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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

ROBERT MAURICE DAWKINS,

Defendant and Appellant.

2d Crim. No. B261763
(Super. Ct. No. TA131190-01)
(Los Angeles County)

Robert Maurice Dawkins appeals a judgment of conviction of first degree murder, attempted willful, deliberate, and premeditated murder (three counts), and unlawful possession of a firearm (two counts), with findings that he personally discharged a firearm causing great bodily injury or death, and that he committed the crimes to benefit a criminal street gang. (Pen. Code, §§ 187, subd. (a), 189, 664, 29800, subd. (a)(1), 12022.53, subds. (b), (c) & (d), 186.22, subd. (b)(1)(C).)¹ We affirm.

¹ All statutory references are to the Penal Code unless otherwise stated.

FACTUAL AND PROCEDURAL HISTORY

This appeal concerns multiple counts of attempted murder, murder, and unlawful firearm possession arising from crimes committed in Compton on May 8, 2012, and September 10, 2012. The first incident involves gunshots fired into a vehicle, injuring one passenger. The second incident involves gunshots fired at a group of men in a courtyard near an alley; one man died and two others received gunshot wounds. The jury convicted Dawkins of charges arising from the second incident, but not the first. It also convicted Dawkins of two counts of unlawful firearm possession based upon a search of his residence following the first incident.

May 8, 2012, Incident

In the afternoon of May 8, 2012, Julius McCoy drove his Cadillac automobile in Compton with four passengers. McCoy parked the automobile on Piru Street and left to speak with a woman. A gray-colored sports utility vehicle drove by and stopped. Moments later, a Black man left that vehicle and fired gunshots toward the passengers in the Cadillac.

Malik Bonner received a gunshot wound to the face. He moved to the driver's seat and drove away, but soon collided with another vehicle. Los Angeles County Sheriff's Deputy Laura Perales responded to the traffic collision. The Cadillac passengers were uncooperative with her investigation and gave vague descriptions of the shooter and the shooting.

On May 13, 2012, deputies executed a search warrant at the home Dawkins shared with his family. In a locked backyard shed, deputies found a bolt-action shotgun. On the roof of the shed, deputies found a Browning nine-millimeter handgun and a 40-caliber magazine. Ammunition and another magazine also lay on the roof. The shed was approximately 20 to 25 feet

from the backdoor of the residence and a fence enclosed the backyard.

During the investigation, a deputy found five shell casings in the 2100 block of Piru Street. A criminalist examined the shell casings as well as the Browning nine-millimeter handgun, and opined that the casings were fired from the handgun.

McCoy and two of his passengers did not attend trial. The two passengers who testified had few memories of the shooting.

September 10, 2012, Incident

In the late evening of September 10, 2012, Jose Cervantes, Robert Gasca, Fermin Orozco, and Braulio Aragon drank beer and socialized in the courtyard of Gasca's Magnolia Street apartment building. After midnight, the men moved deeper within the courtyard to avoid disturbing apartment tenants.

At approximately 1:00 a.m., Dawkins walked by, pointed a semiautomatic firearm at the men, and began shooting. Cervantes, a former security guard, was facing the alley and saw Dawkins. Cervantes quickly took cover behind a trash dumpster. After Cervantes's companions fell wounded, Dawkins ran away. Cervantes called for police and medical assistance and, in the interim, aided his friends.

Sheriff's deputies quickly arrived and interviewed Cervantes, who described the shooter as a thin Black male, 23 to 30 years old, and five feet six inches to five feet eight inches tall. Deputies collected shell casings and bullet fragments from the area. The area had streetlights and light from a nearby car wash. A deputy opined that the general area was "well lit" and the car wash was "very well lit."

Gasca suffered five gunshot wounds and died at the scene. Aragon suffered seven gunshot wounds and Orozco suffered three gunshot wounds. Aragon and Orozco were hospitalized and received treatment. At the time of trial, the two men continued to experience pain. Aragon also lost hearing in his left ear as a result of a gunshot wound to his ear.

At trial, Cervantes identified Dawkins as the alley shooter, stating that he “had a good look” at the shooter’s face. Cervantes stated that he also identified Dawkins in a lineup because he does not forget “bad faces.”

