Filed 6/21/12 P. v. Kim CA2/1

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RATANAK DAVID KIM, Defendant and Appellant.	B230598 (Los Angeles County Super. Ct. No. NA073193)

APPEAL from a judgment of the Los Angeles Superior Court. Richard R. Romero, Judge. Affirmed.

John Lanahan, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Scott A Taryle and David A. Wildman, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant and Appellant Ratanak David Kim was convicted by a jury of two counts of murder, two counts of attempted murder, and assault with a deadly weapon, with various special circumstances and gang and firearm enhancements. He appeals his convictions based on alleged errors in the trial court's instructions to the jury. We find no error, and therefore affirm.

THE FACTS[1]

On January 20, 2007, the Pov family held a birthday party for Mai Tran, who was then the girlfriend of Sowalnut Pov, one of the sons in the Pov family. Although defendant was not invited to the party, he arrived during the evening with two women: Phally Sea, a neighbor who lived across the street, and a woman later identified as Christine Picado, who Sowalnut did not know. Defendant had an "Asian Boyz" gang tattoo on the back of his head.

Defendant introduced himself to Sowalnut as "Baby C," and asked if he could join the party. Sowalnut told defendant he could stay, but told him not to invite others, to which defendant agreed. But when Sowalnut later loaned defendant his cell phone to make a call, defendant used it to invite others.

Sometime later, about ten other people arrived at the front gate, seeking entry. Sowalnut told defendant that "these guys got to go." Defendant replied that they could come in. "It's okay, they my peoples."

At that point a confrontation developed between defendant's friends, who were trying to enter the gate, and Sowalnut's friends, who were trying to block them from entering. The newcomers became more aggressive, pushing, shoving, and identifying themselves with Asian Boyz gang. Meanwhile, some of defendant's friends walked across the street toward a car, starting to leave.

Defendant then pulled a handgun from Picado's purse, pointed it at Sowalnut's head at close range, and said "you should have just let us in. We wasn't even gonna do

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[1] We state the evidence that supports the verdict, omitting controverted facts not germane to the appeal.

nothing." Then he stepped back and shot three times into the air. Defendant then walked off down the street with the girls he had come with, toward a liquor store, saying that he would return.

Sowalnut called the police, who came and told them to end the party. A few relatives and friends stayed to help clean up the rear house, where the party had been. Sometime between a half hour and an hour later, while he was in the driveway arguing with a friend about having let defendant into the party, Sowalnut saw flashes of light and heard gunshots from the front. He turned, and saw his friend Satiya Sokun (known as "Anthro") fall to the ground. After grabbing his girlfriend and pulling her down, Sowalnut turned around to see his younger brother Sovannak rise from where he had been sitting, grabbing his shoulder, then falling to the ground and screaming to call an ambulance.

Both Satiya and Sovannak died that night at the hospital. A number of those present identified defendant as one of the two or three shooters.

THE CASE

A five-count information charged defendant with two counts of first degree murder (counts 1 & 2) (Pen. Code, § 187, subd. (a)); two counts of premeditated attempted murder (counts 3 & 4) (Pen. Code, §§ 187, subd. (a) & 664); and one count of assault with a deadly weapon (count 5) (Pen. Code, § 245, subd. (a)(2)).[2] As to counts 1 and 2, the information alleged special circumstances of multiple murders (§ 190.2, subd. (a)(3)), gang and firearm enhancements (§ 186.22, subd. (b)(1)(C); §12022.53, subds. (b), (c) & (d)). Counts 3, 4 and 5 alleged gang and firearm enhancements. (§ 186.22, subd. (b)(1)(C); §12022.53, subds. (b) & (c).) Two codefendants, Savoeun Soeur and Kenton Oeun, were also charged in counts 1, 2 and 4.

[2] Further statutory references are to the Penal Code unless otherwise identified.

Defendant pled not guilty and denied the allegations. On December 21, 2010, a jury found him guilty as charged in all five counts.[3] It found both the murders to be in the first degree, it found the special circumstance of multiple murder to be true, and it found all the allegations to be true, except the allegations in counts 3 and 4 of the personal discharge of a firearm causing great bodily injury or death.

Defendant was sentenced on January 7, 2011, to state prison for consecutive terms of life without the possibility of parole as to counts 1 and 2; to 15 years to life as to counts 3 and 4; and to 4 years as to count 5. An additional term of 25 years to life was imposed (but stayed) as to counts 1, 2, and 4, under section 12022.5, subdivisions (b), (c), (d) and (e); an additional term of 20 years was imposed (but stayed) as to count 3, under section 12022.53, subdivisions (c) and (e); an additional term of 10 years was imposed as to count 5, under section 12022.5, subdivision (a); and an additional term of 10 years was imposed as to count 5, under section 186.22, subdivision (b). Defendant received credit for 1,441 days of presentence custody, including no conduct credits. On January 31, 2011, he filed a timely notice of appeal.

