Filed 4/29/13 P. v. Calderon CA2/5

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FIVE

THE PEOPLE, Plaintiff and Respondent, v. JOSE CALDERON, Defendant and Appellant.	B239037 (Los Angeles County Super. Ct. No. BA357912)

APPEAL from a judgment of the Superior Court of Los Angeles County, Anne H. Egerton, Judge. Affirmed.

H. Russell Halpern for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Linda C. Johnson, Supervising Deputy Attorney General, Gary A. Lieberman, Deputy Attorney General, for Plaintiff and Respondent.

INTRODUCTION

A jury found defendant and appellant Jose Calderon guilty of second degree murder. (Pen. Code, § 187, subd. (a)[1].) The jury found true the allegation that the offense had been committed for the benefit of, at the direction of, or in association with a criminal street gang (§ 186.22, subd. (b)(1)(c)) and the allegations that defendant personally used and intentionally discharged a firearm causing death (§ 12022.53, subds. (b)-(d)). The trial court sentenced defendant to state prison for a term of 40 years to life.

On appeal, defendant contends that insufficient evidence supports his murder conviction and the trial court erred in admitting certain gang and medical expert testimony. If his challenge to the admission of that gang and medical expert testimony was forfeited by defense counsel's failure to object in the trial court, then defendant contends that he received ineffective assistance of counsel. Defendant also contends that he received ineffective assistance of counsel by defense counsel's failure to challenge for cause one of the jurors. We affirm.

BACKGROUND

People's Case

Defendant was a member of the Toonerville gang. The Toonerville gang claimed as their "turf" an area that was bordered on the south by Los Feliz Boulevard, on the east by San Fernando Road, on the north by the 134 Freeway, and on the west by the Los Angeles riverbed.

The Toonerville gang had a rivalry with the Rascals gang. The area occupied by the Rascals gang was bordered on the north by Los Feliz Boulevard, on the south by the 2 Freeway or Fletcher Drive, on the west by the Los Angeles River, and on the east by San Fernando Road.

Juan Correa was a member of the Echo Park gang. The Echo Park gang and the Rascals gang were not rivals. As long as each gang remained in its territory, there were

---

1 All statutory citations are to the Penal Code unless otherwise noted.

no "issues" between the gangs. In 2008, Correa's girlfriend Melissa O. lived on Hollydale Drive in the Rascals gang territory. Melissa lived her whole life in that neighborhood. She had friends and family members who were Rascals gang members. The fathers, respectively, of her two children were Rascals gang members.

Correa lived with Melissa during the last five months of 2008. Because of his relationship with Melissa, Correa was permitted to be in the Rascal gang's territory on a "pass." A "pass" permitted a member of a gang to enter a different gang's neighborhood for purely personal reasons, so long as that gang member limited his activities in the neighborhood to his personal matters and did not engage in gang or other activity.

About 5:30 p.m., on December 26, 2008, Melissa and Correa returned home after shopping. Later, Correa left the house. Melissa believed that Correa had gone to the backyard. Correa never "wandered off," and knew not to walk around the neighborhood because Melissa told him that she was afraid that members from the Toonerville or Frogtown gangs might come to the neighborhood and assume he was a Rascals gang member.

Marcos F. lived in an apartment on Hollydale near Silver Lake. About 5:45 p.m., on December 26, 2008, he was watching T.V. in his apartment when he heard about five to six gunshots. Another neighbor called 911. Los Angeles Police Department Sergeant Carlos Figueroa responded to the scene. He found Correa lying face down, unconscious and not breathing, in a driveway on the east side of Silver Lake just north of Hollydale. Correa had a bullet hole in his back.

The paramedics arrived shortly after Sergeant Figueroa, and began treating Correa. When the paramedics rolled Correa over, a nine-millimeter semiautomatic pistol fell from his right hand. The gun appeared to have malfunctioned and jammed—"it was a double feed where essentially two rounds, two bullets attempt to go into the chamber which only fits one bullet at the same time."

At some point, Melissa went outside to look for Correa in the backyard. Correa was not there. Melissa went to the front of the house and saw a police car pass by. She grabbed her purse and drove down the street, but it had been blocked off due to a

shooting. She drove around the block and made her way to the shooting scene on Silver Lake. She described to a police officer Correa's clothes and was advised to go to the hospital where she ultimately learned that Correa had passed away.

