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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS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. JOHN F. KENNEDY, Defendant and Appellant.	B264661 (Super. Ct. No. NA092421)

APPEAL from an order of the Superior Court of Los Angeles County. Tomson T. Ong, Judge. Affirmed.

David Andreasen, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Daniel C. Chang, Deputy Attorneys General, for Plaintiff and Respondent.

John F. Kennedy appeals from his conviction of one count of second degree murder and four counts of attempted murder arising from two separate shooting incidents. We reject his contentions that the search warrant authorizing a wiretap of his cell phone that produced incriminating conversations was not supported by probable cause. We also hold that the judgment was supported by substantial evidence, reject some claims of instructional error and hold that others were harmless, and that there was sufficient evidence to support the finding that he suffered a prior conviction. We therefore affirm the judgment.

FACTS AND PROCEDURAL HISTORY

On the night of April 1, 2012, Keyon Kiles was shot and killed at the Fantasy Gold Strip Club on Pacific Coast Highway in Harbor City. Kiles and his brother, John F. Kennedy, were there attending a "going away party" for Charlie Parker, who was heading to prison. Parker belonged to the Rolling 20s gang; Kiles and Kennedy were members of the rival Insane Crips gang.

Between eyewitness testimony and surveillance video evidence, there is no dispute that Kennedy pulled out a gun and began firing multiple shots outside the club right after his brother was killed.[1] The video showed Kennedy just outside the club in a parking lot that separated it from a Panda Express restaurant, in a firing stance with his arm raised. The parking lot led out to PCH. A few hundred feet to the west was the Harbor Inn Hotel. Three guests from the strip club party – Ashley Kennedy, Danisha Dixon, and Britney Batiste – had fled the shooting and run down PCH to Dixon's car, which was parked outside the Harbor Inn.[2] The three women heard gunshots as they entered the car. One round entered the car and struck Batiste in the breast, causing a non-fatal wound.

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[1] On appeal, Kennedy concedes that he did so.

[2] In order to avoid confusion, we will refer to Ashley Kennedy by her first name.

Ashley testified that she heard two shots from nearby and believed they came from a car that had pulled up alongside. However, she did not see a car. Dixon said the shots came from a distance and did not see or hear a car pull up. Batiste could not tell where the shots came from, but said no car had pulled up when the shots were fired. Batiste had the bullet removed and recovered. Ashley's wrist was cut by broken glass.

Los Angeles police officers investigating the shooting recovered eight .40 caliber Winchester casings from the scene. Based on photos documenting the location of those casings, it appears that three were found in the parking area outside the strip club that led out to PCH, with the rest more or less in a line heading west on PCH toward the Harbor Inn. They also found a .40 caliber Federal casing on the sidewalk right by the Harbor Inn.

Some six weeks later, on the night of May 12, 2012, Kenneth McRoyal was shot and killed and Devon Augustine was shot and wounded while attending a party at a downtown loft complex. Photographs taken at the party show that Kennedy was there. Three .40 caliber Winchester casings that came from the same gun used in the strip club shooting were recovered at the scene – two near the loft and one nearly 400 feet away next to a set of car keys.

Witness testimony and police photos show that the shooting took place near a ground floor wood deck adjacent to a doorway into the loft. A metal gate sat at the far end of the deck, and strung along that gate was a sheer tarp. McRoyal and Augustine were outside the deck area when they were shot, and the shots came from behind the tarp. Witness Dwayne Williams said he heard arguing near the deck, saw some people shaking hands, then heard one round of gunshots, followed soon after by another round of gunfire.

In between the two shootings, Long Beach police detectives obtained a warrant to add Kennedy's cell phone to an ongoing

wiretap of other Insane Crips members.[3] In a wiretapped conversation on April 17, 2012, Kennedy talked to an unidentified male about selling or trading his gun. In an April 22, 2012, conversation, Kennedy referred to his brother's feud with Parker, identified another Rolling 20s gang member as the person who shot and killed Kiles, said he was nearby when it happened, and then "pulled out the hammer," "tore the club up," and "just ran out of shells . . . [because] ten . . . [was not] enough." A police gang expert explained that Kennedy's statement that he pulled out a hammer and tore up the club was an admission to committing the shooting.

