Filed 2/3/15 P. v. Gonzalez CA2/8

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

THE PEOPLE, Plaintiff and Respondent, v. ERIC GONZALEZ, Defendant and Appellant.	B254844 (Los Angeles County Super. Ct. No. BA401617)

APPEAL from a judgment of the Superior Court of Los Angeles County. George Lomeli, Judge. Affirmed.

Ryan M. Wolfe for Defendant and Appellant.

Kamala D. Harris, Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr. and David F. Glassman, Deputy Attorneys General, for Plaintiff and Respondent.

A jury convicted Eric Gonzalez of three counts of attempted premeditated murder arising from a run-by shooting. (Pen. Code, §§ 664/187, subd. (a).)[1] Further, the jury found true on all three counts that Gonzalez had personally used and discharged a firearm, a handgun, and that he committed the offense for the benefit of a criminal street gang. (§§ 12022.53, subds. (b), (c), & (e); 186.22, subd. (b).) As to one of the attempted murder counts (count 1), the jury made a further finding that Gonzalez personally discharged a firearm causing great bodily injury. (§ 12022.53, subds. (d) & (e).) The trial court sentenced Gonzalez to a term of 15 years to life on count 1, plus a determinate term of 25 years for the firearm enhancement with great bodily injury; a consecutive term of 15 years to life on count 2, plus a determinate term of 20 years for the firearm discharge enhancement; and a consecutive term of 15 years to life on count 3, plus a determinate term of 20 years for the firearm discharge enhancement. The court ordered that any additional term for the gang benefit enhancement would not be imposed in accord with *People v. Lopez* (2005) 34 Cal.4th 1002. We affirm.

FACTS

The Crimes

Reviewed in accord with the usual standard of review on appeal (see, e.g., *People v. Guerra* (2006) 37 Cal.4th 1067, 1129), the evidence at trial established the following facts. On July 19, 2012, Gonzalez and Eric Alvarado, both members of the Northeast Los Angeles street gang, started "throwing signs" at two members of the Highland Park gang who were sitting at a park table-bench at a recreation center that was located on the other side of Figueroa Street.[2] The recreation center is in "territory" that is "claimed" by the Highland Park gang. Very quickly, Gonzalez and Alvarado started running through traffic on Figueroa Street in the direction of the Highland Park gang members. As Gonzalez was crossing the street, he pulled a handgun from his waist, and the Highland

---

[1] All further undesignated section references are to the Penal Code.

[2] The park bench was on a grassy area separated from the sidewalk on Figueroa by a low chain-link fence. Photographs of the scene were introduced as exhibits at trial.

Park gang members began scrambling away. When Gonzalez got to the sidewalk area on the recreation center side of the street, he started shooting at the Highland Park gang members; he fired at least five times. As misfortune would have it, Erika N. (the victim as to count 1) and her friend, Jenefer D. (the victim as to count 2), had sat down on the park bench just minutes before the two Highland Park gang members came by and sat down near the two young women. A bullet hit Erika in the chest and penetrated her lung; she was transported for emergency surgery at a local hospital. After the shooting, Gonzalez and Alvarado fled the scene on foot.

The Criminal Case

In November 2012, the People filed an information charging Gonzalez with the attempted premeditated murder of Erika N. (count 1), the attempted premeditated murder of Jenefer D. (count 2), and the attempted premeditated murder of "John Doe" (count 3), identified at trial only as one of the Highland Park gang members. Further, the information alleged the firearm and gang enhancements noted as the outset of his opinion.

The charges were tried to a jury in July 2013, at which time the People presented evidence establishing the facts summarized above. The People also presented testimony from a police expert on the subject of the rival gangs involved in the shooting incident. In response to a hypothetical question, the expert opined that a crime with facts mirroring those involved in the shooting would have been committed to benefit the Northeast Los Angeles street gang. In his defense, Gonzalez called one of the prosecution's witnesses, Gloria M., to have her verify that, on the day of the shooting she had told police that the shooter was "Snapper" (Alvarado).[3] On July 31, 2013, the jury returned verdicts as noted above.

Prior to sentencing, Gonzalez retained private counsel, attorney Ryan M. Wolfe.[4] In January 2014, Gonzalez (by attorney Wolfe) filed a motion for new trial on a number

---

[3] Other evidence at trial showed that Gonzalez had the gang moniker "Trigger."

[4] The Office the Los Angeles County Public Defender represented Gonzalez at trial.

of grounds. On January 22, 2014, the trial court denied Gonzalez's motion for new trial, then sentenced Gonzalez as noted above.