Three surveillance cameras from the apartment building captured the shooting in a video-recording. The location of the shooter in the video footage was consistent with the location where shell casings were found. At trial, the prosecutor played the surveillance recording.

Sheriff’s Detective Clifford Jones viewed still photographs taken from the surveillance recording. He immediately identified the shooter as “Black,” a person he knew from many prior contacts. Deputies later learned that Black was Dawkins, a member of “Fruit Town Piru” (FTP), a criminal street gang.

Gang Expert Testimony

Sheriff’s Detective Raul Magadan, a gang detective specializing in Compton criminal street gangs, testified regarding Dawkins and FTP. He stated that the primary activities of FTP include narcotic sales, robberies, burglaries, assaults, attempted murder, and murder. Magadan testified that FTP members had been convicted of predicate criminal offenses, including a robbery that Magadan had investigated.

Magadan testified that he had approximately six contacts with Dawkins over many years. The contacts included

traffic stops and interviews in unrelated criminal investigations. Magadan recognized Dawkins as the shooter in the surveillance recording (“[I]t looked like Mr. Dawkins”). Magadan opined that Dawkins was a member of FTP based upon self-admissions and visible gang-related tattoos. Dawkins used two monikers: “Black” and “CK [Crip Killer] Rob.” Magadan stated that other FTP gang members had informed him that Dawkins was “a very influential member” of the gang who was “willing to commit” violent acts.

Magadan also testified that the Tortilla Flats criminal street gang was a rival gang to FTP. Magadan stated that the September 10, 2012, shooting occurred in an area claimed by Tortilla Flats, as evidenced in part by neighborhood graffiti. For this reason, in response to a hypothetical question, Magadan opined that the shooter shot the men to benefit FTP by increasing the gang’s and the shooter’s reputations.

Surveillance Video-Recording Analysis

Jack Nadelle, an investigative photographer for the Los Angeles District Attorney, examined the surveillance recording of the September 10, 2012, shootings. Nadelle opined that the recording was of poor quality, but he noted four areas of similarities and “distinguishing features” between photographs of Dawkins and the recorded images.

Nadelle discussed guidelines for facial identification published by the Facial Identification Scientific Working Group (FISWG). Members of FISWG included employees of government agencies and universities. The guidelines included four types of analyses: 1) viewing an image as a whole; 2) viewing specific features of an image; 3) taking measurements from a photograph; and 4) superimposing images. Nadelle employed the second

method of comparison and analysis, explaining that the video quality was too poor to allow for another method of comparison.

Ronald Guzek testified as a defense expert witness regarding analysis of the surveillance recordings. He stated that he applied the method of photogrammetry, based upon spatial measurements in photographs and images, in his comparative analysis. Guzek opined that the recorded images did not match Dawkins's photographs because the head sizes and hairlines were different.

Conviction and Sentencing

The jury convicted Dawkins of first degree murder, three counts of attempted murder, and two counts of unlawful possession of a firearm. (§§ 187, subd. (a), 189, 664, 29800, subd. (a)(1).) It also found that he personally fired a firearm causing great bodily injury or death, and that he committed the crimes to benefit a criminal street gang. (§§ 12022.53, subds. (b), (c) & (d), 186.22, subd. (b)(1)(C).) The jury acquitted Dawkins of the attempted murder counts regarding the May 8, 2012, shootings.

The trial court sentenced Dawkins to a prison term of 133 years 8 months, consisting in part of a 25-year-to-life term for murder, three consecutive 25-year-to-life terms for the firearm enhancements for the murder count and two of the attempted murder counts, and a consecutive 20-year term for the firearm enhancement for the third attempted murder count. The court stayed sentence for the criminal street gang enhancements. It also imposed a \$300 restitution fine, a \$300 parole revocation restitution fine (suspended), a \$180 court security assessment, and a \$40 criminal conviction assessment; ordered victim restitution; and awarded Dawkins 800 days of presentence custody credit. (§§ 1202.4, subd. (b), 1202.45, 1465.8, subd. (a); Gov. Code, § 70373.)