In their investigation, the police created a map and took measurements of the crime scene. Silver Lake ran north/south. Hollydale ran east/west and "dead-ended" into Silver Lake Boulevard. There was a bend or curve at the end of Hollydale. An expended nine-millimeter casing, fired from Correa's gun, was found in the street near the bend on Hollydale, west of Silver Lake Boulevard. The casing was located 86 feet, 2 inches from the west curb of Silver Lake, and 9 feet, 6 inches north of the south curb of Hollydale.

There were four drops of blood on Silver Lake Boulevard, south of Correa's body. Measuring from the north curb of Hollydale, the first blood drop was located 100 feet, 4 inches north of Hollydale; the second blood drop was located 104 feet, 4 inches north of Hollydale; the third blood drop was located 108 feet, 5 inches north of Hollydale; and the fourth blood drop was located 112 feet, 7 inches north Hollydale. Correa's gun was located 120 feet, 7 inches from the north curb of Hollydale.

Dr. James Ribe, a coroner with the Los Angeles County Department of Coroner, performed the autopsy on Correa. Dr. Ribe testified that Correa suffered a gunshot wound to his back, the bullet entering Correa's back in the area of his right shoulder blade and traveling through his right eighth rib and his right lung causing entrance and exit wounds to the lung of about one half inch in size. The bullet then bounced off Correa's backbone and proceeded through his esophagus, through his left main stem bronchus—the main air pipe that connects the left lung to the windpipe—cutting it in half, through his left main coronary artery—the main artery that connects the heart to the left lung—putting a one half inch hole in it, and through his left lung before striking and breaking a rib that halted its progress. A .38- or .357-caliber bullet was recovered from Correa's body.

Dr. Ribe testified that Correa's injuries were "[v]ery rapidly fatal" for two reasons. "One is perforation and collapse of both lungs, which disables breathing, and the second is internal bleeding, which was massive." According to Dr. Ribe, a person who suffered

such injuries "[u]sually" would "just drop," but "sometimes we've found they're able to run a very short distance."

Dr. Ribe opined that a person who suffered Correa's injuries could not have run from the location on Hollydale where the nine millimeter shell casing was found to the location on Silver Lake where Correa's body was found (approximately 120 feet from the north curb of Hollydale). Dr. Ribe explained, "The reason is with this type of wound, with two collapsed lungs and gushing blood into the chest from the main pulmonary artery and a severed main stem bronchus, this is immediately disabling and I would expect that person to be incapacitated in a matter of seconds from this, most likely just a few seconds." The "extreme outside limit" period that a person with Correa's injuries could remain upright or engage in "activity" was 15 seconds. Dr. Ribe testified that if a person so injured did not drop immediately, the farthest he had seen or heard of such a person running was 50 feet.

Gabriel Serna was a member of the Toonerville gang. Serna's telephone number was subject to a wiretap. About 5:49 p.m. on December 26, 2008, defendant called Serna. A transcript of the call was played for the jury. In the call, defendant and Serna had the following conversation:

"[Defendant]: Hello.

"[Serna]: What's up fool?

"[Defendant]: Hey, be careful. I caught somebody in Trash,[2] right now.

"[Serna]: Who is it?

"[Defendant]: I don't know.

"[Serna]: Some fool?

"[Defendant]: Yeah.

"[Serna]: You hit 'em?

"[Defendant]: Yeah, I'm on empty.

"[Serna]: So you got 'em for sure?

---

2 "Trash" was a derogatory term for a Rascals gang member.

"[Defendant]: Yeah.

"[Serna]: On foot, or . . . or in the car?

"[Defendant]: On foot.

"[Serna]: Your seen 'em on foot?

"[Defendant]: Yeah.

"[Serna]: He dropped?

"[Defendant]: Yeah.

"[Serna]: Alright, then.

"[Defendant]: Late.

"[Serna]: . . . You coming back?

"[Defendant]: Yeah. I'm, I'm already gonna pull into Bemis.[3]

"[Serna]: Alright. That was you right now?

"[Defendant]: Yeah.