On May 13, hours after the May 12 loft shooting, a wiretap recorded a conversation where Kennedy asked the other person if he ever found a certain key. The other person said the key had not been found and that the area had been blocked off. The gang expert believed this referred to the car key that was found near one of the bullet casings. In a conversation later on May 13, an unidentified male asked Kennedy if he had any "shells for that thing?" Kennedy replied that he did not because he had used his last night. The other man asked if he "got off last night," which the gang expert translated as asking whether he had fired his gun. Kennedy said yes, adding that he got shot in the leg too. Asked where this happened, Kennedy answered, "Aw, at some loft function in L.A. somewhere."

During another phone conversation shortly after the loft shooting, Kennedy said he had been shot and was trying to get home. Asked to describe what happened and who did it, Kennedy replied: "Nah just, you feel me. You know how niggas be, it's just like a group of niggas, you know what I'm saying, just get there, they talking, wolfing and shit. I didn't say shit. You feel me, I just kept going. But you know how confrontations go, and niggas

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[3] Kennedy contends there was no probable cause to authorize the warrant. We set forth the facts surrounding the issuance of the warrant in section 1 of our discussion.

end up start shooting." The other male asked if Kennedy had "knock[ed] back." Kennedy answered, "Yeah, hell yea." According to the gang expert, "knock back" means to shoot or to shoot back. During a May 15 wiretapped conversation Kennedy offered to sell his gun for $500.

In addition to the wiretapped conversations, a variety of physical evidence placed Kennedy at the scene of the two shootings. As noted, he was identified in a surveillance video as the person taking a firing stance with a gun in his hand. Kennedy made several phone calls at or near the time of the strip club shooting that were relayed through cell phone towers in the club's vicinity. As part of the wiretap warrant, a GPS device had been attached to Kennedy's car. It showed that right before the loft shooting his car was parked near the loft where the car keys and one .40 caliber Winchester casing were found. The car began to drive away moments after the shooting ended. A detective who went to Kennedy's house on a pretext saw that Kennedy had an in-and-out bullet wound on his left thigh.

Kennedy was convicted of the second degree murder of McRoyal and of the attempted murders of Augustine, Dixon, Batiste, and Ashley. He was also convicted of shooting at an occupied vehicle (Pen. Code, § 245). The jury found true allegations that he personally and intentionally used a firearm (Pen. Code, § 12022.53, subds. (b)-(d)), that the strip club crimes were committed for the benefit of his street gang (Pen. Code, § 186.22), and that he had served a prior prison term for purposes of the one-year enhancement provided by Penal Code section 667.5, subdivision (b).[4] He was given a combined state prison sentence of 173 years and eight months to life.

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

DISCUSSION

1. *There Was Probable Cause for the Wiretap Warrant*

California law prohibits wiretapping except as allowed by statute. (*People v. Sedillo* (2015) 235 Cal.App.4th 1037, 1053 (*Sedillo*).) A wiretap may be ordered where affidavits establish certain elements, including the one at issue here – probable cause to believe that an individual is committing, has committed, or is about to commit, certain specified crimes, including murder and attempted murder. (*Id.* at p. 1055; § 629.52, subd. (a)(2),(6).)

When a defendant has been identified through an authorized wiretap, the prosecution must ordinarily provide the defendant with copies of the intercepted communications, the court order, and the accompanying application. (§ 629.70, subd. (b).) These disclosures may be limited upon a showing of good cause, including the protection of the identity of confidential informants. (*Sedillo, supra,* 235 Cal.App.4th at pp. 1053-1054; § 629.70, subd. (d).)

Finally, state law cannot be less protective of privacy than the federal wiretap statutes, and, as a result, we also look to applicable federal law when examining the propriety of a wiretap authorization. (*Sedillo, supra,* 235 Cal.App.4th at p. 1053.)

Kennedy moved to suppress the wiretap authorization and all the evidence obtained from the wiretap on the ground that the warrant application did not establish probable cause that he had committed or was committing any crimes. Instead, he contended, the unsealed affidavit showed only that he might possess information about crimes committed by his fellow gang members. The motion was based on the disclosed portions of the wiretap application. However, the prosecution's opposition points and authorities asked the trial court to also base its review on a *sealed* affidavit containing information provided by a confidential informant. The trial court denied the motion to suppress after reviewing both the sealed and unsealed affidavits.