Dawkins appeals and contends that he received the ineffective assistance of counsel pursuant to the federal and California Constitutions based upon counsel's failure to: 1) request a limiting instruction that Nadelle's testimony was to be considered for the basis of his expert opinion and not for its truth; 2) object to the gang expert's hearsay testimony; 3) object to the gang expert's testimony regarding the shooter's state of mind; and, 4) request an instruction that expert opinion evidence is circumstantial evidence. Dawkins also contends that insufficient evidence supports his conviction of possession of a firearm by a felon.

DISCUSSION

I.

Dawkins argues that his counsel was ineffective for not requesting a limiting instruction that the hearsay testimony given by Nadelle was not to be considered for its truth. Specifically, Dawkins asserts that the FISWG guidelines are inadmissible hearsay.

To establish a claim for ineffective assistance of counsel, defendant must establish that counsel's performance was deficient and that defendant suffered prejudice as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-692; *People v. Mickel* (2016) 2 Cal.5th 181, 198.) In demonstrating deficient performance, defendant bears the burden of showing that counsel's performance fell below an objective standard of reasonableness pursuant to prevailing professional norms. (*Mickel*, at p. 198; *People v. Orloff* (2016) 2 Cal.App.5th 947, 955.) In demonstrating prejudice, defendant bears the burden of establishing a reasonable probability that, but for counsel's deficient performance, the outcome of the proceeding would have

been different. (*People v. Patterson* (2017) 2 Cal.5th 885, 900; *Mickel*, at p. 198.)

Claims of ineffective assistance of counsel are, as a practical matter, difficult to decide on direct appeal. (*People v. Mickel*, *supra*, 2 Cal.5th 181, 198; *People v. Orloff*, *supra*, 2 Cal.App.5th 947, 955.) “The record on appeal may not explain why counsel chose to act as he or she did. Under those circumstances, a reviewing court has no basis on which to determine whether counsel had a legitimate reason for making a particular decision, or whether counsel’s actions or failure to take certain actions were objectively unreasonable.” (*Mickel*, at p. 198.)

Moreover, we presume that counsel’s actions fall within the broad range of reasonableness, and afford great deference to counsel’s tactical decisions. (*People v. Mickel*, *supra*, 2 Cal.5th 181, 198.) For this reason, a reviewing court will reverse a conviction based upon the ineffective assistance of counsel on direct appeal only if there is affirmative evidence that counsel had no rational tactical purpose for an action or omissions. (*Ibid.*; *People v. Orloff*, *supra*, 2 Cal.App.5th 947, 955.) Deciding whether to object is inherently tactical, and a failure to object will rarely establish ineffective assistance of counsel. (*People v. Romero and Self* (2015) 62 Cal.4th 1, 25.)

Here counsel had a rational tactical purpose for accepting the validity of the FISWG guidelines and using them to discredit Jones’s and Magadan’s identifications of Dawkins in the surveillance recording. Nadelle testified that the whole face identification method had a 30 percent error rate. Defense counsel argued the high error rate during summation to discredit the identifications. Concededly, the recording was blurry and Jones’s and Magadan’s identifications were not completely

positive. The 30 percent error argument, however, provided additional and quantitative means to attack the identifications. Accordingly, Dawkins has not met his burden of establishing that counsel's performance was deficient because there is a possible justification for not requesting a limiting instruction. (*People v. Mickel, supra*, 2 Cal.5th 181, 198.)

II.

Dawkins argues that trial counsel was ineffective because he did not object, on grounds of hearsay and the confrontation clause, to Magadan's testimony that he (Dawkins) was among a small group of FTP gang members willing to commit violent acts.

Magadan testified that individual criminal street gang members specialize in committing certain types of crimes – “each gang member has his own kind of knack or thing that he does.” Magadan further testified that Dawkins was willing to commit violent crimes: “Based on information [Magadan] received from members of the gang, Mr. Dawkins is a very influential member of the gang. . . . [T]here's a small core group of individuals that are willing to commit those violent types of acts and Mr. Dawkins is one of those people. Based on the things he's willing to do for the gang he's very influential.”

In *People v. Sanchez* (2016) 63 Cal.4th 665, 686 (*Sanchez*), our Supreme Court held that a gang expert witness may not “relate as true case-specific facts asserted in hearsay statements, unless they are independently proven by competent evidence or are covered by a hearsay exception.”