"[Serna]: Alright. If anything, let's, let's just bring that thing[4] over here, right now.

"[Defendant]: Alright, then.

"[Serna]: Alright, late.

"[Defendant]: Late."

Los Angeles Police Sergeant John Strasner, testified as the prosecution's gang expert. The prosecutor presented Sergeant Strasner with the following hypothetical facts: "Let's assume a gang member in the evening, when it's dark, drives his car from Toonerville territory to an area deep in Rascals' territory, on a main thoroughfare, maybe the streets dead-end, it's residential, and in some way he meets up with a person that lives in the area, maybe say an Echo Park gang member that has a pass to be in the area because he's dating a Rascals girl, a girl that lives in the area, and the person that is the Echo Park gang member ends up shot, ends up murdered or shot and dies."

---

3 Bemis was a street in the heart of the Toonerville gang's neighborhood.

4 The phrase, "that thing," referred to the gun.

Based on those hypothetical facts, the prosecutor asked Sergeant Strasner the following question: "Would you have an opinion as to whether or not that shooting was for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members?" Sergeant Strasner responded that his opinion, based on those facts, was that "that shooting, that killing would be in furtherance of the gang, Toonerville." Sergeant Strasner added that shooting a Rascals gang member in Rascals gang territory would have increased defendant's stature within the Toonerville gang.

Defense Case

Defendant, testifying in his own behalf, admitted that he was a Toonerville gang member. Defendant testified that during the late afternoon or early evening of December 26, 2008, he drove to the corner of Hollydale and Silver Lake to pick up "Daisy"—he did not know her last name—a girl with whom he had "an occasional relationship." Defendant never picked up Daisy from her house—he picked her up at various locations in the area—and did not know her phone number.

Defendant knew that he was picking up Daisy in Rascals gang territory, but his "intention wasn't to do nothing, just pick [Daisy] up and come right back." Defendant armed himself with a gun in case he had to protect himself. When defendant arrived, Daisy was not at their appointed meeting place. Defendant turned right on Hollydale, drove his car "up about three or four houses," and parked. He got out of his car intending to walk back to the corner to see if Daisy had arrived. As he crossed Hollydale, heading toward Silver Lake, he noticed Correa standing in the street looking at him. Correa was standing about 15 to 25 feet from defendant in the area where the casing was later found.

Correa raised his chin and "threw his hands up" to shoulder level with his palms facing out. Correa did not say anything. By his gesture, defendant believed that Correa was saying, "What's up?" The gesture can also mean, "What are you doing in my hood?" Defendant waited for Correa to put down his hands, then returned the gesture.

Defendant intended to show Correa that he "wasn't there to do nothing." Defendant was "kind of like surrendering."

While defendant's hands were up, Correa pulled out a gun and fired a shot at defendant. Defendant saw a flash come from Correa's hand, heard a shot, and felt a bullet fly past his head. Defendant was afraid for his life. He "sort of backtracked," but kept Correa in his line of sight. Defendant saw Correa back up towards Silver Lake and make a motion that looked as if he was attempting to shoot at defendant again.[5] Defendant pulled his gun from his back pocket and fired four rounds at Correa as fast as he could. He was afraid and wanted to scare Correa. Correa turned as defendant was firing. Correa stumbled and then fell. Defendant was still on Hollydale when Correa fell. Defendant could not remember which round hit Correa. He only fired at Correa to protect himself. Without looking back, defendant ran back to his car and left.

DISCUSSION

I. Sufficiency of Evidence

Defendant contends that insufficient evidence supports his murder conviction. Sufficient evidence supports the conviction.

"'When considering a challenge to the sufficiency of the evidence to support a conviction, we review the entire record in the light most favorable to the judgment to determine whether it contains 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.' [Citation.]" (*People v. Avila* (2009) 46 Cal.4th 680, 701.) "We must presume in support of the judgment the existence of every fact that the trier of fact could reasonably deduce from the evidence. [Citation.]" (*People v. Medina* (2009) 46 Cal.4th 913, 919.) "A reversal for insufficient evidence 'is unwarranted unless it appears "that upon no hypothesis whatever is there sufficient substantial evidence to support"' the jury's verdict. [Citation.]" (*People v. Zamudio*

---

[5] Defendant testified that he and Correa "maybe" backed away from each other another five to 10 feet.