Kennedy may be right that the unsealed affidavit is defective in regard to probable cause. However, the sealed affidavit relaying information provided by the confidential

informant cures any defects that might exist.[5] (See *People v. Leon* (2007) 40 Cal.4th 376, 392-393 [examining sealed affidavit]; *People v. Hobbs* (1994) 7 Cal.4th 948, 976-977 [same]; *Sedillo, supra,* 235 Cal.App.4th at p. 1055 [same].) Without revealing too much, the confidential informant provided direct evidence that Kennedy obtained a handgun after his brother was shot at the strip club and "shot at" Dixon, Batiste, and Ashley. This statement provides probable cause that Kennedy committed that crime. (See *People v. Lazarus* (2015) 238 Cal.App.4th 734, 765 [strong evidence of guilt gives rise to probable cause].) Because the wiretap was valid as to the strip club shootings, the police could use evidence concerning the subsequent loft shooting obtained from the wiretaps as well. (*United States v. Masciarelli* (1977) 558 F.2d 1064, 1067; *People v. Jackson* (2005) 129 Cal.App.4th 129, 145.) We therefore hold that the trial court did not err by denying Kennedy's motion to suppress the wiretap evidence.

2. *There Was Substantial Evidence That Kennedy Fired at All Three Strip Club Shooting Victims*

Kennedy raises two related substantial evidence challenges to his attempted murder convictions in connection with the strip club shooting: (1) even though he fired the gun that discharged the .40 caliber Winchester casings, the existence of the one Federal casing near the Harbor Inn shows there was at least one more shooter, and there is no evidence that he was the one who shot at Ashley, Dixon, and Batiste; and (2) even if there is sufficient evidence that he fired in their direction, the fact that only one bullet pierced the car and struck Batiste shows he fired only one shot toward them, requiring reversal of two of the three attempted murder convictions. (*People v. Perez* (2010) 50 Cal.4th 222, 231-232 [attempted murder convictions of multiple supposed

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[5] Kennedy asked us to augment the record to include the sealed confidential informant affidavit so we could review it as part of the probable cause analysis. We granted that motion.

victims reversed when evidence showed only one shot in their direction].)

A police detective testified that there had been other shootings in the area and that it was not uncommon to find expended shell casings from a previous shooting. Kennedy was the only person seen with a gun and concedes that he was responsible for the multiple Winchester casings (but not the lone Federal casing) found at the scene of the strip club shooting. This evidence at most raised a conflict for the jury to resolve, and we hold that the jury could reasonably find that Kennedy had been the only shooter.

We also believe there was substantial evidence that Kennedy fired multiple shots toward the three women. First, as the gang expert testified, gang culture called for an immediate and escalated response by Kennedy that targeted as many people as possible. Second, Kennedy had additional motive because the fellow gang member who had just been killed was his brother. Third, Kennedy admitted in a wiretapped conversation that he emptied his gun in response to his brother's murder. Fourth, the location of the expended Winchester casings looks like a trail that leads down PCH from the strip club to the Harbor Inn, suggesting that Kennedy moved toward the victims in an effort to concentrate on them and increase his chances of hitting his targets. Finally, the fact that only one bullet hit the mark shows only that Kennedy had poor aim. Taken as a whole, when viewed under the substantial evidence standard of review, we conclude there was sufficient evidence that Kennedy fired multiple shots at all three victims at the strip club shooting.

3. *Any Errors in Connection with the Kill Zone Instruction Were Harmless*

Although a murder charge requires proof of intent to kill by either express or implied malice, attempted murder requires proof that the defendant actually intended to kill the targeted victim. Proof of intent by implied malice will not suffice. (*People v. Stone* (2009) 46 Cal.4th 131, 140.) The jury was instructed that it had to find specific intent in connection with the

attempted murder counts. The jury was also instructed on the so-called "kill zone" theory, which applies when a defendant intends to kill a primary target, and his actions show a concurrent intent to kill everyone around the target in order to do so. (*Id.* at p. 137.)

In connection with the kill zone theory the jury was instructed with CALJIC Instruction 8.66.1 as follows: "A person who primarily intends to kill one person, may also concurrently intend to kill other persons within a particular zone of risk. This zone of risk is termed the 'kill zone.' The intent is concurrent when the nature and scope of the attack, while directed at a primary victim, are such that it is reasonable to infer the perpetrator intended to kill the primary victim by killing everyone in that victim's vicinity. [¶] Whether a perpetrator actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' or zone of risk is an issue to be decided by you."

