defend

himself from the Florence gang members. Defendant then gave a long-winded explanation about why he had to attack these Florence gang members before they attacked him. The court denied defendant's request to testify because it had already given defendant the opportunity to testify and had found defendant guilty.

The trial court sentenced defendant to LWOP for the murder, and two consecutive life terms for the attempted murders.

DISCUSSION

1. Substantial Evidence of Premeditation

Defendant argues that there is insufficient evidence to support his conviction for two counts of premeditated attempted murder. In reviewing claims of insufficient evidence, “ ‘we review the whole record in the light most favorable to the judgment to determine whether it discloses substantial evidence—that is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. . . . [W]e presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence.’ ” (*People v. Wilson* (2008) 44 Cal.4th 758, 806 (citations omitted).) Reversal is warranted only where it appears “ ‘that upon no hypothesis what[so]ever is there sufficient substantial evidence to support [the conviction].’ ” (*People v. Bolin* (1998) 18 Cal.4th 297, 331.)

“Attempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.” (*People v. Lee* (2003) 31 Cal.4th 613, 623.) “ ‘There is rarely direct evidence of a defendant's intent. Such intent must usually be derived from all the circumstances of the attempt, including the defendant's actions.’ ” (*People v. Smith* (2005) 37 Cal.4th 733, 741.) “The

prosecution may seek a jury finding that an attempted murder was ‘willful, deliberate, and premeditated’ for purposes of sentence enhancement.” (*Id.* at p. 740.) Premeditation requires showing defendant attempted to kill as a result of a preconceived or deliberate plan or judgment. (*People v. Anderson* (1968) 70 Cal.2d 15, 26.) “[P]remeditation and deliberation must result from ‘“careful thought and weighing of considerations” ’ . . . [but] ‘[t]he process of premeditation and deliberation does not require any extended period of time. “The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly. . . .” ’ ” (*People v. Manriquez* (2005) 37 Cal.4th 547, 577 [citations omitted].) The Supreme Court has indicated that evidence of planning activity, motive, and an exacting or particular manner of killing can provide substantial evidence of premeditation and deliberation. (*People v. Lenart* (2004) 32 Cal.4th 1107, 1127.)

Here, the court could reasonably infer that defendant contemplated and created a plan to kill Lopez and Delgadillo (the first and third victims) based on the similar manner and mode of killing them. Defendant admitted he regularly armed himself with a kitchen knife. Police found many more similar knives in the converted garage where he slept. It could reasonably be inferred that defendant armed himself in this manner for opportunities to attack unaware victims like Lopez and Delgadillo. His manner of killing was exacting and identical for both crimes such that it showed the existence of a plan and contemplation of the killings. Defendant attacked the victims from behind with a knife, while they were unaware of his presence. He stabbed Lopez in the arm and back, and Delgadillo twice in the neck. The trier of fact could deduce that defendant sought these blows to be fatal because he attacked with a deadly

weapon and impaled the victims in vulnerable areas, not only in extremities. Defendant even asserted to police that he hoped Delgadillo died as a result of his stabbing, which speaks to his intent. Defendant confessed to police that he attacked the two men because he believed they were part of the Florence gang and that they were his enemies.

Defendant asserts that the People failed to provide evidence of his intent to kill either victim or that he carefully contemplated the acts. Defendant likens his case to *People v. Belton* (1980) 105 Cal.App.3d 376, 381 (*Belton*), where the Court of Appeal reversed the defendant's attempted murder conviction because there was insufficient evidence of a specific intent to murder his wife. There, the defendant set fire to the building his ex-wife lived in, while she and her children were inside the building. (*Id.* at pp. 378-379.) To show intent for attempted murder, the prosecution introduced evidence that defendant assaulted the ex-wife three months before the fire. There was also evidence that on the day of the fires, the defendant and the ex-wife spent the day together in "tranquility." (*Id.* at p. 380.) The court held that intent to kill "cannot be presumed solely from the commission of some other crime," and that "there is a dearth of evidence to establish that defendant set the fires with an intent to murder" his ex-wife. (*Id.* at p. 381.)