Gonzalez filed a timely notice of appeal.

DISCUSSION

I. Motion for New Trial on the Ground of Insufficiency of the Evidence on the Issue of the Identity of the Shooter

Gonzalez contends the trial court erred in denying his motion for new trial based on a claim of insufficient evidence to support the jury's verdicts, specifically with respect to the jury's finding that he was the shooter. We disagree.

Section 1181, subdivision (6), empowers a trial court to grant a motion for new trial when the court determines that a jury's verdict is "contrary to . . . [the] evidence." In considering such a motion, the court is authorized to weigh the evidence independently, in effect acting as a "'13th juror.'" (*People v. Lagunas* (1994) 8 Cal.4th 1030, 1038, fn. 6.) When a trial court — sitting as a "13th juror" — decides for itself that it would have decided the case differently than did the 12 jurors, the court may, in an exercise of its discretion, grant a new trial. On appeal, a trial court's ruling on a motion for new trial is reviewed under an abuse-of-discretion standard. (See *People v. Navarette* (2003) 30 Cal.4th 458, 526.) Under this standard on appeal, a reviewing court may not reverse a trial court's ruling unless the appealing party demonstrates that the trial court's ruling was arbitrary or beyond the bounds of reason. (*People v. Ledesma* (2006) 39 Cal.4th 641, 705.) When an issue involves an evaluation of facts, a reviewing court may find an abuse of discretion if a factual finding critical to the trial court's decision is not supported by substantial evidence. (*People v. Cluff* (2001) 87 Cal.App.4th 991, 998.)

Gonzalez's challenge to the trial court's ruling to deny his motion for new trial necessarily fails because the jury's verdicts are supported by substantial evidence, and the trial court, in exercising its discretion whether to grant a new trial, was not, as Gonzalez seems to suggest in his opening brief on appeal, required to view the evidence in a light most favorable to Gonzalez. As noted above, the court's role was to examine the trial evidence for itself. To the extent Gonzalez argues that he was entitled to two decisions

on the evidence, one by the jury and another by the trial court in passing on his motion for new trial, his argument is unhelpful. Here, the trial court expressly stated that it was denying Gonzalez's motion for a new trial insofar as he claimed insufficiency of the evidence because, in the court's words, "the nature of the evidence presented [at] trial simply does not support the defendant's contention." Gonzalez asked for and received a second decision on the evidence by the trial court in passing on his motion for new trial, and, plainly, the court found the evidence supported a finding of guilt.

The trial court's decision cannot be said to be beyond the bounds of reason. Two witnesses, including victim Erika N., identified Gonzalez as the shooter at trial. Another witness, a bus driver, identified Gonzalez as being one of the two males who went after the persons sitting on the park bench at the time of the shooting. The bus driver's testimony was supported by photographs taken at the time of the shooting from a camera on his bus. Other witnesses' testimony generally describing the nature of the shooting was as consistent with the testimony identifying Gonzalez; the other witnesses simply could not expressly identify Gonzalez as being the shooter. Gonzalez's arguments on appeal openly acknowledges that he was one of the two gang members who were involved in the shooting incident. The credibility of the identification of Gonzalez as the shooter was an issue for the jury (and for the trial court on the motion for new trial), and we simply will not substitute our credibility calls on appeal in place of the respective finders of fact below. (*People v. Brown* (2014) 59 Cal.4th 86, 106 [an appellate court does not reweigh the evidence, and does not substitute its view of the evidence in place of the trier of fact]; and see also, e.g., *People v. Anderson* (2001) 25 Cal.4th 543, 570-575 [a single eyewitness's identification is sufficient to prove a defendant's identify as the perpetrator of a crime].)

II. Motion for New Trial on the Ground of Insufficiency of the Evidence on the Element of Specific Intent

Gonzalez contends the trial court erred in denying his motion for new trial based on a claim of insufficient evidence to support the jury's verdicts, specifically with respect to the element of the specific intent to kill. We disagree.

Our analysis is the same here as it was for the issue of identity discussed above. The trial court reasonably could have found, and did find — sitting as a "13th juror" — that Gonzalez had the specific intent to kill when he shot at the persons who were sitting on the recreation center bench. A defendant's intent is rarely susceptible of direct proof (e.g., by an express admission), and, for this reason, the law allows intent to be inferred from the circumstances surrounding an offense, and recognizes that a jury's reasonable inference is sufficient to constitute substantial evidence of a defendant's intent. (*People v. Bloom* (1989) 48 Cal.3d 1194, 1208; *People v. Pre* (2004) 117 Cal.App.4th 413, 420.) Here, Gonzalez fired multiple gunshots at a targeted group of people from a relatively short distance measured in a matter of feet. A reasonable examiner of the facts could reasonably find that such a shooter had the specific intent to kill.

