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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.

TROY VARNADO,

Defendant and Appellant.

B231738

(Los Angeles County
Super. Ct. No. BA326634)

APPEAL from a judgment of the Superior Court of Los Angeles County. Larry Paul Fidler, Judge. Affirmed.

Robert E. Boyce, 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, Senior Assistant Attorney General, Shawn McGahey Webb and David Zarmi, Deputy Attorneys General, for Plaintiff and Respondent.

Defendant Troy Varnado appeals from the judgment entered following a jury trial in which he was convicted of first degree murder, with a finding he personally fired a gun, causing death. Defendant contends his trial attorney rendered ineffective assistance by failing to object to the admission of evidence that he possessed a gun that was shown not to be the murder weapon and ammunition for that gun. We affirm.

BACKGROUND

On the morning of July 27, 2007, Ralph McLaughlin was driving around his neighborhood on the way home from work. (Undesignated dates pertain to 2007.) He and Brandi Holloway passed one another twice, going opposite directions. Holloway was driving a Cadillac that McLaughlin had seen her driving in the same area on prior occasions. The Cadillac belonged to defendant's cousin, who was in jail. McLaughlin did not see anyone else in the Cadillac, but thought there must have been a passenger because Holloway was laughing and talking. As McLaughlin was about to turn from an alley onto northbound Stevely Avenue about 9:30 a.m., he saw a man whom he later identified as Velton Gates walking toward him on the east side of Stevely, speaking on a mobile phone. McLaughlin also saw a man walking on the west side of Stevely. Gates turned and saw the man across the street, then began running toward McLaughlin's van. The other man ran across the street toward Gates, pulled a .38-caliber revolver from his pocket, and fired twice at Gates. Gates fell against McLaughlin's van. The other man, whom McLaughlin identified at trial as defendant, walked up alongside the driver's side window of McLaughlin's van and, from a distance of about one yard, fired two more shots at Gates as Gates lay on the ground. Defendant looked at McLaughlin through the van window for two or three seconds, raised the gun, and pulled the trigger twice. The gun did not fire. Defendant ran south on Stevely and got into the Cadillac driven by Holloway. As defendant ran, he turned and looked back at McLaughlin. McLaughlin was frightened. Based on their attire, McLaughlin believed Gates and defendant were gang members. He phoned 911 but did not give his name, then left the scene.

Gates had been fatally shot twice in the head, and had also been shot in the side of his neck and on his back.

On July 31, McLaughlin phoned the police station and reported that he had witnessed the shooting. Detectives visited his apartment that day and asked him to come to the station to give a statement. He did so the next day, and the video recording of his statement was played at trial. He did not tell the police everything because he was still scared and did not want to be involved or to testify. He identified defendant and Holloway from separate photographic arrays, although, with respect to defendant, he simply stared at defendant's photograph and was then questioned by the detective as to why he was staring at the photo; McLaughlin said the hair and clothing were similar to the shooter. The detective asked whether the face in the photograph looked like the shooter, and McLaughlin said it did. At the detective's request, McLaughlin circled the photograph of defendant. At trial, McLaughlin explained that he immediately recognized defendant's photograph as that of the shooter, but he did not point it out right away because he wanted to be certain.

Police stopped a Chevrolet Impala, owned and occupied by defendant and driven by Holloway, on the morning of August 2 and arrested the two. The police searched the car and found a loaded .380-caliber semiautomatic handgun hidden in the headliner above the rear view mirror. The police also searched Holloway's apartment and found a large number of .380-caliber rounds and five shotgun shells in a cabinet in her bedroom closet. They also found photographs, including one of defendant lying on Holloway's bed in that apartment, and documentation for the Cadillac.

A firearms examiner determined that the .380-caliber gun from defendant's car did not fire the bullet fragments recovered from Gates's body by the medical examiner.

Holloway and defendant were charged with murder. In May 2010, after she broke up with defendant, Holloway offered to testify against him. At the time of defendant's trial, she had pleaded guilty to being an accessory after the fact, but had not been

sentenced. She expected to receive a four-year term, with credit for almost three years she had spent in jail.

Holloway testified that defendant and Gates were members of the Black P-Stones gang. Although Holloway had a Black P-Stones gang tattoo, she denied she was part of the gang. She testified that defendant was extremely angry with Gates because Gates had not paid him a share of money defendant was supposed to receive for allowing Gates to claim one of defendant's daughters as a dependent on his income tax. The two men had engaged in a fistfight in the street in March, but other members of the gang broke up the fight.