Kennedy contends the trial court erred by giving this instruction in two regards: (1) there was no evidence to support the kill zone theory because there was no evidence that he knew any of the victims or otherwise had selected one or more of them as a primary target (*People v. Guiton* (1993) 4 Cal.4th 1116, 1129 [it is error to give instruction that is inapplicable because the instructional theory is not supported by substantial evidence]); and (2) even if there was evidence to support giving a kill zone instruction, CALJIC 8.66.1 is flawed and misleading. We take each in turn.[6]

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[6] Kennedy did not object to either giving CALJIC 8.66.1 in the first place or to the wording of the instruction as given. Respondent concedes that Kennedy's failure to object did not waive the objection to the wording of the instruction (§ 1259 [instructional error that affects defendant's substantial rights not waived by failure to object]), but contends he did waive the issue whether the instruction should have been given at all. We exercise our discretion to reach that issue on the merits.

As to the first, we believe there was substantial evidence that the four attempted murder victims were primary targets. As discussed earlier, the evidence shows a trail of expended shell casings leading down PCH toward Batiste, Dixon, and Ashley, suggesting that Kennedy specifically targeted them and came closer in order to increase his chances of hitting his targets. As for the loft shooting, Kennedy said in a wiretapped conversation that he shot back after being shot, also raising the inference that he targeted the individuals he shot. As a result, there was substantial evidence to support giving the kill zone instruction.

Kennedy's second contention is based on three supposed flaws in CALJIC 8.66.1. First, under *People v. McCloud* (2012) 211 Cal.App.4th 788, 802, footnote 7, he contends the instruction's use of the term "zone of risk" is misleading because that term finds no support in the case law and because it suggests the jury can find the defendant created a kill zone by merely placing persons other than the primary target at risk of fatal injury. Second, he contends the instruction does not refer to specific intent, a required element of attempted murder. Finally, he complains that the instruction allows the jury to find intent under the kill zone theory if it is merely reasonable to infer the defendant intended to kill the primary victim by killing everyone around him, and should instead have required the jury to find that the evidence actually established that intent.

We reject the latter two contentions. In order to evaluate a claim of instructional error, we must view the instructions as a whole to determine whether there is a reasonable likelihood the jury was misled. (*People v. Tate* (2010) 49 Cal.4th 635, 696.) The jury was instructed with CALJIC 3.31 that it had to find Kennedy had the required specific intent for both the murder and attempted murder counts. CALJIC 8.66 also told the jury that the prosecution had to prove that Kennedy had malice aforethought, "a specific intent to kill unlawfully another human being," in order to convict him of attempted murder. After

describing the kill zone theory, CALJIC 8.66.1 concluded by stating it was for the jury to decide whether Kennedy "actually intended to kill the victim, either as a primary target or as someone within a 'kill zone' . . . ." Taken as a whole, no reasonable juror could conclude that Kennedy was guilty of attempted murder if the kill zone theory were merely reasonable. Instead, when read together, the directions clearly told the jurors they must determine whether Kennedy specifically and actually intended to kill each of his victims.

As for the first contention concerning use of the supposedly ambiguous term "kill zone," we conclude that any errors in that instruction were harmless.[7] Where an instruction omits or misdescribes an element of a charged offense, the error violates the right to a jury trial guaranteed by the Sixth Amendment to the United States Constitution. As a result, we will reverse unless the error is harmless beyond a reasonable doubt because the verdict would have been the same absent the error. (*People v. Samaniego* (2009) 172 Cal.App.4th 1148, 1165.)

Kennedy contends the error was prejudicial because: (1) the prosecutor relied solely on an improper version of the kill zone theory and never argued that there was evidence for a finding that he actually intended to kill his attempted murder victims; and (2) there was no evidence that he in fact had that specific intent.

Kennedy is wrong as to both. In addition to arguing that the kill zone theory applied, the prosecutor said in her opening

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[7] Although Kennedy challenges the wording of CALJIC 8.66.1, he does not offer alternative wording that should have been used instead. We assume for discussion's sake, but do not decide, that error occurred. We also note that the language of CALJIC 8.66.1 was revised in Fall 2016, and that the propriety of CALJIC 8.66.1 is currently before our Supreme Court in several cases. (*People v. Cardona*, S234660, rev. granted July 27, 2016; *People v. Sek*, S226721, rev. granted July 22, 2015; *People v. Canizales*, S221958, rev. granted Nov. 19, 2014.)

argument regarding the attempted murder: "And did he intend to kill? It doesn't matter if he didn't know [Batiste, Ashley, or Dixon] from before. It doesn't matter. But did he know they were people and did he intend to kill somebody when he pulled the trigger? Same thing as to Devon Augustine, you don't have mad *[sic]* at Devon Augustine or Ken McRoyal. Doesn't matter. Did he pull the trigger in the direction of a person intending to kill?" In her closing argument, the prosecutor asked the jury to find that Kennedy "tried to murder the three girls, and he tried to murder Devon Augustine."

