Filed 4/24/14 P. v. Saakyan CA2/1

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. GAYK SAAKYAN, Defendant and Appellant.	B246476 (Los Angeles County Super. Ct. No. PA057735)

APPEAL from a judgment of the Superior Court of Los Angeles County. David B. Gelfound, Judge. Affirmed.

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Jean Ballantine, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Lance E. Winters, Assistant Attorney General, Paul M. Roadarmel, Jr., and Nima Razfar, Deputy Attorneys General, for Plaintiff and Respondent.

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As relevant, a second amended information, filed on December 11, 2012, charged Gayk Saakyan with five counts of willful, deliberate and premeditated attempted murder (Pen. Code, §§ 664, 187, subd. (a))[1], shooting at an occupied vehicle (§ 246) and possession of a firearm by a felon (former § 12021, subd. (a)(1)). As to the five attempted murder counts and the count for shooting at an occupied vehicle, the second amended information specially alleged, in part, firearm use causing great bodily injury (§ 12022.53, subd. (d)). A jury convicted Saakyan of the five willful, deliberate and premeditated attempted murder counts and the count for shooting at an occupied vehicle and found true the special allegations of firearm use. The trial court sentenced Saakyan to consecutive life terms for three of the attempted murders, plus 25 years to life on each of those counts for the section 12022.53, subdivision (d), enhancements. The court imposed concurrent terms for the other two attempted murder counts and the count for shooting at an occupied vehicle, as well as for the attendant enhancements.

Saakyan appealed, contending that (1) substantial evidence does not support the jury's finding that the attempted murders were willful, deliberate and premeditated; and (2) the prosecutor committed prejudicial misconduct during closing argument. We reject these contentions and thus affirm the judgment.

DISCUSSION

1. *Substantial Evidence Supports the Jury's Finding That the Attempted Murders Were Willful, Deliberate and Premeditated*

"'[A]ttempted murder requires the specific intent to kill and the commission of a direct but ineffectual act toward accomplishing the intended killing.' [Citations.]" (*People v. Smith* (2005) 37 Cal.4th 733, 739.) An attempted murder is premeditated and deliberate when it occurs "as the result of preexisting thought and reflection rather than unconsidered or rash impulse. [Citations.]" (*People v. Stitely* (2005) 35 Cal.4th 514, 543.) "'Deliberation'" refers to "careful weighing of considerations in forming a course of action" and "'premeditation' means thought over in advance. [Citations.]"

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[1] Statutory references are to the Penal Code.

(*People v. Koontz* (2002) 27 Cal.4th 1041, 1080.) "Premeditation and deliberation do not require an extended period of time, merely an opportunity for reflection. [Citations.]" (*People v. Cook* (2006) 39 Cal.4th 566, 603.) "'The true test is not the duration of time as much as it is the extent of the reflection. Thoughts may follow each other with great rapidity and cold, calculated judgment may be arrived at quickly . . . .' [Citations.]" (*People v. Mayfield* (1997) 14 Cal.4th 668, 767.)

The Supreme Court has "distilled certain guidelines to aid reviewing courts in analyzing the sufficiency of the evidence to sustain findings of premeditation and deliberation": "(1) planning activity, (2) motive, and (3) manner of killing." (*People v. Perez* (1992) 2 Cal.4th 1117, 1125.) These factors, "while helpful for purposes of review, are not a sine qua non to finding first degree premeditated murder [or attempted murder], nor are they exclusive." (*Ibid.*)

"Review on appeal of the sufficiency of the evidence supporting the finding of premeditated and deliberate murder [or attempted murder] involves consideration of the evidence presented and all logical inferences from that evidence . . . ." (*People v. Perez, supra,* 2 Cal.4th at p. 1124.) "'[I]t is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment.' [Citations.]" (*Ibid.*)

Saakyan contends the evidence is insufficient to support the jury's conclusion that the attempted murders were deliberate and premeditated. We disagree. The evidence, viewed in the light most favorable to the jury's findings, shows that on October 31, 2006, about 10:30 p.m., five juvenile males left their residential drug abuse rehabilitation center and walked around the block to Kagel Canyon Street. Two of the juveniles wanted to leave the treatment program, and three other juveniles followed them in an attempt to convince them to stay in the program. A case manager drove a van around the corner from the rehabilitation center to observe the juveniles. The five juveniles argued in a group on the street. Saakyan came out of a house across the street with a pit bull. He let

the dog off the leash, and the dog ran across the street, coming close to the juveniles and barking at them. One of the juveniles became afraid that the dog was going to attack, yelled at the dog and made a kicking motion toward the dog, hoping it would leave the area. Saakyan came toward the group, confronted them and put the dog back on the leash. He "egg[ed] the dog on like as if he was gonna let him go[,]" giving the dog slack on the leash and then pulling him back. Saakyan returned to the house with the dog. He then came out of the house again, this time without the dog, and retrieved a semiautomatic handgun from a BMW X5 parked in the driveway. He walked to the street and began firing at the juveniles. He fired two sets of shots, pausing in between as if he were reloading the gun, and then fled the scene in the BMW. One of the shots in the first set struck a juvenile, causing a bone fracture in his right thigh, which required surgery. Police discovered 24 spent, nine-millimeter casings in the area outside the house exited by Saakyan. Saakyan was a fugitive until arrested in Missouri on March 24, 2011.