(2008) 43 Cal.4th 327, 357.) "In deciding the sufficiency of the evidence, a reviewing court resolves neither credibility issues nor evidentiary conflicts. [Citation.] Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact." (*People v. Young* (2005) 34 Cal.4th 1149, 1181.)

"Substantial evidence includes circumstantial evidence and the reasonable inferences flowing therefrom." (*People v. Ugalino* (2009) 174 Cal.App.4th 1060, 1064.) "We 'must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]' [Citation]." (*People v. Zamudio, supra,* 43 Cal.4th at pp. 357–358.) "The standard of review is the same when the prosecution relies mainly on circumstantial evidence." (*People v. Valdez* (2004) 32 Cal.4th 73, 104.)

Defendant states that he was the only witness to the shooting. According to defendant, his testimony clearly established that he shot Correa in self defense and circumstantial evidence, conceded by the prosecution, corroborated his testimony that Correa first shot at defendant and was prevented from shooting at him further because his firearm malfunctioned. The prosecution's theory that he shot Correa as Correa was running away was based on Dr. Ribe's testimony that Correa could not have run from the place where Correa's shell casing was found to the place where his body was found. However, defendant argues, "even if Dr. Ribe's assertion that Mr. Corea [*sic*], at the most could have lasted only 15 seconds after being shot, a man running at less then [*sic*] average speed of 9 miles per house would have covered a distance of 190, well beyond the 120 feet that Mr. Correa travelled."

Dr. Ribe testified that a person with the injuries Correa suffered would "drop" immediately. He further testified that at most a person so injured would have lived 15 seconds and that he had heard of a case where a person ran 50 feet after sustaining such significant injuries. Dr. Ribe did not testify that Correa could have run nine miles per hour and traveled 120 feet with the injuries he sustained. Defendant shot Correa in the back. Correa died a significant distance from the location where his shell casing was found, and defendant testified that he shot Correa. Because Correa was found at some distance from his shell casing and he was shot in the back, an inference can be drawn that

he was running from the scene and defendant must have chased and then shot Correa. Defendant was a member of the Toonerville gang which had a rivalry with the Rascals gang. The shooting took place in Rascals gang territory. Sergeant Strasner testified that by shooting a Rascals gang member in Rascals gang territory, defendant would have increased his stature within his gang. Based on such evidence, the jury reasonably could have rejected defendant's self defense theory and concluded that defendant chased down and murdered Correa believing him to be a Rascals gang member after Correa fired his gun at defendant and then attempted to flee. Accordingly, sufficient evidence supports the jury's verdict. (*People v. Avila, supra,* 46 Cal.4th at p. 701; *People v. Medina, supra,* 46 Cal.4th at p. 919; *People v. Zamudio, supra,* 43 Cal.4th at pp. 357-358; *People v. Young, supra,* 34 Cal.4th at p. 1181; *People v. Valdez, supra,* 32 Cal.4th at p. 104; *People v. Ugalino, supra,* 174 Cal.App.4th at p. 1064.)

II. Sergeant Strasner's Testimony

Defendant contends that the trial court erred in permitting Sergeant Strasner to opine that defendant killed Correa with the specific intent to benefit defendant's gang. Defense counsel's failure to object to Sergeant Strasner's testimony forfeited review of this issue, and any claim that defense counsel provided ineffective assistance by failing to object is properly raised in a petition for writ of habeas corpus.

A. Background

The prosecutor presented Sergeant Strasner with the following hypothetical facts: "Let's assume a gang member in the evening, when it's dark, drives his car from Toonerville territory to an area deep in Rascals' territory, on a main thoroughfare, maybe the streets dead-end, it's residential, and in some way he meets up with a person that lives in the area, maybe say an Echo Park gang member that has a pass to be in the area because he's dating a Rascals girl, a girl that lives in the area, and the person that is the Echo Park gang member ends up shot, ends up murdered or shot and dies."