Unlike the *Belton* defendant, there is substantial evidence that defendant had the specific intent to kill his victims. Defendant was not in the middle of committing other crimes when he stabbed his victims. On the contrary, stabbing appeared to be his entire objective when interacting with each victim. Defendant approached his victims from behind, armed with a deadly weapon he brought from home. As explained above, the manner and mode of killing provide sufficient evidence of planning and contemplation in this case. Defendant's own

admissions that he targeted the men because of their race and gang affiliation, and his statements that he hoped for the death of two of the three victims provide further support for the court's findings.

2. *Substantial Evidence of the Lying-in-Wait Special Circumstance*

Defendant also asserts there was insufficient evidence to support the lying in wait special circumstance finding of his first degree murder conviction for Perez's death. "A sufficiency of evidence challenge to a special circumstance finding is reviewed under the same test applied to a conviction. [Citation.] Reviewed in the light most favorable to the judgment, the record must contain reasonable and credible evidence of solid value, 'such that a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt.'" (*People v. Stevens* (2007) 41 Cal.4th 182, 201.)

"The lying-in-wait special circumstance requires an intentional murder, committed under circumstances which include (1) a concealment of purpose, (2) a substantial period of watching and waiting for an opportune time to act, and (3) immediately thereafter, a surprise attack on an unsuspecting victim from a position of advantage. . . . The element of concealment is satisfied by a showing that a defendant's true intent and purpose were concealed by his actions or conduct. It is not required that he be literally concealed from view before he attacks the victim." (*People v. Moon* (2005) 37 Cal.4th 1, 22 [internal quotation marks and citations omitted].) No precise period of time is necessary to prove the second element; the period of time need only be substantial. (*Id.* at p. 23.)

Defendant's own admissions in the police interview provide substantial evidence of the lying-in-wait special circumstance. Defendant stated that he was walking to the gas station to

purchase snacks when he saw Perez behind him. Concealment was accomplished when defendant turned onto a side street to hide and wait for Perez to pass him. Defendant then watched for the opportunity to strike. Defendant told police that after Perez passed him, defendant approached Perez from behind in a slow “sneaky” “jog.” Taking advantage of Perez’s ignorance to defendant’s presence, defendant came behind Perez on his “tippy toes” and squatted down a little behind Perez before jumping him. The bystander who witnessed the surprise attack from across the street corroborated defendant’s description of events, and testified that defendant quietly crept up to Perez and grabbed him in a chokehold. Defendant then plunged his knife into Perez’s neck multiple times. When asked why he stabbed Perez in the neck, he said he “thought about it . . . it’s the neck, . . . it’s like part of your – where you breathe and eat and so I thought of that.” Defendant stated that he thought the stabbing was “effective,” admitted that he stabbed Perez in the neck because he wanted Perez to die, and bragged that he hoped Perez died. Defendant also contemplated the location of the stabbing and made sure to stab Perez out of the view of security cameras.

Defendant relies on *People v. Nelson* (2016) 1 Cal.5th 513, 552, to argue that defendant’s “coming up behind the victim in this case was not sufficient evidence to constitute lying in wait.” In *Nelson*, “The evidence showed, directly or by reasonable inference, that Nelson rode his bicycle to the area near the Target parking lot, where he had reason to believe the victims would be waiting to go to work. He concealed his bicycle and came up behind his victims on foot to take them by surprise. He shot the two victims in quick succession. After ensuring his victims were dead by shooting a second time, he retrieved his bicycle and left.” (*Id.* at p. 551.) The court found there was insufficient evidence to prove the lying-in-wait special circumstance because there was

no evidence “that Nelson arrived before the victims or waited in ambush for their arrival. In the absence of such evidence, there is no factual basis for an inference that before approaching the victims, he had concealed his bicycle and waited for a time when they would be vulnerable to surprise attack.” (*Ibid.*)

Unlike *Nelson*, here the evidence was defendant spotted Perez on the street and then hid so that Perez would not see him. Defendant then waited to ambush Perez from behind with a knife. The People provided substantial evidence of concealment, waiting, and surprise attack.