III. Motion for New Trial on the Ground of Insufficiency of the Evidence on the "Kill Zone" Theory of Intent

Gonzalez contends the trial court erred in denying his motion for new trial based on a claim of insufficient evidence to support the jury's verdicts, specifically with respect to the "kill zone" theory of criminal liability. Once again, we find no error because, once again, we find the trial court's decision not to depart from the jury's verdict was within the bounds of reason and, thus, not an abuse of discretion.

The Governing Legal Principles

The crime of attempted murder requires evidence that the defendant had a specific intent to kill (*People v. Stone* (2009) 46 Cal.4th 131, 136 (*Stone*)), and the doctrine of transferred intent does not apply to attempted murder. (*People v. Bland* (2002) 28 Cal.4th 313, 317 (*Bland*).) As the Supreme Court has explained: "A person who intends to kill only one is guilty of the attempted . . . murder of that one but not . . . others the person did not intend to kill." (*Ibid.*) Stated in other words: "The defendant's mental state must be examined as to each alleged attempted murder victim. [A defendant] who intends to kill only one person and attempts unsuccessfully to do so, is guilty of the attempted murder of the intended victim, but not of others." (*Bland, supra*, 28 Cal.4th at p. 328.)

This said, the law recognizes the possible reality that a defendant who performs a deadly act against a group of people that includes a primary target may have concurrently intended to kill the primary target and also everyone else within the "kill zone." (*Bland*, *supra*, 28 Cal.4th at pp. 329-330.) In *Bland*, the defendant fired multiple shots at the occupants of a car, killing the driver and injuring, but not killing, two of the passengers. (*Id*. at p. 318.) The defendant was convicted of one count of murder and two counts of attempted murder. The evidence in *Bland* showed that the defendant specifically intended to kill the driver, and the question arose whether the evidence supported a finding that he also intended to kill the passengers. (*Id*. at p. 319.) The Supreme Court explained that, when the defendant and his cohort "fired a flurry of bullets" at the victims' vehicle, he "created a kill zone." (*Id*. at p. 331.) Although the defendant had the specific intent to target and kill the driver, he could properly be convicted of the attempted murder of the passengers because of the nature of the force he used, which supported a finding that he intended to kill everyone. (*Id*. at pp. 329-331.) As the court explained:

> "[C]onsider a defendant who intends to kill A and, in order to ensure A's death, drives by a group consisting of A, B, and C, and attacks the group with automatic weapon fire or an explosive device devastating enough to kill everyone in the group. The defendant has intentionally created a 'kill zone" to ensure the death of his primary victim, and the trier of fact may reasonably infer from the method employed an intent to kill others concurrent with the intent to kill the primary victim. When the defendant escalated his mode of attack from a single bullet aimed at A's head to a hail of bullets or an explosive device, the factfinder can infer that, whether or not the defendant succeeded in killing A, the defendant concurrently intended to kill everyone in A's immediate vicinity to ensure A's death." (*Bland*, *supra*, 28 Cal.4th at p. 330.)

What this all means is that a trier of fact is permitted to find that the intent to kill a so-called "nontargeted" victim was "concurrent" with the intent to kill a targeted victim "when the nature and scope of the attack, while directed at a primary victim, are such that [the trier of fact could reasonably] conclude the perpetrator intended to ensure harm to the primary victim by harming everyone in that victim's vicinity." (*Bland, supra,* 28 Cal.4th at p. 329.) We understand this case to teach that the "kill zone" theory of intent is not an independent basis for criminal liability, but rather, a way of examining evidence with an eye toward determining whether a defendant had concurrent intents to kill more than one person.

The counter-corollary to the principles discussed above is that the kill zone theory of intent does not apply where there is no evidence showing a defendant used a *means* of killing that inevitably would result in the death of others within a "kill zone." (*Stone, supra,* 46 Cal.4th at p. 138.) In *Stone*, the Supreme Court held that "kill zone" instructions should not have been given where the defendant was charged only with the attempted murder of a single named individual, and there was no evidence that he "used a means to kill the named victim . . . that inevitably would result in the death of other victims within a zone of danger." (*Ibid*.) In *Stone*, the defendant fired only a single gunshot into a group of rival gang members, albeit indiscriminately. Given this factual framework, the Supreme Court ruled that the "kill zone" theory of intent did not apply because the means used — a single gunshot — did not create a kill zone area within which it was inevitable that others also would be killed or injured. (*Ibid*.)