Based on those hypothetical facts, the prosecutor asked Sergeant Strasner the following question: "Would you have an opinion as to whether or not that shooting was for the benefit of, at the direction of or in association with a criminal street gang with the specific intent to promote, further or assist in criminal conduct by gang members?" Sergeant Strasner responded that his opinion, based on those facts, was that "that shooting, that killing would be in furtherance of the gang, Toonerville." Defense counsel did not object to the prosecutor's hypothetical facts or to the prosecutor's question based on those facts.

B. Application of Relevant Principles

"It is, of course, 'the general rule that questions relating to the admissibility of evidence will not be reviewed on appeal in the absence of a specific and timely objection in the trial court on the ground sought to be urged on appeal.' [Citation.]" (*People v. Benson* (1990) 52 Cal.3d 754, 786, fn. 7; *People v. Gutierrez* (1993) 14 Cal.App.4th 1425, 1432-1434 [failure to object in the trial court to a gang expert's opinion testimony forfeited appellate review]; Evid. Code, § 353.) Defendant concedes that defense counsel failed to object to Sergeant Strasner's testimony. Accordingly, the issue has been forfeited. (*People v. Benson, supra,* 52 Cal.3d at p. 786, fn. 7; *People v. Gutierrez, supra,* 14 Cal.App.4th at pp. 1432-1434; Evid. Code, § 353.)

Defendant argues that if this issue was forfeited, then he received ineffective assistance of counsel. "When a claim of ineffective assistance is made on direct appeal, and the record does not show the reason for counsel's challenged actions or omissions, the conviction must be affirmed unless there could be no satisfactory explanation. [Citation.]" (*People v. Anderson* (2001) 25 Cal.4th 543, 569.) "A claim of ineffective assistance in such a case is more appropriately decided in a habeas corpus proceeding." (*People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266-267.) The record on appeal does not reveal the reason defense counsel failed to object to Sergeant Strasner's testimony. Defense counsel may have concluded that any objection would lead to further clarification by the witness or that he could successfully impeach the witness on cross-

examination. There is no way of discerning if defense counsel had a tactical reason for not objecting. Any claim of ineffective assistance with respect to the claimed deficiency is better suited to a petition for writ of habeas corpus. (*People v. Anderson, supra,* 25 Cal.4th at p. 569; *People v. Mendoza Tello, supra,* 15 Cal.4th at p. 267.)

III. Dr. Ribe's Testimony

Although not clear, defendant appears to contend that the trial court should have excluded, sua sponte, Dr. Ribe's testimony about the length of time Correa could have lived given the type of wounds Correa suffered because the prosecution failed to establish Dr. Ribe's qualification to testify on that subject. Defendant's contention fails because the trial court had no sua sponte duty to exclude Dr. Ribe's testimony, defense counsel's failure to object to Dr. Ribe's testimony forfeited review of this issue, and any claim that defense counsel provided ineffective assistance by failing to object is properly raised in a petition for writ of habeas corpus.

A. Background

Defendant's claim with respect to Dr. Ribe is as follows: "When asked how many cases involving the type of wounds suffered by Mr. Corea [*sic*], Dr. Ribe was unable to answer or even give an estimate. He was unable to give any basis for his opinion at all. In fact the 15 seconds he quoted as the maximum that a person would live after the would [*sic*] suffered by Corea [*sic*], would have allowed a person running at a moderate pass [*sic*] of 15 miles an hour, to cover a distance of 190 feet. The Court on its own motion should have excluded the testimony given the fact that Dr. Ribe's opinion had no factual basis."

On direct examination, Dr. Ribe testified that the extensive injuries Correa suffered as a result of the gunshot wound were "[v]ery rapidly fatal." As a result of the injuries, both of Correa's lungs collapsed and he suffered "massive" internal bleeding. Usually, Dr. Ribe testified, a person suffering such injuries would just "drop," but some persons had been found to run a very short distance. Injuries of the type Correa suffered

were "immediately disabling." The farthest distance Dr. Ribe had heard that a person so injured had run was 50 feet, although the distance usually was far shorter. Defense counsel did not object to any of Dr. Ribe's testimony on direct examination.