DISCUSSION

Defendant's appeal challenges the instructions given by the trial court to the jury, in two respects.

A. The Trial Court Correctly Instructed The Jury With Respect To Guilt As An Accomplice.

The trial court instructed the jury that defendant and his codefendants could be found guilty of the crimes charged, in either of two ways: as a perpetrator of the crime, or as an aider and abettor of the perpetrator. It instructed the jury, in the language of CALCRIM No. 401, that "[t]o prove that the defendant is guilty of a crime based on aiding and abetting that crime, the People must prove that:

"1. The perpetrator committed the crime;

"2. The defendant knew that the perpetrator intended to commit the crime;

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[3] Codefendants Soeur and Oeun were tried with defendant, but the jury deadlocked on all charges against them.

"3. Before or during the commission of the crime, the defendant intended to aid and abet the perpetrator in committing the crime;
AND

"4. The defendant's words or conduct did in fact aid and abet the perpetrator's commission of the crime.

"Someone aids and abets a crime if he or she knows the perpetrator's unlawful purpose and he or she specifically intends to, and does in fact, aid, facilitate, promote, encourage, or instigate the perpetrator's commission of that crime.

"If all of these requirements are proved, the defendant does not need to actually have been present when the crime was committed to be guilty as an aider and abettor.

"Among the factors which may be considered in making the determination of aiding and abetting are: presence at the scene of the crime, companionship, and conduct before and after the offense.

"If you conclude that defendant was present at the scene of the crime or failed to prevent the crime, you may consider that fact in determining whether the defendant was an aider and abettor. However, the fact that a person is present at the scene of a crime or fails to prevent the crime does not, by itself, make him or her an aider and abettor." (Italics added.)

Defendant challenges the language of the instruction's second-to-last paragraph (italicized above). He does not argue that the challenged language misstates the law. He claims only that the instruction erroneously permitted the jury to find him guilty of murder and attempted murder as an aider and abettor if it concluded that he merely knew the perpetrators, but did nothing to promote or aid them in the second shooting. It could have permitted the jury to find him guilty of murder and attempted murder as an accomplice to the second shooting, he argues, based only on his having fired shots at the first shooting episode, even if the jury believed he was not present at the second episode

and did not know that others had returned to the house and "shot it up."[4] The trial court rejected defendant's objection to the challenged language.

In evaluating whether giving an instruction was error, the challenged language must be examined to determine both whether there is a "'reasonable likelihood'" that the jury understood it as the appellant contends they could have done (*People v. Kelly* (1992) 1 Cal.4th 495, 525), and if that likelihood exists, "whether the instruction, so understood, states the applicable law correctly." (*People v. Warren* (1988) 45 Cal.3d 471, 487.) The instruction's correctness must be evaluated on the basis of the entire charge to the jury, not merely from consideration of an isolated portion of the instruction. (*People v. Harrison* (2005) 35 Cal.4th 208.)

Read as a whole, the instruction is not reasonably susceptible to the interpretation proposed by defendant (nor does it misstate the law). The instruction told the jury, as defendant contends, that he might be found to be guilty as an aider and abettor even if he was not present when the crimes were committed, and that his conduct before the charged crimes was relevant to the jury's determination whether he aided and abetted the crimes' perpetrator or perpetrators. However, it also told the jury that defendant could not be found guilty of aiding and abetting the crimes unless he knew that the perpetrator intended to commit the crimes; unless he intended to aid and abet the perpetrator in committing the crimes; and unless he "did in fact aid and abet the perpetrator's commission of the crime."

Unless the jury wholly disregarded these portions of the instructions, it could not have found defendant guilty of murder or attempted murder based only on his having fired shots at the first shooting episode. In order to find defendant guilty as an aider and abettor the jury had to have determined that he knew of the perpetrator's criminal intention in returning to the party to shoot again; that he intended to aid the perpetrator in

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[4] In the trial court both defendant and his codefendants objected to this instruction on the ground that the jury might find them guilty as accomplices to the murder and attempted murder at the second shooting episode based simply on their presence at the first episode.

carrying out that criminal intention; and that he in fact aided and abetted the perpetrator in doing so.

As the court correctly instructed, his physical presence when the crimes occurred was a factor the jury could consider in determining whether he was guilty as an aider and abettor, but it was not essential to that determination. Because the instruction, read as a whole, neither incorrectly stated the law nor is susceptible to the interpretation urged by defendant's appeal, we find no reasonable likelihood that the jury was misled.

B. The Jury Was Correctly Instructed That In Order To Convict Defendant It Must Find Defendant Guilty Beyond A Reasonable Doubt Of Each Element Of The Charged Offenses, Special Circumstances, and Enhancements.