People v. Perez (2010) 50 Cal.4th 222 (*Perez*), is also instructive. In *Perez*, the defendant fired a single gunshot at a group of seven police officers and one civilian. The Supreme Court ruled that the evidence showing the victims were standing close together was not sufficient to show that the defendant created a "kill zone" which would support multiple convictions for attempted murder. (*Perez, supra,* 50 Cal.4th at pp. 232-234.)

Analysis

Applying the kill zone theory of intent to Gonzalez's case, there was easily sufficient evidence that he intended to kill a rival gang member, John Do, and that in

doing so, Gonzalez had the concurrent intent to kill everyone in the target's vicinity. A finding of a concurrent intent to kill others nearby (as implicit in the jury's verdict and in the trial court's order denying Gonzalez's motion for new trial) is supported by evidence showing that Gonzalez fired multiple gunshots from a relatively short distance into a group of people seated near each other on park bench.[5] The facts in Gonzalez's current case were more like firing multiple gunshot indiscriminately into a car (*Bland, supra*, 28 Cal.4th 313) than firing a single shot into a group of people or a group of people standing near each other. (*Stone, supra*, 46 Cal.4th 131; *Perez, supra*, 50 Cal.4th 222).

In Gonzalez's current case, the jury drew a reasonable inference based on the number of shots fired, the direction the shots were fired, the use of a lethal weapon, and the location of the shooter and his targets, all of which supported the proposition that Gonzalez created a kill zone. From the evidence, the jury could reasonably infer that by firing a flurry of shots at the group of victims, Gonzalez intended to kill his gang target. And, the nature of the attack was such that the jury could reasonably infer he also intended to kill everyone in that particular location in order to assure that he killed his targeted victim. The trial court, in ruling on Gonzalez's motion for new trial, could have and did make the same reasonable inference.

IV. Motion for New Trial on the Ground of Prosecutorial Misconduct

Gonzalez contends the trial court erred in denying his motion for new trial based on the ground of prosecutorial misconduct. We disagree.

Section 1181, subdivision (5), empowers a trial court to grant a motion for new trial when the court determines that a prosecutor was "guilty of prejudicial misconduct during . . . trial . . . before the jury."

Gonzalez's claims the prosecutor committed misconduct in asking the People's gang expert a hypothetical question during the expert's testimony. Gonzalez complaints that the prosecutor's "mesh[ed]" the facts of the shooting involved in his case into the

---

[5] The photographic exhibits introduced at trial show the framework of the shooting area.

hypothetical question and improperly "vouch[ed]" for the People's evidence. Gonzalez's argument does not persuade us to find misconduct. While it is true that the prosecutor's hypothetical question included many of the facts of the case, the prosecutor's use of such a question in a criminal case with a gang enhancement allegation does not constitute misconduct. (See, e.g., *People v. Vang* (2011) 52 Cal.4th 1038, 1045; and see also *People v. Medina* (1995) 11 Cal.4th 694, 756.) We have reviewed the exchange between the prosecutor and the gang expert and see no "vouching" for any evidence.[6]

We also reject Gonzalez's claim that the prosecutor misstated the law concerning the "kill zone" theory of liability. First, defense counsel did not object to the prosecutor's argument, thus any claim of prosecutorial misconduct has been forfeited on appeal. (See, e.g., *People v. Gonzales* (2011) 51 Cal.4th 894, 920.) Second, we have read the entirety of the prosecutor's argument, and do not see any language amounting to misstatement of the law regarding the kill zone theory of intent. The argument with which Gonzalez takes issue is as follows: "a shooter may be convicted of multiple counts of attempted murder where the evidence establishes that the shooter used lethal force designed and intended to kill everyone in the area around the targeted victim, i.e., the 'kill zone,' as a means of accomplishing the killing of the victim." Gonzalez claims use of the word "everyone" instead of "anyone" was improper. This exact argument was rejected in the context of considering the propriety of a jury instruction. (*People v. Campos* (2007) 156 Cal.App.4th 1228, 1243 (*Campos*).) Because, as stated in *Campos*, "there is little difference between the words 'kill anyone within the kill zone' and 'kill everyone within the kill zone,'" also find the argument lacking merit in the context of prosecutorial misconduct. (*Ibid*.)