This evidence is sufficient to support the jury's finding of deliberate and premeditated attempted murders. Saakyan exited a house across the street from where the juveniles were arguing and taunted them with his pit bull. He then returned to the house and left the dog inside. Upon leaving the house again, Saakyan went to the BMW parked in the driveway and retrieved a semiautomatic handgun from which he fired at least 24 shots in two separate sets. Saakyan's act in returning to the house, retrieving the gun from the vehicle and going into the street before shooting demonstrates that he contemplated the possibility of violence. (See *People v. Lee* (2011) 51 Cal.4th 620, 636 [defendant's act of bringing a loaded handgun with him on the night of the murder indicates he "considered the possibility of a violent encounter"]; *People v. Steele* (2002) 27 Cal.4th 1230, 1250 [defendant's act of carrying fatal knife into victim's home "makes it 'reasonable to infer that he considered the possibility of homicide from the outset'"].) Saakyan also had time to reflect on his actions. At first he walked away from the juveniles, going back into the house, but he then went outside again, retrieved a gun from the vehicle, went into the street and began shooting at the juveniles. His shots were not random, but aimed at the juveniles with whom he had confronted with his dog and

then verbally. Given Saakyan's acts in confronting the juveniles, returning to the house, exiting the house again and retrieving a semiautomatic handgun from the vehicle parked in the driveway and then firing at least 24 shots in two sets at the group, the planning, motive and manner of the shooting show the preexisting thought and reflection necessary for deliberate and premeditated attempted murders.

Saakyan contends that substantial evidence of deliberate and premeditated attempted murders is lacking because the evidence demonstrates the shootings were "rash" and "impulsive." He also relies on inconsistencies in the evidence to support his insufficient evidence argument regarding deliberate and premeditated attempted murders. His contentions do not assist him on appeal. We cannot reweigh the evidence. Because the evidence is sufficient to support the jury's conclusion, we may not substitute the contrary conclusion advanced by Saakyan for that of the jury. (*People v. Ochoa* (1993) 6 Cal.4th 1199, 1206.)

2. *The Prosecutor Did Not Commit Prejudicial Misconduct During Closing Argument*

"'The applicable federal and state standards regarding prosecutorial misconduct are well established. "'A prosecutor's . . . intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so "egregious that it infects the trial with such unfairness as to make the conviction a denial of due process."'" [Citations.] Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct under state law only if it involves "'"the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury."'"' [Citation.]" (*People v. Navarette* (2003) 30 Cal.4th 458, 506.)

Saakyan contends the prosecutor committed prejudicial misconduct during closing argument by making "the thrust of his argument . . . that[,] because shooting 24 times demonstrated an intention to kill, it therefore demonstrated premeditation and deliberation." According to Saakyan, the prosecutor equated the deliberate and premeditated components of the attempted murders with willfulness and thus told the jury

that it could convict him of willful, deliberate and premeditated attempted murder simply by finding that he intended to shoot the victims.

During closing argument, the prosecutor stated, "[t]hen if you vote guilty on any of the attempted murder[s], . . . you have to decide whether or not there was premeditation. If you find the defendant guilty as it says, you have to figure out whether that attempted murder was willful, whether it was deliberate, and whether there was premeditation. What does that mean? There is a long instruction defining each of those things. Willfully means he did it with the intent. He did it with intent when he acted. Obviously, doing something willfully you are doing it with intent because he did it 24 times. It is not an accident. If there was one shot, it may be a more difficult question. Right? But 24 shots it is screaming at us what his intention was. He is making it pretty well-known. He deliberated, meaning he carefully weighed the considerations for and against this choice and knowing the consequences decided to kill. Now, remember, he had this confrontation with the kids about his dog. He picks up [hi]s dog in a pretty calm fashion. He walks back toward his house. Took some period of time. [A man sitting in his parked car on the street where the shooting occurred] sees the defendant go to this [BMW] X5 and then make a motion consistent with pulling the gun, and then the defendant walks toward the group in pretty close range, shoots at [two of the victims]. They duck. He switches and starts shooting at the group. Now, this doesn't mean you have to sit at your kitchen table and discuss this with your wife. Careful consideration, there is no time limit required. But when he is doing this, he is deliberating. He acts premeditated if he decided to kill before the acting. That is the whole point of shooting the gun and shooting 24 times. That is a willful act. It's a deliberate act. It's a premeditated act. 24 shots. Not only consider the actions before the first shot, but consider the action between shot number one and number four. Shoot. Handle recoil. Repoint. Pull the trigger. Then after the first magazine, do that over and over again. After the first magazine is empty you take it out. You take another magazine and pull. You put it back in. And you keep shooting at this group. Clearly these elements are met. Attempted murder with premeditation and deliberation."