Holloway testified that she and defendant worked the same shift at a Verizon office on Wilshire Boulevard, and they drove to work together. Defendant usually spent the night with Holloway on weeknights, and did so on the night of July 26. On the morning of July 27, before they went to work, Holloway and defendant went to Nicolet Avenue in the Cadillac to buy marijuana. After making the purchase, Holloway drove around the area looking for a place they could park and smoke some marijuana. Defendant saw a friend and asked Holloway to pull over. Defendant chatted with the friend for a while through the car window. Holloway then resumed driving around the area to look for a place to smoke. She turned onto Stevely Avenue from Coliseum Street and saw Gates. Defendant told her to pull over. She stopped the car in the middle of the street. Defendant got out and walked toward the back of the car. After a time, Holloway heard gunshots. She made a U-turn. Defendant jumped in the car, holding a revolver. As Holloway drove north on Steveley, she saw Gates lying on the ground. Holloway drove to where defendant had parked his car the night before, and they switched cars. She dropped defendant off at his mother's home, then drove to her own home.

Holloway testified that she lied when she spoke to the police after her arrest because she was frightened and wanted to protect herself and defendant. She told the police that she did not get along with Gates and they had been in a dispute over money

she lent him, which he did not repay. At trial she denied any hard feelings between herself and Gates.

At trial the prosecutor played a number of recordings of telephone calls from defendant, in jail, to Holloway's sister Cora. On August 11, Cora told defendant that she knew the name of the "sniznich." Defendant told her not to say it, but to call "Little Bone" and give him the information. Defendant then told Cora that nothing could be said on "these lines" because they were "bugged." The next day, Cora told defendant that she had "some more info" about where "that fool" lived. Defendant told her to "just holler at the homies. You gotta let them know." Defendant then told her to call "M rock" and tell him to call "Firebug" because one of them "had told me some information to see if that's the same fool or not." Defendant later reminded Cora not to forget to call M rock, explaining, "that's vital right there. This might be the same mother fucker blood was telling about, you know what I[']m saying." He then reminded her that he could not say much because the conversations were monitored. On August 15, defendant told Cora that he knew the name of the "fool" who had picked him out of a six-pack, though he could not tell her over the phone. Defendant also said someone thought the man "live on the E nay."

McLaughlin testified that on August 18 two or three strange men who looked like gang members walked around outside his apartment building with a video camera. McLaughlin was frightened and phoned Detective Corey Farrell. Farrell moved McLaughlin and his family into a hotel, then the state assisted them financially in moving to another apartment. Eventually, McLaughlin moved out of state because he did not feel safe in Los Angeles. He also felt intimidated by men in the audience at trial.

The prosecution gang expert testified that although defendant and Gates belonged to the same gang, defendant was an older, more respected member. It would be disrespectful and embarrassing to an older, more respected gang member if a younger member failed to repay a debt to the older member and fought with the older member in public. The older gang member would lose respect if he did not respond.

Defendant's sister and stepfather testified that defendant slept at home on the night of July 26. Defendant's stepfather testified that defendant was in the house on the morning of July 27 until 9:30 a.m. Defendant then went outside and talked to his friend, Brosnam Grandy, for at least 20 minutes. Grandy testified he spoke to defendant outside his house from about 9:40 to 9:50 a.m. on July 27. Defendant's neighbor Davon Jones testified he washed defendant's car on the morning of July 27, as he did every Friday, and returned the car keys to defendant at 9:30 a.m.

Defense expert Dr. Robert Shomer testified regarding the factors and conditions that increase or diminish the accuracy of eyewitness identification.

The jury convicted defendant of first degree murder and found he personally fired a gun, causing death (Pen. Code, § 12022.53, subd. (d)). The court found true allegations that defendant had suffered a prior serious felony conviction within the scope of both the "Three Strikes" law and Penal Code section 667, subdivision (a)(1). The court sentenced defendant to a second strike term of 80 years to life in prison, consisting of 25 years to life, doubled, for murder, plus 25 years to life for the firearm enhancement, plus 5 years for the prior serious felony enhancement.