Sanchez also held that the trier of fact must necessarily consider the basis for expert testimony for its truth in order to evaluate the expert's opinion, which in turn implicates the Sixth amendment right to confrontation. (*Sanchez, supra*, 63

Cal.4th 665, 684.) “When any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert’s opinion, the statements are hearsay. . . . If the case is one in which a prosecution expert seeks to relate *testimonial* hearsay, there is a confrontation clause violation unless (1) there is a showing of unavailability and (2) the defendant had a prior opportunity for cross-examination, or forfeited that right by wrongdoing.” (*Id.* at p. 686, fn. omitted.)

Magadan’s testimony was proper pursuant to decisional law existing at the time of trial. (*People v. Gardeley* (1996) 14 Cal.4th 605, 618-620, overruled in part by *Sanchez*, *supra*, 63 Cal.4th 665, 686, fn. 13.) Accordingly, an objection to this testimony would have been futile. (*People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7 [“Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert ‘basis’ evidence does not violate the confrontation clause”].)

Nevertheless, the outcome of trial would not have been different had counsel successfully objected to this brief testimony. At court hearings and in a lineup, Cervantes identified Dawkins as the shooter. Magadan and Jones identified Dawkins from the surveillance video as the shooter. The jury also viewed the surveillance video and could make its own comparisons. Moreover, the jury acquitted Dawkins of the May 8, 2012, shooting, suggesting that it relied upon eyewitness identification and not the ballistics evidence or Magadan’s opinion that Dawkins was a FTP gang member willing to commit violent acts. Dawkins has not established prejudice from his asserted claim of ineffective counsel. (*People v. Mickel*, *supra*, 2 Cal.5th 181, 198 [defendant bears burden of establishing that,

but for counsel's deficient performance, the outcome of the proceeding would be different].)

III.

Dawkins argues that his counsel was ineffective because he did not object to Magadan's hypothetical testimony regarding the shooter's intent to benefit the FTP criminal street gang by shooting men in the rival Tortilla Flats gang neighborhood. Dawkins points to Magadan's testimony that the shooter believed the victims were rival gang members, a fact not in evidence.

In *Sanchez, supra*, 63 Cal.4th 665, 684, our Supreme Court approved gang expert testimony presented "in a properly worded hypothetical question in the traditional manner." However, the hypothetical question must rest upon evidence properly admitted through an appropriate witness. (*Ibid.*; *People v. Vang* (2011) 52 Cal.4th 1038, 1045 [hypothetical question must be rooted in facts shown by the evidence].)

Here Magadan responded to a hypothetical question based upon properly admitted evidence and reasonable inferences therefrom. Although there is no direct evidence that the shooter thought the four victims were Tortilla Flats gang members, it is a reasonable inference from the evidence that the four men were Hispanic males in the Tortilla Flats neighborhood marked by Tortilla Flats gang graffiti. Thus, counsel cannot be faulted for not making a futile objection.

Objection aside, Dawkins has not established prejudice because the jury would likely have drawn this conclusion given the evidence that the shooting occurred in the Tortilla Flats neighborhood and Tortilla Flats was a rival to FTP. Moreover, Magadan also opined that the shooter's violent acts "create[d] an atmosphere of fear and intimidation within the

community” in general, not just among rival gang members. There is no reasonable probability that the result would have been different had counsel objected to this testimony. (*People v. Mickel, supra*, 2 Cal.5th 181, 198.)

IV.

Dawkins asserts that his counsel was ineffective for failing to request an instruction that expert and lay opinion evidence is circumstantial evidence. Dawkins refers to Jones’s and Magadan’s testimony identifying him in the surveillance video, and Magadan’s testimony that the hypothetical shooter believed that the victims were Tortilla Flats gang members. Dawkins contends that jurors likely reasoned that opinion evidence is direct evidence.

The trial court instructed regarding the definition of direct and circumstantial evidence (CALCRIM No. 223); the prosecutor’s burden of proof beyond a reasonable doubt with circumstantial evidence (CALCRIM No. 224); and evaluating expert witness opinions (CALCRIM No. 332). These instructions sufficiently informed the jury regarding its evaluation of the expert witness opinion testimony. (*People v. Lucas* (2014) 60 Cal.4th 153, 291, overruled on other grounds by *People v. Romero and Self, supra*, 62 Cal.4th 1, 53, fn. 19.) “[T]he court instructed the jury on circumstantial evidence, which it defined as ‘evidence that, if found to be true, proves a fact from which an inference of the existence of another fact may be drawn.’ Because some of the expert testimony and much of the lay opinion testimony in this case fit this description, this instruction was sufficient.” (*Ibid.*) *Lucas* applies to the instructions given here. We presume that jurors understand and follow the court’s instructions. (*People v. Pearson* (2013) 56 Cal.4th 394, 414.)