On cross-examination, Dr. Ribe testified that the "extreme outside limit" that a person with Correa's injuries could remain upright or engage in "activity" was 15 seconds. Defense counsel asked Dr. Ribe the number of cases he had seen with injuries similar to Correa's injuries. Dr. Ribe responded, "That I have autopsied over the years, I could not give you a number. I would guess—" Defense counsel stated that he did not want Dr. Ribe to guess and asked if Dr. Ribe could provide an estimate. Dr. Ribe responded, "I don't have a number. I mean, I've done hundreds of gunshot wound cases and a lot of them involve chest wounds." Defense counsel asked Dr. Ribe if he previously had to estimate how long a person with injuries similar to Correa's injuries would remain "upright." Dr. Ribe said that he was sure he had been asked that type of question in the past. Defense counsel did not object to any of Dr. Ribe's responses to defense counsel's examination.

B. Application of Relevant Principles

A trial court has no sua sponte duty to exclude evidence. (*People v. Montiel* (1993) 5 Cal.4th 877, 918.) The failure to object in the trial court to an expert witness's qualifications forfeits appellate review of the issue. (*People v. Bolin* (1998) 18 Cal.4th 297, 321; *People v. Lewis* (2008) 43 Cal.4th 415, 503.) Similarly, objections to the admissibility of expert witness testimony must be raised in the trial court or forfeited. (*People v. Gutierrez, supra,* 14 Cal.App.4th at pp. 1432-1434; Evid. Code, § 353.) As defendant concedes, defense counsel did not object to Dr. Ribe's testimony. Defense counsel's failure to object to Dr. Ribe's challenged testimony on the ground that the prosecutor failed to establish Dr. Ribe's qualifications as an expert witness forfeited this issue on appeal. (*People v. Bolin, supra,* 18 Cal.4th at p. 321; *People v. Lewis, supra,* 43 Cal.4th at p. 503; *People v. Gutierrez, supra,* 14 Cal.App.4th at pp. 1432-1434; Evid. Code, § 353.)

As with Sergeant Strasner's testimony, defendant contends that if this issue was forfeited, then he received ineffective assistance of counsel. Like defendant's claim as to Sergeant Strasner's testimony, the record on appeal does not reveal the reason defense counsel did not object to Dr. Ribe's testimony. Defense counsel may have believed that he could successfully impeach Dr. Ribe on cross-examination or that the prosecution might produce a stronger expert witness. There is no way of discerning if defense counsel had a tactical reason for not objecting. Any claim of ineffective assistance with respect to the claimed deficiency is better suited to a petition for writ of habeas corpus. (*People v. Anderson, supra,* 25 Cal.4th at p. 569; *People v. Mendoza Tello, supra,* 15 Cal.4th at p. 267.)

IV. Juror No. 9

Defendant contends that defense counsel provided ineffective assistance by failing to challenge for cause Juror No. 9 on the ground that the juror expressed fear of gangs and defendant and by failing to ask the trial court to survey the other jurors to determine if they were influenced by Juror No. 9's concerns. Defendant's ineffective assistance of counsel claim is properly raised in a petition for writ of habeas corpus.

A. Background

On the second day of testimony, the trial court discussed in chambers with Juror No. 9 concerns he had expressed to "Deputy Escalara" about serving as a juror. The trial court explained that the jurors' names are kept confidential and could not be discovered without a motion. In the trial court's 10 years on the bench, it had never had such a motion. Also in the trial court's experience, nothing had ever happened to a juror. The trial court explained to the juror that the bailiff and it kept a close eye on everyone in the courtroom and promptly addressed contact with jurors by anyone.

Juror No. 9 stated that he was dealing with the sudden death of his brother-in-law. He was the only person available to help his sister and her three children. Also, the murder scene was in the general area of his home and where he conducted his daily

activities. The juror stated that "he" looked at each juror as the jurors left the courtroom. Although his name was kept confidential, Juror No. 9's face was not. He was concerned about how persons associated with the case—"maybe not necessarily the guy that's being accused; maybe it's some of the spectators"—would react to a guilty or not guilty verdict.