DISCUSSION

Defendant contends that his trial attorney rendered ineffective assistance by failing to object to admission of the evidence regarding the .380-caliber handgun found in defendant's car and the ammunition found in Holloway's closet. He argues the gun and ammunition had no relevance to the murder and were inadmissible under the principle set forth in *People v. Riser* (1956) 47 Cal.2d 566, and other cases, precluding admission of evidence that a defendant possessed a weapon that was not used in the charged crime and was not shown to have some arguable relevance to the case. (*Id.* at p. 577.) "[S]uch evidence tends to show, not that he committed the crime, but only that he is the sort of person who carries deadly weapons." (*Ibid.*)

A claim that counsel was ineffective requires a showing, by a preponderance of the evidence, of objectively unreasonable performance by counsel and a reasonable

probability that, but for counsel's errors, the defendant would have obtained a more favorable result. (*In re Jones* (1996) 13 Cal.4th 552, 561.) The defendant must overcome presumptions that counsel was effective and that the challenged action might be considered sound trial strategy. (*Ibid.*)

In order to prevail on an ineffective assistance of counsel claim on appeal, the record must affirmatively disclose the lack of a rational tactical purpose for the challenged act or omission. (*People v. Majors* (1998) 18 Cal.4th 385, 403.) "Tactical errors are generally not deemed reversible, and counsel's decisionmaking must be evaluated in the context of the available facts. [Citation.] To the extent the record on appeal fails to disclose why counsel acted or failed to act in the manner challenged, we will affirm the judgment 'unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation' [Citation.]" (*People v. Bolin* (1998) 18 Cal.4th 297, 333.)

We agree that the evidence of the live ammunition and .380-caliber gun should have been excluded, if requested, because they could not have been used in the murder, had very little relevance to any permissible purpose, and created a risk that the jury would infer that defendant was the sort of person who had access to multiple guns and carried guns in his car. The prosecutor explained to the jury that the gun concealed in defendant's car linked him to the .380-caliber ammunition found in Holloway's bedroom, which supported Holloway's testimony that he slept at her home, not his mother's home, on the night of July 26. Because the .380-caliber ammunition fit the gun found in defendant's car, that ammunition had some tendency to show that defendant had at some time been in Holloway's bedroom, but not on any particular day or night. Indeed, the ammunition may have been placed in Holloway's bedroom after the charged crime. The prosecutor did not argue any relevance for the shotgun shells. Because there was no evidence that defendant had ever possessed a shotgun, the shotgun shells found in Holloway's bedroom had no tendency to prove defendant's presence in the bedroom or any other relevant matter. In addition, as defendant notes, the photograph of defendant

lying on Holloway's bed in that bedroom proved defendant's presence there on some unidentified occasion without the risk of prejudice that the gun and ammunition evidence created.

A review of the entire record reveals that defense counsel incorporated the presence of the ammunition in Holloway's room, and to a lesser extent, the gun in defendant's car, into his defense theory that Holloway and another man (not defendant) killed Gates and Holloway chose to minimize her own liability by falsely blaming defendant. Throughout cross-examination of prosecution witnesses and his argument, counsel focused on Holloway's role and sought to portray her as a vicious gang member who had her own monetary dispute with Gates, did not get along with him, and wanted him dead. Defense counsel noted that Holloway often drove defendant's car and was driving it the day they were arrested and the gun was found. He further noted that the ammunition was not found in defendant's home or car, but in Holloway's closet. Attempting to attribute possession of the ammunition and gun to Holloway fed into defense counsel's strategies of casting Holloway as the primary force behind Gates's murder and attacking Holloway's credibility. In light of this, we cannot conclude from the appellate record that defense counsel lacked reasonable tactical reasons for failing to seek exclusion of the gun and ammunition evidence.

In addition, defendant has not established a reasonable probability he would have obtained a more favorable outcome if counsel had successfully sought exclusion of the ammunition and .380-caliber gun evidence. McLaughlin testified that he saw defendant through the window of his van, defendant was right outside the van window, and they looked at one another for several seconds before defendant aimed at McLaughlin and attempted to shoot him. Defendant also looked back at McLaughlin as he ran away. It was daylight and McLaughlin had a good opportunity to look at defendant at close range. The jury was fully informed of the purported flaws in McLaughlin's identification, yet rejected them. McLaughlin also identified Holloway, who admitted at trial that she was the driver at the time of the shooting. Defendant's statements to Cora during phone calls

from the jail strongly suggested an attempt to intimidate a witness and thereby suppress evidence, which supported a strong inference of consciousness of guilt. And three days after defendant told Cora he knew the name of the person who identified him and had possible information about where he lived, strangers who appeared to be gang members showed up at McLaughlin's apartment building with a video camera. Finally, defendant had a motive to kill Gates. That Holloway may also have had such a motive does not diminish the significance of defendant's motive. In light of the very strong evidence, the prosecutor's own argument that the only relevance of the evidence regarding the .380-caliber gun and .380-caliber ammunition was to link defendant to Holloway's apartment, and the prosecutor's failure to ascribe any relevance to the shotgun shells, it is not reasonably probable that defendant would have obtained a more favorable result if the gun and ammunition evidence had been excluded upon defense counsel's motion or objection.

DISPOSITION

The judgment is affirmed.

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MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.