We disagree that the prosecutor's remarks conveyed the message asserted by Saakyan that the jury could find willful, deliberate and premeditated attempted murder based solely on a finding of intent. In arguing to the jury, the prosecutor stated that, on a finding of guilty for one or more of the attempted murders, it had to answer three questions: "whether that attempted murder was willful, whether it was deliberate, and whether there was premeditation." He referred the jury to the "long instruction[, CALCRIM No. 601,] defining each of those things." The prosecutor then discussed why the evidence demonstrated the presence of all three elements. Thus, the prosecutor neither misrepresented to the jury the elements of willful, deliberate and premeditated attempted murder nor suggested by his discussion of the evidence that only willfulness was required.

In any case, even if the prosecutor's remarks could be viewed as improper, it is not reasonably probable Saakyan would have obtained a more favorable verdict absent the alleged misconduct. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1220 [applying *People v. Watson* (1956) 46 Cal.2d 818, 836 standard of prejudice to claim of prosecutorial misconduct].) The evidence of deliberate and premeditated attempted murders was strong. The trial court correctly instructed the jury under CALCRIM No. 601 on the elements required for a finding that the attempted murders were willful, deliberate and premeditated[2] and directed the jury under CALCRIM No. 200 that, "[i]f you believe that

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[2] Under CALCRIM No. 601, the trial court instructed, "If you find the defendant guilty of attempted murder under Counts 14, 15, 16, 17 and/or 18, you must then decide whether the People have proved the additional allegation that the attempted murder was done willfully, and with deliberation and premeditation. [¶] The defendant acted willfully if he intended to kill when he acted. The defendant deliberated if he carefully weighed the considerations for and against his choice and, knowing the consequences, decided to kill. The defendant premeditated if he decided to kill before acting. The length of time the person spends considering whether to kill does not alone determine whether the attempted killing is deliberate and premeditated. The amount of time required for deliberation and premeditation may vary from person to person and according to the circumstances. A decision to kill made rashly, impulsively, or without careful consideration of the choice and its consequences is not deliberate and premeditated. On the other hand, a cold, calculated decision to kill can be reached quickly. The test is the

the attorneys' comments on the law conflict with my instructions, you must follow my instructions." It is presumed the jury followed those instructions. (*People v. Boyette* (2002) 29 Cal.4th 381, 436 [alleged prosecutorial misconduct not prejudicial when trial court properly instructed on the law because jury presumed to have followed instructions]; *People v. Clair* (1992) 2 Cal.4th 629, 663, fn. 8 [jury presumed to have treated "prosecutor's comments as words spoken by an advocate in an attempt to persuade"].) Given the evidence and the instructions, it is not reasonably likely the jury misunderstood the prosecutor's remarks to conclude, as Saakyan contends, that deliberate and premeditated meant no more than willful or intentional in the context of the attempted murders. (*People v. Gurule* (2002) 28 Cal.4th 557, 657 ["'To prevail on a claim of prosecutorial misconduct based on remarks to the jury, the defendant must show a reasonable likelihood the jury understood or applied the complained-of comments in an improper or erroneous manner'"].)[3]

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extent of the reflection, not the length of time. [¶] The People have the burden of proving this allegation beyond a reasonable doubt. If the People have not met this burden, you must find the allegation has not been proved."

[3] Because the prosecutor's remarks challenged by Saakyan were not improper and, in any event, did not prejudice his case, we necessarily reject his alternative contention that his trial counsel was ineffective for failing to object to and request an admonition to the jury regarding the alleged misconduct. (*People v. Ledesma* (1987) 43 Cal.3d 171, 217 [to "obtain relief on an ineffective-assistance claim," defendant must show that counsel's performance was "deficient" and "prejudice"].)

DISPOSITION

The judgment is affirmed.

NOT TO BE PUBLISHED.

ROTHSCHILD, Acting P. J.

We concur:

JOHNSON, J.

MILLER, J.*

* Judge of the Los Angeles Superior Court, Assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.