V.

Dawkins contends that insufficient evidence supports his conviction of count 11, possession of a firearm (shotgun) by a felon. (*People v. Sifuentes* (2011) 195 Cal.App.4th 1410, 1416-1420 [insufficient evidence of firearm possession where gun found under mattress in motel room occupied by four people].) He asserts that his conviction violates due process of law pursuant to the federal and California Constitutions.

In reviewing the sufficiency of evidence to support a conviction, we examine the entire record and draw all reasonable inferences therefrom in favor of the judgment to determine whether there is reasonable and credible evidence from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. (*People v. Rangel* (2016) 62 Cal.4th 1192, 1212; *People v. Johnson* (2015) 60 Cal.4th 966, 988.) Our review is the same in a prosecution primarily resting upon circumstantial evidence. (*Johnson*, at p. 988; *People v. Watkins* (2012) 55 Cal.4th 999, 1020.) We do not redetermine the weight of the evidence or the credibility of witnesses. (*People v. Albillar* (2010) 51 Cal.4th 47, 60; *People v. Young* (2005) 34 Cal.4th 1149, 1181 [“Resolution of conflicts and inconsistencies in the testimony is the exclusive province of the trier of fact”].) We must accept logical inferences that the jury might have drawn from the evidence although we would have concluded otherwise. (*People v. Streeter* (2012) 54 Cal.4th 205, 241.) “If the circumstances reasonably justify the trier of fact’s findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding.” (*Albillar*, at p. 60.)

The sufficiency of evidence in a particular case depends upon the factual circumstances in that case. (*People v.*

Thomas (1992) 2 Cal.4th 489, 516 [in deciding sufficiency of evidence, comparison with other cases is of “limited utility”].) A finding of sufficiency in one case does not suggest that weaker factual circumstances in another case will not support a conviction. (*Ibid.*) In our review, we focus upon the evidence that was presented, rather than evidence that might have been but was not presented. (*People v. Story* (2009) 45 Cal.4th 1282, 1299.)

Section 29800, subdivision (a)(1) punishes “[a]ny person who has been convicted of a felony . . . and who owns, purchases, receives, or has in possession or under custody or control any firearm.” Implicit in the criminal offense is the requirement that the accused is aware that the item is in his possession and that it is a firearm. (*People v. Kim* (2011) 193 Cal.App.4th 836, 846 [knowledge is an element of the offense of unlawful possession of a firearm].)

Possession of a firearm may be actual or constructive. (§ 29800, subd. (a)(1); *People v. Pena* (1999) 74 Cal.App.4th 1078, 1083-1084.) A defendant has actual possession of a firearm that is within his immediate physical possession or control; he has constructive possession where the firearm is not within his immediate physical possession, but where he knowingly exercises control or the right to control the weapon. (*Ibid.*) Mere proximity to the weapon, however, standing alone, is not sufficient evidence of possession. (*People v. Sifuentes, supra*, 195 Cal.App.4th 1410, 1417.)

Sufficient evidence supports the finding that Dawkins knowingly possessed the shotgun found in the backyard shed of his residence. Dawkins lived in the residence with his mother, girlfriend, and cousin. The locked shed was located within the fenced backyard of the residence, approximately 20 to

25 feet from the backdoor. The lock on the shed permits the reasonable inference that Dawkins intended to limit access to the shed and its contents to others. It is a reasonable inference from this evidence that Dawkins had knowledge and general dominion and control of the locked shed. (*People v. Jenkins* (1979) 91 Cal.App.3d 579, 584 [statement of general rule].) “The inference of dominion and control is easily made when the contraband is discovered in a place over which the defendant has general dominion and control: his residence” (*Ibid.*)

The judgment is affirmed.

NOT TO BE PUBLISHED.

GILBERT, P. J.

We concur:

YEGAN, J.

PERREN, J.

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