3. *LWOP Sentence Did Not Violate the Eighth and Fourteenth Amendments*

Defendant contends that imposition of an LWOP sentence based on the lying-in-wait special circumstance violated the Eighth and Fourteenth Amendments’ prohibition against imposing arbitrary and capricious sentences. Defendant asserts that the “lying-in-wait special circumstance, as interpreted by [the] California Supreme Court, fails to narrow the class of persons eligible for an LWOP sentence and fails to provide a meaningful basis for distinguishing the few cases in which this sentence is imposed from the many cases in which it is not in violation of the Eighth Amendment.” Defendant specifically argues that there “is no meaningful distinction between the lying-in-wait special circumstance and first degree murder predicated on theories of premeditation and deliberation or lying in wait.”

As defendant acknowledges, this claim has been repeatedly rejected by our Supreme Court. The Supreme Court has “differentiated between the lying-in-wait special circumstance and lying in wait as a theory of first degree murder on the bases that the special circumstance requires an intent to kill (unlike first degree murder by lying in wait, which requires only a

wanton and reckless intent to inflict injury likely to cause death) and requires that the murder be committed “while” lying in wait, that is, within a continuous flow of events after the concealment and watching and waiting end. [Citation.] Contrary to defendant’s argument, the lying-in-wait special circumstance is not coextensive with either theory of first degree murder; it does not apply to all murders and is not constitutionally infirm.” (*People v. Casares* (2016) 62 Cal.4th 808, 849; *People v. Streeter* (2012) 54 Cal.4th 205, 253 [stating the same].)

4. *The Trial Court Did Not Violate Defendant’s Constitutional Rights by Denying His Request to Testify After the Court Found Him Guilty*

Defendant argues that the trial court violated his constitutional rights when it denied his request to testify, made after the court stated it found defendant guilty. “A defendant in a criminal case has the right to testify in his or her own behalf.” (*People v. Bradford* (1997) 15 Cal.4th 1229, 1332.) This right is “‘subject to reasonable restrictions.’” (*People v. Mickel* (2016) 2 Cal.5th 181, 218.) “In the exercise of this right, the accused, as is required of the State, must comply with established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.” (*Chambers v. Mississippi* (1973) 410 U.S. 284, 302.)

At trial, prior to the close of evidence, the defense counsel informed the court that he had met with defendant that morning and they discussed “at length” whether defendant wanted to testify. Defense counsel stated that it was defendant’s “position that because the court heard his interrogation which was his version of what occurred he’s decided not to testify.” The trial court advised defendant of his right to remain silent and his right to testify on his own behalf. The court asked defendant whether he understood these rights. Defendant responded he did. The

court inquired: “And you choose not to testify?” Defendant confirmed: “I choose not to testify.” The defense then rested without presenting any evidence.

Following some short arguments by counsel, the court announced its findings of guilt. Defendant then asked, “I can’t testify anymore?” The court responded, “No. That’s why I asked you.” Defendant provided a lengthy explanation of what his testimony would have been. The trial court repeated that it had previously asked if defendant wanted to testify and defendant decided against it. Defendant stated that he did not understand. The trial court indicated that defendant’s proposed testimony was inconsistent with his interview transcripts. The court denied defendant’s request.

We conclude the trial court did not violate defendant’s constitutional rights. Rather, the trial court made every effort to offer defendant the opportunity to testify and confirmed defendant understood his rights when he chose not to testify. Defendant only requested to testify after the close of evidence and the court’s announcement of guilt. Defendant has shown no authority for his position that the trial court erred in not permitting defendant to testify after the court had found defendant guilty.

DISPOSITION

The judgment is affirmed.

RUBIN, Acting P.J.

WE CONCUR:

GRIMES, J.

GOODMAN, J.*

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