Defendant's appeal charges that the trial court erroneously failed to instruct the jury that in order to convict defendant, all of the elements of the charged offenses and special circumstances must be found to have been established beyond a reasonable doubt. He concedes that the court properly instructed the jury that its determinations must be based on proof of defendant's guilt beyond a reasonable doubt with respect to the charges of attempted murder, the gang allegation, and the allegations of gang-related and personal use of a firearm. But he contends that the instructions with respect to murder and the special circumstances erroneously failed to require the prosecution to prove each element of the offense or the enhancement beyond a reasonable doubt.

We disagree, for a number of reasons.

First, that is not what the record reflects. The record shows that the court instructed the jury that in order to convict defendant of first degree murder, "[t]he People have the burden of proving beyond a reasonable doubt that the killing was a first degree murder rather than a lesser crime. If the People have not met this burden, you must find the defendant not guilty of first degree murder." It instructed the jury that "[t]he People have the burden of proving [the allegation of attempted murder] beyond a reasonable doubt. If the People have not met this burden, you must find this allegation has not been proved." It instructed the jury that "[i]f all of you agree that the People have proved beyond a reasonable doubt that the defendant is guilty of first degree murder," the jury

should complete and sign that verdict form.[5] It instructed the jury that "[t]he People have the burden of proving the special circumstance [with respect to first degree murder] beyond a reasonable doubt. If the People have not met this burden, you must find the special circumstance has not been proved."[6] It instructed the jury that "[i]f the defendant was not the actual killer, then the People have the burden of proving beyond a reasonable doubt that he acted with the intent to kill for the special circumstance of multiple murder to be true. If the People have not met this burden, you must find the special circumstance has not been proved true for that defendant."[7] It instructed the jury that "[t]he People have the burden of proving each allegation [with respect to a pattern of criminal gang activity] beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." It instructed the jury that with respect to the allegation for each crime that one of the principals personally and intentionally discharged a firearm, "[t]he People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." It instructed the jury that with respect to the allegation for each crime that the defendant personally used a firearm during the commission of the crime, "[t]he People have the burden of proving each of the allegations beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." It instructed the jury that with respect to the allegation for each crime that the defendant personally and intentionally discharged a firearm during the commission of the crime, "[t]he People have the burden of proving each allegation beyond a reasonable doubt. If the People have not met this burden, you must find that the allegation has not been proved." And it instructed the jury that to prove the allegation for each crime that the defendant used a firearm during the crime causing great bodily injury or death, "[t]he People have the burden of proving each allegation beyond a reasonable

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[5] Defendant's brief fails to mention or cite this instruction.

[6] Defendant's brief fails to mention or cite this instruction.

[7] Defendant's brief fails to mention or cite this instruction.

doubt. If the People have not met this burden, you must find that the allegation has not been proved."

If these instructions were not alone sufficient, there is more. Before instructing the jury as to the elements of each crime, special circumstance, and enhancement, the trial court specifically instructed it that a defendant is presumed to be innocent, and that the presumption "requires that the People prove a defendant guilty beyond a reasonable doubt." And it instructed the jury that that burden would apply to everything the People must prove: "Whenever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt." "Unless the evidence proves the defendants guilty beyond a reasonable doubt, they are entitled to an acquittal and you must find them not guilty."[8]

In light of these instructions, defendant is simply wrong in contending that the instructions failed to tell the jury that it must find each element of each offense and each special circumstance to be proved beyond a reasonable doubt. In addition to the instructions identifying the offenses and special circumstances listed above, the jury was specifically instructed that everything the People must prove, it must prove beyond a reasonable doubt.

Nothing in the instructions could have led the jury to believe that anything less than proof beyond a reasonable doubt was required for anything at all that the People were required to prove. As the court held in *People v. Riley* (2010) 185 Cal.App.4th 754, an instruction telling the jury that whenever the court instructs it that the People must prove something, this means the People must prove it beyond a reasonable doubt is "sufficient to inform the jury that the prosecution had the obligation to prove each element beyond a reasonable doubt." (*Id*. at pp. 768-769; see also, *People v. Wyatt* (2008) 165 Cal.App.4th 1592, 1601 [same]; *People v. Ramos* (2008) 163 Cal.App.4th 1082, 1087-1089 [same]; *People v. Henning* (2009) 178 Cal.App.4th 388, 406

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[8] Defendant's brief fails to mention this global instruction.

[contention that CALCRIM No. 220 fails to instruct jury that each element must be proved beyond reasonable doubt is frivolous].)[9]

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

CHANEY, J.

We concur:

ROTHSCHILD, Acting P. J.

JOHNSON, J.

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[9] Defendant argues that *People v. Henning*, *supra*, 178 Cal.App.4th 388, and the other cases that have found no error in CALCRIM No. 220's language are inapplicable here, because in those cases the court had not instructed the jury that some, but not all, facts required proof beyond a reasonable doubt. Even if that contention were true (it is not clear that it is), it lacks merit in light of the court's specific instruction that "[w]henever I tell you the People must prove something, I mean they must prove it beyond a reasonable doubt."