Kennedy also complains that the prosecutor misstated the meaning of CALJIC 8.66.1 when she told the jury that kill zone liability existed if Kennedy "pulled the trigger knowing that there were other people around and did not care who he hit in order to accomplish his goals," and, specifically as to the strip club shooting, if Kennedy "fire[d] a shot toward that car and [did] not care who, if anybody, he hit there."

According to Kennedy, the test is not whether he cared about hitting others but whether he intended to do so. When the arguments and instructions are considered as a whole, we conclude beyond a reasonable doubt that the jury was not thrown off by the prosecutor's comments.

First, Kennedy's argument did not mention the intent issue at all, focusing instead on creating reasonable doubt whether he actually fired at the attempted murder victims. Second, as set forth above, the instructions as a whole told the jury that in order to find intent to kill under the kill zone theory, it had to find that Kennedy specifically intended to kill his attempted murder victims. Third, the prosecutor's statements were prefaced by both her reference to the instruction itself and her statement that the focus was on whether Kennedy intended to kill his victims and "tried" to kill them.

Given the evidence that Kennedy moved toward Dixon, Batiste, and Ashley, leaving a trail of shell casings along the way, and his own statement that he shot back at the loft party after being shot himself, combined with the lack of emphasis on this

issue during argument, we conclude beyond a reasonable doubt that even if CALJIC 8.66.1 was flawed, a properly instructed jury would have found that Kennedy actually intended to kill all four victims when he fired.

4. *The Prior Conviction Allegation Was Supported by Substantial Evidence*

In order to prove the section 667.5 prior conviction allegation, the prosecutor introduced a packet from the California Department of Corrections that included a prison intake record, a set of fingerprints, and the abstract of judgment from the 2010 conviction of "John Fitzgeralg Kennedy" for being a felon in possession of a firearm. At the hearing, the prosecutor referred to an identifying photo in the packet, but that photo is not in the appellate record. The trial court said it had reviewed the packet and Kennedy's lawyer offered no defense.

Kennedy contends on appeal that the evidence was insufficient to establish that he was the same John Kennedy identified by the records because the prosecutor did not offer a comparison set of fingerprints for the court to examine, it is unclear that the photograph was in fact before the trial court, and there are many other people with the same name, including one of his fellow gang members who was also a target of the police wiretap.[8]

The prosecution must prove beyond a reasonable doubt the elements of the sentence enhancement allegation. (*People v. Fielder* (2004) 114 Cal.App.4th 1221, 1232.) A common means of meeting that burden is to introduce certified documents from the previous conviction proceedings and prison commitment, including the abstract of judgment. (*People v. Delgado* (2008) 43 Cal.4th 1059, 1066.) The trier of fact may draw reasonable inferences from those records that prove the prior conviction allegation under the presumption that an official duty has been regularly performed. (*Ibid;* Evid Code, § 664.) Unless evidence is

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[8] The unsealed wiretap affidavit corroborates this last point.

offered to rebut this presumption, the trier of fact may determine that a qualifying conviction occurred. (*Delgado,* at p. 1066.)

While the copy of the prior conviction documents placed in the appellate record does not contain the photograph of Kennedy referred to at the trial, we have reviewed the actual documents themselves, which include that photograph.[9] We therefore reject Kennedy's insinuation that the prosecutor falsely told the trial court that the document packet included his photo and that the trial court took that at face value without examining the packet. Given that the trial court said it had reviewed the packet, which included the photograph, along with the other documents, we conclude there was sufficient evidence to support the section 667.5 prior conviction allegation.[10]

DISPOSITION

The judgment is affirmed.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J. GRIMES, J.

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[9] We called up from the superior court all the exhibits introduced at trial, including the prior prison record packet. On our own motion we augment the record to include those exhibits. (Cal. Rules of Court, rules 8.155(a)(1), 8.340(c).)

[10] We also note that the 2010 abstract of judgment lists Kennedy's birthday as February 19, 1990, which matched the date given by testimony at trial and the date listed in the probation report from this proceeding.