---

[6] At trial, Gonzalez's public defender objected that the prosecutor's hypothetical question violated *People v. Killebrew* (2002) 103 Cal.App.4th 644. In *Killebrew*, the Court of Appeal ruled that a prosecution gang expert had been improperly allowed to testify regarding the intent of the defendants on trial, as opposed to the intent of gang members in general; i.e., the expert had essentially testified that he actually knew what was going on inside the defendants' minds at the time they committed the charged crime. (*Killebrew, supra,* at p. 658.) Gonzalez does not renew his *Killebrew* claim on appeal.

Finally, even if the objection were not forfeited or misstated the law, reversal is not required. When a prosecutor engages in an act which may be deemed misconduct, reversal is required only when the misconduct has so infected the trial with unfairness as to deny the defendant of his or her due process right to a fair trial, or there is a reasonable likelihood that the jury applied any of the complained-of remarks in a fashion which undermines the reliability of the verdict. (*People v. Ayala* (2000) 23 Cal.4th 225, 283-284.) Gonzalez has simply failed to persuade us on appeal that his trial was unfair, or that the jury applied the prosecutor's remarks in a fashion which affected the verdicts.

V. Motion for New Trial on the Ground of Erroneous Jury Instructions

Gonzalez contends the trial court erred in denying his motion for new trial based on the ground of instructional error. We disagree.

Other than observing that section 1181, subdivision (5), empowers a trial court to grant a motion for new trial "[w]hen the court had misdirected the jury in a matter of law . . . ," Gonzalez's argument regarding instruction error is not sufficiently developed to persuade us to reverse. Gonzalez's opening brief presents a one-page argument that consists of little more than a bald assertion that the jury instructions were "confusing and prejudicial." He has not identified any particular instruction given at trial, nor has he cited any published case law supporting an argument that any particular instruction was problematic. An argument presented in such a perfunctory manner may be rejected by a reviewing court. (See, e.g., *People v. Williams* (1997) 16 Cal.4th 153, 206.)

VI. Ineffective Assistance of Counsel

Gonzalez contends the jury's verdicts must be reversed because his lawyer at trial provided ineffective assistance of counsel. Gonzalez argues his trial counsel should have called more eyewitnesses to the shooting to contest the prosecution's witnesses, and should have sent an investigator to find witnesses who would help the defense. He does not, however, identify any witnesses that would have so testified. Gonzalez further argues his public defender should have presented a gang expert, an identification expert, and a ballistics expert. We find no ground for reversing the jury's verdicts based on Gonzalez's claim of ineffective assistance of counsel.

In seeking relief based on a claim of ineffective assistance of counsel on appeal, the burden is on the defendant to show "(1) trial counsel failed to act in the manner to be expected of reasonably competent attorneys acting as diligent advocates and (2) it is reasonably probable that a more favorable determination would have resulted in the absence of counsel's failings." (*People v. Lewis* (1990) 50 Cal.3d 262, 288; and see *Strickland v. Washington* (1984) 466 U.S. 668.) Where the record on appeal does not contain any material allowing for a meaningful determination as to why defense counsel acted as he or she did, or tending to show how some different performance by counsel would have resulted in a more favorable determination for a defendant, an ineffective assistance of claim may be better suited to a petition for writ of habeas corpus. (*People v. Anderson, supra,* 25 Cal.4th at p. 560; *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 267.)

A reviewing court will defer to counsel's tactical decisions in examining a claim of ineffective assistance of counsel unless there could be no rational tactical purpose for a challenged act or omission, and there is a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance. (*People v. Vines* (2011) 51 Cal.4th 830, 876.) Accordingly, a defendant's claim of ineffective assistance of counsel is difficult to carry on direct appeal. (*Ibid*.) A trial lawyer's decision whether to put on a particular witness is a matter trial tactics and strategy which a reviewing court generally will not second-guess. (*People v. Pangelina* (1984) 153 Cal.App.3d 1, 6-9.)

Gonzalez's ineffective assistance of counsel claim fails at the first step of the examination. Here, the record does not shed any light on why defense counsel did not find more witnesses or call experts. Further, there is nothing in the record on appeal to show the possible substance of the testimony of any witness not called for the defense in Gonzalez's case. Absent such a showing, we simply are unable to say on appeal that there is reasonably probability that a more favorable outcome for Gonzalez would have resulted from any uncalled witness's testimony. Gonzalez's ineffective assistance of counsel claim fails at the second step of the examination.

DISPOSITION

The judgment is affirmed.

BIGELOW, P.J.

We concur:

FLIER, J.

GRIMES, J.