Juror No. 9 said, "It's just—that's just a fear for me, because like I said, since I'm like—I wouldn't want for me to be in any danger, or even my family, if I'm out there with them. Not necessarily from Mr. Calderon. I'm not saying that from him, but just people who are here. [¶] Whatever verdict we give, I do not know how they might take it or how long, however long this might take, where they might be familiar with people's faces and stuff. [¶] I'm sitting there—and I'm in the front row as well—and I'm trying to just look down or do something, trying to get through it. [¶] It's just a very big concern. I just wanted to share and that's why I spoke to the sheriff, 'Can I talk [to] the judge? [¶] By no means am I'm trying to make excuses. I'm not making things up, trying to get out of jury duty. I'm actually bringing forth the truth about what I'm going through right now and that I'm pretty much concerned for myself."

The trial court suggested that it speak with Juror No. 9 again at the end of the trial to see how he was feeling then and if he could deliberate. The juror said, "Can I do that?" He then expressed again his concern about being recognized in the community. The trial court stated once more that in its 10 years' experience, no juror had ever been contacted much less injured. The trial court asked the prosecutor and defense counsel if they had any questions for Juror No. 9. Neither had any questions. Juror No. 9 stated that he was not trying to get out of jury duty and would appreciate speaking with the trial court at the time for deliberations.

After Juror No. 9 left the trial court's chambers, the trial court said to the prosecutor and defense counsel, "You know, I think he's sincerely freaked out a little bit." The trial court suggested that the juror remain on the jury until deliberations and consider whether he should continue at that point unless either counsel wanted "to kick him now." The trial court stated that it did not think there was cause to excuse Juror No.

9, but said that the parties could stipulate to excuse him. The prosecutor said, "I think your idea is a good idea. Let him sit there." Defense counsel said, "I agree."

After closing arguments, in chambers, the trial court said to Juror No. 9, "My only question is whether, now that you have been here for eight days and sort of seen how things go and you have had a chance to think about it, whether you think you can deliberate with the other jurors and base your verdict on the evidence and the law and not any fear and not this very tragic situation with your brother-in-law. [¶] Do you think you can do that?" Juror No. 9 stated that at the beginning of trial he had some trepidation about who would be in the audience to support defendant, but noticed that it was only family members and "[s]o after that, and after hearing—I just feel a little bit more at ease, so I think I'll be good." The trial court asked the juror if he felt as if he could proceed. The juror responded, "Yeah, yeah."

After Juror No. 9 left the trial court's chambers, the trial court said to the prosecutor and defense counsel, "I think he just freaked out a little bit at the beginning, but he seems fine and he's been attentive. Okay." The prosecutor responded, "Okay." Defense counsel responded, "Yes."

B. Application of Relevant Principles

"Reviewing courts defer to counsel's reasonable tactical decisions in examining a claim of ineffective assistance of counsel (see *People v. Wright* (1990) 52 Cal.3d 367, 412 [276 Cal.Rptr. 731, 802 P.2d 221]), and there is a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' (*Strickland v. Washington* (1984) 466 U.S. 668, 689 [80 L.Ed.2d 674, 694, 104 S.Ct. 2052].) Defendant's burden is difficult to carry on direct appeal, as we have observed: '"Reviewing courts will reverse convictions [on direct appeal] on the ground of inadequate counsel only if the record on appeal affirmatively discloses that counsel had no rational tactical purpose for [his or her] act or omission."' (*People v. Zapien* (1993) 4 Cal.4th 929, 980 [17 Cal.Rptr.2d 122, 846 P.2d 704].)" (*People v. Lucas* (1995) 12 Cal.4th 415, 436-437.)

The record on appeal does not affirmatively disclose that defense counsel did not have a rational tactical purpose for declining to challenge Juror No. 9. Defense counsel may have had a tactical reason for not challenging the juror—defense counsel may have believed that Juror No. 9's answers in voir dire made him a favorable juror notwithstanding his anxiety over serving as a juror. Also, defense counsel may have believed that Juror No. 9 was a more favorable juror than any of the alternate jurors. Because there may have been rational tactical reasons for defense counsel's failure to object, defendant's claim on appeal fails. (*People v. Lucas, supra,* 12 Cal.4th at pp. 436-437.) Any claim with respect to defense counsel's challenged omission is properly raised in a petition for writ of habeas corpus. (*People v. Mendoza Tello, supra,* 15 Cal.4th at p. 267.)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS.

MOSK, J.

We concur:

ARMSTRONG, Acting P. J.

KRIEGLER, J.